

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
T.K., Appellant)	
)	
and)	Docket No. 19-1222
)	Issued: December 2, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Santa Clarita, CA, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 10, 2018 appellant filed a timely appeal from an April 16, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than two percent permanent impairment of the left lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On July 10, 2017 appellant, then a 57-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained stenosis at L4-5 causally related to factors

¹ 5 U.S.C. § 8101 *et seq.*

of her federal employment. OWCP accepted the claim for an aggravation of lumbar spinal stenosis. Appellant stopped work on September 9, 2016 and returned to modified employment on November 12, 2017.

On July 18, 2018 appellant filed a claim for a schedule award (Form CA-7).

On July 27, 2018 OWCP referred appellant to Dr. Mark Bernhard, an osteopath and Board-certified physiatrist, for a second opinion examination to determine the extent of any employment-related permanent impairment. It advised him that he should rate appellant's impairment using *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (*The Guides Newsletter*) (July/August 2009), a supplemental publication of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).²

In a report dated August 20, 2018, Dr. Bernhard reviewed appellant's history of injury and diagnosed lumbar spinal stenosis with neurogenic claudication and left L5-S1 radiculopathy. On examination he found decreased sensation at L5-S1 on the left, normal muscle strength bilaterally, and equal leg length. Dr. Bernhard noted that electrodiagnostic testing had revealed demyelinating left lower extremity sensory neuropathy, but no motor radiculopathy. Using Proposed Table 2 of *The Guides Newsletter*, he identified the class of diagnosis (CDX) as class 1 mild sensory deficit on the left at L5 and S1. Dr. Bernhard applied a grade modifier for functional history (GMFH) of one and a grade modifier for clinical studies (GMCS) of one, which yielded a net adjustment of zero and one percent permanent impairment at both L5 and S1, which he added to find a left lower extremity impairment of two percent. He further found that appellant had five percent impairment due to a mild motor deficit at L5 and three percent impairment due to a mild motor deficit at S1. Dr. Bernhard added the impairment ratings and concluded that she had 10 percent permanent impairment of the left lower extremity.

On September 26, 2018 Dr. Kenekwue Ugokwe, a Board-certified neurosurgeon serving as a district medical adviser (DMA), opined that appellant had one percent permanent impairment due to a loss of sensation on the left at L5 and S1, for a total left lower extremity impairment of two percent. He found that she had no motor deficit. Dr. Ugokwe indicated that there was insufficient evidence to rate appellant's impairment using range of motion (ROM).

By letter dated October 1, 2018, OWCP provided Dr. Bernhard with a copy of Dr. Ugokwe's report and requested that he advise whether he agreed with the DMA's impairment rating.

In an October 26, 2018 supplemental report, Dr. Bernhard concurred with the two percent impairment rating found by Dr. Ugokwe. He related that appellant's impairment rating should be based only on her sensory impairment as he had found no motor weakness on examination.

On December 27, 2018 Dr. Ugokwe again found two percent permanent impairment of the left lower extremity. He advised that a rating for ROM was inapplicable, noting that Dr. Bernhard had failed to measure ROM of the lower extremity.

² A.M.A., *Guides* (6th ed. 2009).

In an addendum report dated February 11, 2019, Dr. Bernhard related that he had rated appellant's impairment using *The Guides Newsletter* as the accepted condition as an aggravation of spinal stenosis. He opined that the ROM method was not applicable for a spinal condition.

On March 29, 2019 Dr. Ugokwe reviewed Dr. Bernhard's report February 11, 2019 and concurred with his findings.

By decision dated April 16, 2019, OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity. The award ran for 5.76 weeks from August 20 to September 29, 2018.

LEGAL PRECEDENT

The schedule award provision of FECA,³ and its implementing federal regulation,⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁵ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁶

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).⁷ Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by grade modifiers based on functional history, physical examination and clinical studies.⁸ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁹

³ *Supra* note 1.

⁴ 20 C.F.R. § 10.404.

⁵ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁶ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁷ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

⁸ *Id.* at 494-531.

⁹ *Id.* 411.

Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹⁰

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.¹¹ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹² The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. Proposed Table 2 of *The Guides Newsletter* provides that the maximum permanent impairment for impairment associated with a single nerve is 13 percent. The appropriate tables for rating spinal nerve extremity impairment are incorporated in OWCP's procedures.¹³

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than two percent permanent impairment of the left lower extremity, for which she previously received a schedule award.

OWCP referred appellant to Dr. Bernhard to evaluate the extent of any permanent impairment of her lower extremities resulting from her accepted condition lumbar spinal stenosis in accordance with *The Guides Newsletter*.

In an August 20, 2018 impairment evaluation, Dr. Bernhard diagnosed lumbar spinal stenosis with neurogenic claudication and left L5-S1 radiculopathy. He found normal muscle strength of the bilateral lower extremities with reduced sensation at L5-S1 on the left side. Dr. Bernhard reviewed electrodiagnostic testing which revealed sensory neuropathy of the left lower extremity, but no motor radiculopathy. Citing Proposed Table 2 of *The Guides Newsletter*, he identified the CDX as class 1 left sensory deficit at both L5 and S1, which yielded a default impairment rating of one percent. Dr. Bernhard applied a GMFH of one and a GMCS of one to find no adjustment from the default value.¹⁴ He added the one percent impairment at both L5 and S1 to find a total left lower extremity impairment of two percent.

Dr. Bernhard also found that appellant had five percent impairment due to a mild motor deficit at L5 and three percent impairment due to a mild motor deficit at S1. However, after review of the DMA's September 26, 2018 report, in a report dated October 26, 2018 he clarified, that she

¹⁰ *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹¹ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019);

¹² *Supra* note 5 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3) (March 2017).

¹³ *Supra* note 5 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹⁴ The net adjustment formula, (GMFH-CDX) + (GMCS-CDX), or (1-1) + (1-1) = 0, yielded no adjustment.

did not have a permanent impairment due to a motor deficit at either L5 or S1 based on the normal examination findings. Dr. Bernhard opined that appellant had two percent permanent impairment of the left lower extremity due to sensory loss at L5 and S1. He further properly determined that a rating for ROM was not applicable as her impairment should be rated according to *The Guides Newsletter*. As discussed, the proper mechanism for rating impairments of the upper or lower extremities caused by a spinal injury is provided in section 3.700 of OWCP's procedures, which memorializes proposed table 2 from *The Guides Newsletter*.¹⁵

Dr. Ugokwe, the DMA, in reports dated December 27, 2018 and March 29, 2019, concurred with Dr. Bernhard's finding of two percent permanent impairment of the left lower extremity.

The Board finds that Dr. Bernhard and the DMA properly applied the appropriate tables and grading schemes of *The Guides Newsletter* to the examination findings. The record contains no medical evidence utilizing the appropriate tables of *The Guides Newsletter* demonstrating a greater percentage impairment of the left lower extremity.¹⁶

On appeal appellant contends that she has 10 percent permanent impairment of the left lower extremity as originally found by Dr. Bernhard due to her pain and difficulty standing and walking. As noted, however, Dr. Bernhard subsequently clarified that she had only two percent permanent impairment of the left lower extremity. Appellant has the burden of proof to submit medical evidence in accordance with the A.M.A., *Guides* establishing greater permanent impairment of the left lower extremity.¹⁷ As appellant has not done so, she has not met her burden of proof.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish greater than two percent permanent impairment of the left lower extremity, for which she previously received a schedule award.

¹⁵ See *supra* note 13; see also *C.K.*, Docket No. 16-1294 (issued January 13, 2017).

¹⁶ *C.S.*, Docket No. 18-0920 (issued September 23, 2019).

¹⁷ See *R.F.*, Docket No. 19-0778 (issued September 18, 2019).

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 2, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board