United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 18-0336**
	)	**Issued: May 29, 2019**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Detroit, MI, 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:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 5, 2017 appellant, through counsel, filed a timely appeal from a September 18, 2017 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.[3]

[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. §§ 8101-8193 (2006).

[3] The Board notes that, following the September 18, 2017 decision, OWCP 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.*

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

Appellant, a 57-year-old custodian, injured his low back on May 4, 2009 when he lifted a bucket of water. OWCP accepted his claim for sciatica and lumbar radiculopathy. On September 16, 2010 appellant filed a claim for a schedule award (Form CA-7). OWCP denied the claim on November 1, 2012 and a representative of OWCP's Branch of Hearings and Review affirmed the denial on April 8, 2013. Appellant appealed to the Board. By decision dated February 18, 2014, the Board affirmed the hearing representative's decision.[5] Appellant timely requested reconsideration and submitted a November 19, 2014 impairment rating from Dr. Catherine E. Watkins Campbell, Board-certified in family and occupational medicine, who found 15 percent left lower extremity impairment based on motor and sensory deficits involving the L5 and S1 nerve roots. By decision dated December 16, 2014, OWCP reviewed the merits of the schedule award claim, but denied modification.

Appellant again appealed to the Board. By decision dated July 2, 2015, the Board determined that the case was not in posture for decision.[6] On remand OWCP referred the case to a district medical adviser (DMA), who recommended that appellant undergo a second opinion evaluation.

In an August 7, 2015 report, Dr. Emmanuel N. Obianwu, a Board-certified orthopedic surgeon and OWCP-referral physician, concluded that there was no work-related spinal nerve injury causing impairment to the lower extremities. The DMA reviewed Dr. Obianwu's August 7, 2015 report and agreed with his findings. He found there was no basis for lower extremity impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[7]

By decision dated September 3, 2015, OWCP denied modification of the December 16, 2014 decision. Appellant again appealed to the Board. By decision dated April 11, 2016, the Board found that the case was not in posture for decision because an unresolved conflict in medical opinion existed between Dr. Watkins Campbell, appellant's treating physician, who had determined that appellant had 15 percent permanent impairment of the left lower extremity, and Dr. Obianwu, an OWCP referral physician, who determined that appellant had no ratable

[4] Docket No. 13-2011 (issued February 18, 2014); Docket No. 15-0606 (issued July 2, 2015); Docket No. 16-0174 (issued April 11, 2016).

[5] Docket No. 13-2011 (issued February 18, 2014).

[6] Docket No. 15-0606 (issued July 2, 2015).

[7] A.M.A., *Guides* (6th ed. 2009).

impairment of the lower extremities.[8] The Board remanded the case to OWCP for referral to an impartial medical examiner.

On remand OWCP referred appellant's case to Dr. Clifford Buchman, a Board-certified orthopedic surgeon and OWCP impartial medical examiner (IME), for examination and opinion on whether appellant sustained a permanent impairment of his affected extremities in accordance with the A.M.A., *Guides*.[9] In an October 26, 2016 report, Dr. Buchman reviewed appellant's medical records, including the reports of Dr. Watkins Campbell and Dr. Obianwu, appellant's history of injury, a statement of accepted facts (SOAF), his occupational history, and appellant's current work restrictions. He related appellant's current complaints of back pain in the labral discs and numbness of his left foot. Upon physical examination, Dr. Buchman reported that neurovascular status of appellant's feet was satisfactory except for some decreased sensation to pinprick in a glove-like sensation from the calf to his foot. Supine straight leg raise testing was 60 degrees on the right pain-free and 40 degrees on the left with complaints of back pain. Dr. Buchman diagnosed low back pain with no clinical signs of radiculopathy and noted the accepted conditions of sciatica and radiculopathy.

Dr. Buchman reported that, based upon his examination, he did not find any spinal nerve impairment in accordance with the A.M.A., *Guides*, *The Guides Newsletter* Rating Spinal Nerve Extremity Impairment Using the Sixth Edition *(The Guides Newsletter)*. He found no spinal nerve impairment in the L3 nerve root, L4 nerve root, L5 nerve root, or S1 nerve root, either on the right or left. Dr. Buchman related that an electromyography (EMG) study dated June 12, 2012 showed mild chronic bilateral L5 radiculopathy without ongoing denervation and continued electrodiagnostic evidence of mild distal axonal sensory polyneuropathy. He concluded that, based on his clinical evaluations and the most recent EMG, appellant had no permanent impairment according to the sixth edition of the A.M.A., *Guides*.

By decision dated December 6, 2016, OWCP denied appellant's claim for a schedule award. It found that the special weight of medical evidence rested with Dr. Buchman in his capacity as an IME.

On December 14, 2016 appellant, through counsel, requested a telephonic hearing before a hearing representative from OWCP's Branch of Hearings and Review. A hearing was held on June 15, 2017.

In letters dated April 12 to July 21, 2017, Dr. William Gonte, Board-certified in internal medicine and sports medicine, indicated that he evaluated appellant for complaints of worsening lower back pain radiating to the legs. Upon initial examination of appellant's back, Dr. Gonte reported tenderness over the left S1 joint with spasms and positive straight leg raise testing on the left. He diagnosed lumbar radiculopathy.

Appellant received medical treatment from Dr. Eric A. Kovan, Board-certified in physical and rehabilitation medicine, who noted, in reports dated May 17 and June 28, 2017, that

[8] Docket No. 16-0174 (issued April 11, 2016).

[9] OWCP initially referred appellant to Dr. Joseph Salama, a Board-certified orthopedic surgeon, for an impartial examination, but as Dr. Salama failed to address the issue of permanent impairment in his July 29, 2016 report, OWCP referred appellant to a new IME.

examination of appellant's bilateral feet showed full range of motion and weakness on the left. Dr. Kovan diagnosed lumbago with sciatica on the left side, acute left L5-S1 radicular pain, and mild bilateral knee osteoarthritis.

A June 12, 2017 lumbar spine magnetic resonance imaging (MRI) scan showed a disc bulge at L3-L4, broad-based posterior disc herniation at L4-L5 and L5-S1, and a 2.5 centimeter complex right renal cortical cyst.

In a July 20, 2017 report, Dr. David M. Gordon, Board-certified in physical medicine and rehabilitation, noted diagnoses of lumbago with sciatica on the left and lumbar radiculopathy.

By decision dated September 18, 2017, an OWCP hearing representative affirmed the December 6, 2016 decision denying appellant's schedule award claim. She found that Dr. Buchman's report represented the special weight of medical evidence sufficient to resolve the conflict of medical opinion and established that there was no evidence of ratable impairment of the lower extremities due to appellant's work-related lumbar condition.

LEGAL PRECEDENT

The schedule award provision of FECA[10] and its implementing federal regulations,[11] 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 of loss of a member shall be determined. 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.[12] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[13] 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.[14]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.[15] For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that the

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] *Id.* at § 10.404(a).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[14] *D.S.*, Docket No. 18-1140 (issued January 29, 2019); *Isidoro Rivera*, 12 ECAB 348 (1961).

[15] *Supra* note 13 at Chapter 3.700, Exhibit 4 (January 2010).

July/August 2009, *The Guides Newsletter* is to be applied.[16] FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[17]

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[18] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[19] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.[20]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his lower extremities entitling him to a schedule award.

Following the Board's last April 11, 2016 decision, OWCP prepared an updated SOAF and properly referred appellant's case to Dr. Buchman for an impartial medical examination in order to resolve the conflict in medical opinion regarding whether he sustained a permanent impairment of his lower extremities in accordance with the A.M.A., *Guides*, pursuant to 5 U.S.C. § 8123(a). In an October 26, 2016 report, Dr. Buchman reviewed the history of injury and provided physical examination findings. He noted appellant's accepted lumbar conditions and opined that, based on his clinical evaluations and diagnostic testing, appellant had zero impairment rating according to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. The Board finds that the opinion of Dr. Buchman is of sufficient probative value to resolve the conflict in the medical opinion evidence.

When a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[21] The Board finds that Dr. Buchman's October 26, 2016 report is entitled to special weight and established that appellant had not sustained a permanent impairment for schedule award purposes.[22]

In his October 26, 2015 report, Dr. Buchman described his examination findings and concluded that appellant had zero percent permanent impairment of his lower extremities causally related to the accepted lumbar injury. He reviewed appellant's history of injury, including the SOAF, and noted no clinical signs of radiculopathy or spinal nerve impairment. Dr. Buchman

[16] *Id.* at Chapter 3.700, Exhibit 1 (January 2010). *The Guides Newsletter* is included as Exhibit 4; *see also G.N.*, Docket No. 10-0850 (issued November 12, 2010).

[17] *Supra* note 13 at Chapter 2.808.5c(3) (February 2013).

[18] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The DMA, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

[19] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[20] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[21] *Id.*

[22] *T.C.*, Docket No. 17-1741 (issued October 9, 2018).

concluded that, based on his clinical evaluations and the most recent EMG, appellant had zero impairment rating according to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. The Board finds that Dr. Buchman's report is detailed, well rationalized, and based on a proper factual background. Dr. Buchman's opinion, therefore, is entitled to the special weight accorded an IME and has established that appellant does not have a ratable impairment of the lower extremities causally related to his accepted lumbar injury.[23]

The Board further finds that the additional medical evidence submitted are insufficient to overcome the special weight accorded to Dr. Buchman as the IME and fail to establish a ratable permanent impairment of appellant's lower extremities. The additional letters and reports by Dr. Gonte, Dr. Kovan, and Dr. Gordon, are insufficient to establish a ratable permanent impairment as none of the physicians provided an opinion with regard to permanent impairment.[24] As well the June 12, 2017 lumbar spine MRI scan lacks probative value as diagnostic tests as they do not provide an opinion on causal relationship between the employment injuries and any permanent impairment.[25] Thus, the Board finds that the medical evidence of record fails to establish that appellant has a permanent impairment to his lower extremities causally related to his accepted lumbar injury. Consequently, appellant has not established entitlement to a schedule award.

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

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his lower extremities entitling him to a schedule award.

[23] *F.S.*, Docket No. 18-0383 (issued August 22, 2018); *Manuel Gill*, 52 ECAB 282 (2001).

[24] 20 C.F.R. § 10.404 (1999); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[25] *See generally, D.B.*, Docket No. 18-1359 (issued May 14, 2019) (the Board has held that reports of diagnostic tests lack probative value as they do not provide an opinion on causal relationship between his employment incident and a diagnosed condition).

ORDER

IT IS HEREBY ORDERED THAT the September 18, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 29, 2019
Washington, DC

Christopher J. Godfrey, 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