

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

L.S., Appellant)	
)	
and)	Docket No. 19-0092
)	Issued: June 12, 2019
DEPARTMENT OF JUSTICE, BUREAU OF)	
PRISONS, FCI JESUP, Jesup, GA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 15, 2018 appellant filed a timely appeal from a September 26, 2018 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.²

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of his lower extremities, warranting a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the September 26, 2018 decision, OWCP and the Board received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On July 3, 2013 appellant, then a 49-year-old landscape/maintenance foreman, filed a traumatic injury claim (Form CA-1) alleging that on June 25, 2013 he sustained a low back injury while in the performance of duty. He explained that, when he lifted a 15-foot limb, he felt a pull in his lower back; and, shortly thereafter, while riding a mower, he hit a hole and “really felt a pull” in his back. Appellant stopped work on June 25, 2013 and returned to work on August 22, 2013 in a full-time limited-duty capacity. On March 10, 2014 OWCP accepted the claim for lumbosacral neuritis (radiculitis). Appellant retired from the employing establishment, effective November 17, 2014.

On October 13, 2016 and August 2 and 25, 2017 OWCP received appellant’s claim for a schedule award (Form CA-7) dated June 13, 2016. No medical evidence was submitted in support of his claim.

In a development letter dated September 18, 2017, OWCP advised appellant that the medical evidence was insufficient to support a schedule award claim because it did not establish a permanent impairment of a scheduled member or function of the body. It advised him of the requirements to support a claim for a schedule award and afforded him 30 days to submit the necessary evidence.

On January 19, 2018 OWCP referred appellant to Dr. Raymond Topp, a Board-certified orthopedic surgeon, for a second opinion to evaluate appellant’s work-related condition and any resulting permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

In his February 28, 2018 report, Dr. Topp noted appellant’s history of injury, reviewed the statement of accepted facts and appellant’s medical record and reported his findings on examination. He related that appellant’s physical examination demonstrated diffused weakness in the bilateral lower extremities and impaired/abnormal sensation. Dr. Topp indicated that he would base his rating on the peripheral neuropathy and utilized Tables in Chapter 16 of the A.M.A., *Guides*. He opined that appellant had 30 percent combined right lower extremity and 30 percent combined left lower extremity permanent impairment based on the diagnosis-based impairment method for peripheral, sciatic, and the common peroneal nerves. Dr. Topp also opined that appellant had reached maximum medical improvement (MMI) on June 23, 2014.

In a March 17, 2018 report, Dr. Arthur Harris, a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA), reviewed the medical record, including Dr. Topp’s February 15, 2018 evaluation, which he found to be the date of MMI. The DMA opined that appellant had no lower extremity impairment in either extremity in accordance with *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*). He found that appellant’s weakness in the bilateral lower extremities and impaired/abnormal sensation were not consistent with lumbar radiculopathy. Since appellant did not have any neurologic deficit consistent with radiculopathy in the lower extremity, the DMA opined that appellant did not have any lower extremity permanent

³ A.M.A., *Guides* (6th ed. 2009).

impairment. The DMA also noted that Dr. Topp did not use the A.M.A., *Guides* in the correct manner as it did not appear that Dr. Topp was aware of the approach to rate spine nerve impairments described in *The Guides Newsletter*.

On June 6, 2018 OWCP requested that Dr. Topp clarify his impairment rating in light of the DMA's March 17, 2018 report.

In a July 27, 2018 supplemental report, Dr. Topp indicated that MMI was reached on February 28, 2018 and he related that he agreed with the DMA's report. He also again noted that appellant had peripheral neuropathy which affected his femoral nerve, tibia nerve, perineal nerve, and lateral femoral cutaneous nerve. Dr. Topp also noted that appellant was weak in his lower extremities, with a grading of 4/5, appellant had burning dysesthesia and objective evidence of neuropathy. He opined that appellant had zero percent right lower extremity impairment and zero percent left lower extremity in accordance with *The Guides Newsletter*.

By decision dated September 26, 2018, OWCP denied appellant's schedule award claim. It found that, based on Dr. Topp's physical examination findings as reviewed by the DMA and his July 27, 2018 supplemental report, appellant had zero percent permanent impairment of the right lower extremity and zero percent permanent impairment of the left lower extremity.

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for 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 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*.⁶

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.⁷ In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 1 (January 2010).

⁷ See *B.W.*, Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *Pamela J. Darling*, 49 ECAB 286 (1998).

schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.⁸

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* has offered an alternative approach to rating spinal nerve impairments consistent with sixth edition methodology.⁹ OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures which memorializes proposed tables outlined in a July/August 2009, *The Guides Newsletter*.¹⁰

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment and to verify the calculations of the attending physician or second opinion examiner in accordance with the A.M.A., *Guides*.¹¹

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP accepted that appellant sustained lumbosacral neuritis (radiculitis). Dr. Topp's initial impairment report of February 28, 2018 was not based on *The Guides Newsletter*. As noted, the proper mechanism for rating impairment of the lower extremities caused by a spinal injury is provided in section 3.700 of OWCP procedures, which memorializes proposed tables outlined in a July/August 2009 *The Guides Newsletter*.¹² An opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment.¹³

The DMA noted his review of the medical record. He found that Dr. Topp's February 15, 2018 examination findings of weakness in the bilateral lower extremities and impaired/abnormal sensation were not consistent with lumbar radiculopathy. Since appellant did not have any neurologic deficit consistent with radiculopathy in the lower extremity, the DMA opined that appellant had no ratable impairment to his lower extremities due to the accepted lumbar radiculopathy in accordance with *The Guides Newsletter*.

OWCP thereafter requested that Dr. Topp clarify his report in light of the DMA's March 17, 2018 report. Dr. Topp thereafter reported on July 27, 2018 that he agreed with the DMA's conclusions, however, he also reported that appellant did have peripheral neuropathy

⁸ *B.W., id; J.M., id; Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁹ *Supra* note 6 at Chapter 2.808.5(c)(3) (February 2013); *supra* note 2 at Chapter 3.700 Exhibit 4 (January 2010).

¹⁰ *Supra* note 6 at Chapter 3.700 Exhibits 1, 4 (January 2010).

¹¹ *Supra* note 6 at Chapter 2.808.6(f)(1) (March 2017).

¹² *See J.M., supra* note 7.

¹³ *See J.M., supra* note 7; *Carl J. Cleary*, 57 ECAB 563 (2006).

which affected his femoral, tibia, peroneal, and lateral femoral cutaneous nerves. He related that appellant had weakness and a burning sensation in his lower extremities and objective findings of neuropathy.

The Board finds that OWCP has not properly developed the issue of permanent impairment following the submission of Dr. Topp's supplemental report. Pursuant to its procedures, OWCP should have routed the case record, including the supplemental report of Dr. Topp, to a DMA for an opinion concerning the nature and extent of permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified, if any.¹⁴ As this was not done, the case must be remanded for referral to a DMA.¹⁵

On remand OWCP shall further develop the medical evidence of record by obtaining an opinion from a DMA regarding the nature and extent of appellant's permanent impairment, if any, for his accepted condition. Following this, and such further development as may be deemed necessary, it shall issue a *de novo* decision regarding appellant's schedule award claim.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁴ *L.T.*, Docket No. 18-1405 (issued April 8, 2019); *supra* note 6 at Chapter 2.808.6(f) (March 2017).

¹⁵ *R.H.*, Docket No. 17-1017 (issued December 4, 2018).

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2018 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further action consistent with this decision.

Issued: June 12, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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