United States Department of Labor
Employees' Compensation Appeals Board

T.Z., Appellant	)	
and	)	**Docket No. 17-0679**
	)	**Issued: May 9, 2019**
DEPARTMENT OF HOMELAND SECURITY, FEDERAL AIR MARSHAL SERVICE, East Elmhurst, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 6, 2017 appellant, through counsel, filed a timely appeal from a December 5, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On April 19, 2013 appellant, then a 49-year-old federal air marshal, filed a notice of recurrence (Form CA-2a) of a spinal injury that occurred on April 10, 2013 while working light duty subsequent to his original October 10, 2012 work injury (OWCP File No. xxxxxx565). He claimed that he rose up out of his chair, turned, and then immediately felt pain in his neck and lower back. In an April 23, 2013 letter, OWCP notified appellant that it had accepted his claim as a new claim for a traumatic injury because it was caused by a specific event within a single day or work shift and assigned the current case number, File No. xxxxxx112. By decision dated June 5, 2013, it accepted the new claim for lumbar back sprain and aggravation of neck sprain. Appellant returned to work in a full-time, limited-duty capacity on September 23, 2013.[3]

In an August 13, 2013 report, Dr. Edward S. Rubin, a Board-certified anesthesiologist and pain medicine specialist, diagnosed lumbosacral radiculitis and cervical radiculopathy. He asserted that appellant's conditions began on April 10, 2013 after a work accident when standing up from a chair and turning quickly. Dr. Rubin indicated that the pain was improved by nothing and aggravated by walking, lifting, and movement. He found that a magnetic resonance imaging (MRI) scan of the cervical spine showed disc bulges at C4-7 and an MRI scan of the lumbar spine was positive for L5-S1 disc herniation. Dr. Rubin administered an epidural steroid injection.

On August 13, 2015 appellant, through counsel, filed a claim for a schedule award (Form CA-7).

In a July 20, 2015 report, Dr. Kumar S. Reddy, a Board-certified orthopedic surgeon, reviewed the medical evidence of record and conducted a physical examination, noting that appellant's range of motion was obtained using a goniometer. He found right cervical radiculopathy, but no tenderness about the cervical spine and no paravertebral muscle spasm. Appellant's cervical range of motion was 40 degrees flexion and extension, 60 degrees right and left rotation, and 30 degrees right and left lateral flexion. An examination of the lumbar spine revealed no sacroilic joint tenderness, no scoliosis or kyphosis, and no paravertebral muscle spasm. Straight-leg raising test was to 50 degrees on the left and 70 degrees on the right. Dr. Reddy indicated that there was left sciatica present. Appellant's lumbar range of motion was 60 degrees flexion, 20 degrees extension, and 20 degrees right and left lateral flexion. Neurological examination of the upper and lower extremities revealed muscle strength of 5/5. Dr. Reddy diagnosed "lumbar L4-5 and L5-S1 herniated discs left radiculopathy resolved with residuals." He determined that appellant had reached maximum medical improvement (MMI) and opined that he had 10 percent permanent impairment of the lumbar spine based on the sixth edition of the

[3] On July 30, 2014 the employing establishment notified appellant that it could no longer offer him a limited-duty assignment. On August 12, 2014 appellant filed a notice of recurrence (Form CA-2a) and, in a decision dated August 12, 2014, OWCP accepted his claim for a recurrence of disability beginning August 3, 2014 due to withdrawal of limited-duty work. Additionally, OWCP paid appellant disability compensation for the period August 3 to 9, 2014.

American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).

In an August 20, 2015 development letter, OWCP notified appellant of the deficiencies of his schedule award claim and requested a medical report from a physician assessing any permanent impairment of his affected extremities under *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (*The Guides Newsletter*) (July/August 2009). It noted that the opinion from Dr. Reddy was not probative because schedule awards were not payable for permanent impairment of the spine.

In response, appellant submitted a September 16, 2015 addendum report from Dr. Reddy who explained that his diagnosis was based on his examination findings and continued to find that appellant had 10 percent permanent impairment of the lumbar spine. He also submitted two reports dated November 6, 2013 from Dr. Rubin who continued to diagnose lumbar radiculopathy and administer epidural steroid injections.

OWCP subsequently referred the case to its district medical adviser (DMA), Dr. Morley Slutsky, who is Board-certified in occupational medicine.

In a February 15, 2016 report, Dr. Slutsky explained that appellant's accepted conditions of lumbar back sprain and aggravation of neck sprain did not result in permanent lower extremity or upper extremity sensory and motor deficits and, therefore, there was no basis for lower or upper extremity impairment under *The Guides Newsletter*. He noted that Dr. Reddy likewise did not find lower or upper extremity deficits related to appellant's lumbar and cervical conditions. Dr. Slutsky further explained that appellant had preexisting lumbar and cervical conditions that were not employment related. He determined that the date of MMI was September 16, 2015, the date of the impairment examination performed by Dr. Reddy. Utilizing the diagnosis-based impairment (DBI) method, Dr. Slutsky concluded that appellant's accepted conditions had resolved at the time of Dr. Reddy's examination and he had no ratable permanent impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

By decision dated February 24, 2016, OWCP denied appellant's schedule award claim on the basis that the medical evidence did not establish a ratable impairment of a scheduled member.

On March 4, 2016 counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review and submitted a July 28, 2016 report from Dr. Neil Allen, a Board-certified internist and neurologist, who conducted an impairment examination. Dr. Allen's examination of appellant's cervical spine found muscle strength of 5/5 for the bilateral C8 level and 4/5 for the C5 (biceps), C6 (wrist flexors), and C7 levels (wrist extensors). Appellant's cervical range of motion was 60 degrees flexion, 70 degrees extension, 45 degrees right and left lateral flexion, and 90 degrees right and left rotation. Examination of his lumbar spine revealed tenderness and increased tone through the trapezius, left greater than right, and lumbar erectors. Muscle strength was 5/5 for L4 level (quadriceps) on the right, L5 level (extensor hallicus longus) bilaterally, and L1 level (ankle plantar flexors) bilaterally. Muscle strength was rated 4/5 for the L4 level (quadriceps) on the left. Range of motion of appellant's lumbar spine was 70 degrees flexion, 30 degrees extension, 30 degrees right and left lateral flexion. Straight-leg raise was positive for radicular pain into the right hip, anterior thigh, and proximal lower leg with right-sided

leg raise at 30 degrees. Appellant was negative for radicular complaints with left-sided leg raise. Utilizing the range of motion (ROM) method, Dr. Allen calculated appellant's impairment at each spinal level based on a diagnosis of mild motor deficit and then concluded that he had a total of 29 percent permanent impairment of the upper extremities and 13 percent permanent impairment of the left lower extremity under *The Guides Newsletter*.

A telephonic hearing was held before an OWCP hearing representative on November 2, 2016. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

Subsequently, appellant submitted a July 28, 2016 addendum report from Dr. Allen who clarified his impairment ratings. Regarding his cervical condition, Dr. Allen explained that the strength deficits of the upper extremity were observed to be bilateral and, therefore, he calculated that appellant had 26 percent permanent impairment rating of the bilateral upper extremities. Additionally, appellant had sensory deficits of the right upper extremity for which Dr. Allen added an extra three (3) percent impairment, equaling a total of 29 percent permanent impairment of the right upper extremity and 26 percent permanent impairment of the left upper extremity. Regarding appellant's lumbar condition, Dr. Allen found that the strength and sensory deficits of the lower extremities were observed to be on the left, which equated to 13 percent permanent impairment of the left lower extremity.

By decision dated December 5, 2016, OWCP's hearing representative affirmed the February 24, 2016 decision denying appellant's schedule award claim.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim, including that he or she sustained an injury in the performance of duty as alleged, and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[4]

The schedule award provision of FECA[5] and its implementing regulations[6] 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for

[4] *See A.M.*, Docket No. 13-0964 (issued November 25, 2013) (where the employee claimed entitlement to a schedule award for permanent impairment to the left lower extremity due to his employment-related lumbar condition, the Board found that the medical evidence did not establish a ratable impairment to the lower extremity resulting from his spinal condition and, therefore, denied his schedule award claim).

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

evaluating schedule losses.[7] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[8] It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[9] A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.[10]

A schedule award is not payable for a member, function, or organ of the body not specified in FECA or in the implementing regulations.[11] As neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.[12] However, as FECA makes provision for the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.[13]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[14]

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

OWCP properly referred the medical evidence of record to its DMA, Dr. Slutsky. In his February 15, 2016 report, Dr. Slutsky explained that appellant's accepted conditions of lumbar back sprain and aggravation of neck sprain did not result in permanent lower extremity or upper extremity sensory and motor deficits and, therefore, there was no basis for lower or upper extremity impairment under *The Guides Newsletter*. He noted that Dr. Reddy likewise did not find any lower or upper extremity deficits related to appellant's lumbar and cervical conditions. Dr. Slutsky further explained that appellant had preexisting lumbar and cervical conditions that were not employment related. He determined that the date of MMI was September 16, 2015, the date of the

[7] *Id.*

[8] FECA Bulletin No. 09-03 (March 15, 2009).

[9] *See Raymond E. Gwynn*, 35 ECAB 247, 253 (1983); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (January 2010). This portion of OWCP's procedure provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

[10] *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

[11] *See Tania R. Keka*, 55 ECAB 354 (2004).

[12] *See id*. FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

[13] *See George E. Williams*, 44 ECAB 530 (1993). In 1966, amendments to FECA modified the schedule award provision 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.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017).

impairment examination performed by Dr. Reddy. Utilizing the DBI method, Dr. Slutsky concluded that appellant's accepted conditions had resolved at the time of Dr. Reddy's examination and he had no permanent impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

Appellant submitted Dr. Allen's reports regarding the extent of his permanent impairment. Regarding appellant's cervical condition, he explained that the strength deficits of the upper extremity were observed to be bilateral and, therefore, he calculated that appellant had 26 percent permanent impairment of the bilateral upper extremities. Additionally, appellant had sensory deficits of the right upper extremity, for which Dr. Allen added an extra 3 percent impairment, for a combined total of 29 percent permanent impairment of the right upper extremity and 26 percent permanent impairment of the left upper extremity. Regarding appellant's lumbar condition, Dr. Allen found that the strength and sensory deficits of the lower extremities were observed to be on the left, which equated to 13 percent permanent impairment of the left lower extremity.

The Board notes that proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.[15] Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[16]

The Board finds that OWCP should have routed Dr. Allen's reports to a DMA for review. The case must therefore be remanded. On remand, the case record should be referred to a DMA for an opinion addressing whether appellant has permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. Following this and such further development deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for a schedule award.

CONCLUSION

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

[15] *T.R.*, Docket No. 17-1961 (issued December 20, 2018); *William J. Cantrell*, 34 ECAB 1223 (1983).

[16] *Id.; Richard F. Williams*, 55 ECAB 343, 346 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2019
Washington, DC

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

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

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