

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

S.J., Appellant)	
)	
and)	Docket No. 19-0623
)	Issued: October 28, 2019
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Trenton, NJ, Employer)	
)	

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 28, 2019 appellant, through counsel, filed a timely appeal from a November 27, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 greater than 26 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

OWCP accepted that on January 5, 2016 appellant, then a 59-year-old mail processor, sustained aggravation of lumbar disc disease with radiculopathy as a result of bending into a cage and lifting packages while in the performance of duty.³ It authorized medial branch blocks at the left and right L3-4, L4-5, and L5-S1 under fluoroscopy, which were performed on March 24 and August 11, 2016.

On March 15, 2016 Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, examined appellant for low back pain with radiation into the right greater than left leg. On examination he noted that a straight leg raise reproduced right leg pain at 40 degrees and 4/5 weakness of the extensor hallucis longus, with otherwise normal findings of the extremities. Dr. Valentino diagnosed lumbar disc herniation with radiculopathy, lumbar stenosis, lumbar facet arthropathy, and low back pain.

On March 21, 2016 Dr. Brad Tinkelman, a Board-certified neurologist, conducted an electromyogram (EMG) and nerve conduction velocity testing to determine the presence of a neuropathy or radiculopathy. He stated that motor and sensory nerve testing was normal, but that a needle EMG revealed ongoing and chronic irritation of the right L4-S1 and left L4-5 innervated muscles. Dr. Tinkelman concluded that the study revealed electrical evidence of an ongoing and chronic right L4-S1 and left L4-5 radiculopathy.

In a report dated May 9, 2017, Dr. Nicholas Diamond, Board-certified in physical medicine and rehabilitation, diagnosed lumbar sprain and strain, lumbar disc syndrome at L2-3 and L5-S1 with aggravation of preexisting lumbar pathology; right L4, L5, and S1 radiculopathy; lumbar facet syndrome; status post interventional pain management epidural steroid injections and medial branch facet block injections; osteoarthritis of the left hip; right hip total arthroplasty with metallosis; and revision of the right hip total arthroplasty due to metallosis and implant failure. On examination, he noted negative straight leg raising signs, but an increase of low back pain with excursion of the right lower extremity, as well as 5/5 strength of the extensor hallucis longus. Sensory examination revealed a perceived sensory decrease on the right in the L4, L5, and S1 dermatomal distribution with 3.61 mgs Semmes-Weinstein Monofilament testing on the right. Deep tendon reflexes were +1/4 on the right lower extremity for the patella and Achilles. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent*

³ Appellant stopped work on January 5, 2016 and returned to limited-duty work on October 2, 2016. By decision dated July 2, 2018, OWCP reduced his wage-loss compensation to zero, as his actual earnings from his position at the employing establishment met or exceeded the current wages of the date-of-injury position, and fairly and reasonably represented his wage-earning capacity. Appellant retired from the employing establishment effective August 31, 2018.

Impairment (A.M.A., *Guides*),⁴ Dr. Diamond calculated 40 percent right lower extremity permanent impairment. The rating was based on findings of class 1 moderate sensory deficits of the right L4 nerve root (5 percent), L5 nerve root (5 percent), and S1 nerve root (3 percent); a class 1 mild 4/5 motor strength deficit of the right quadriceps (9 percent); and a class 2 right total hip arthroplasty with good results (25 percent). Dr. Diamond indicated that appellant had reached maximum medical improvement (MMI) on May 9, 2017.

On September 19, 2017 appellant filed a claim for a schedule award (Form CA-7).

OWCP routed Dr. Diamond's May 9, 2017 report, a statement of accepted facts (SOAF), and the case file to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), for review as to whether appellant sustained permanent impairment as a result of his accepted condition.

In a September 25, 2017 report, Dr. Katz recommended a second opinion evaluation, as there was significant conflict of information between the findings of Drs. Valentino and Tinkerman with respect to the lower extremities and Dr. Diamond in his impairment examination, which could not be resolved on the basis of a review of the medical record. He indicated that MMI was undetermined, pending a second opinion evaluation.

OWCP referred appellant to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation regarding appellant's permanent impairment. In a March 2, 2018 report, Dr. Draper examined appellant's lower extremities, finding slightly decreased touch sensation of the lateral foot and sole due to the S1 nerve. He opined that appellant had a class 1, grade C, or one percent impairment of the right lower extremity. Dr. Draper referenced the sixth edition A.M.A., *Guides* and *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*) as the method for determining impairment. He indicated that MMI had been reached as of March 2, 2018.

In a March 28, 2018 report, Dr. Katz reviewed Dr. Draper's report and found that, while his examination was more consistent with the findings of other examiners than Dr. Diamond's assessment, he failed to consider impairment for appellant's right total hip replacement, and thus he did not agree with Dr. Draper's final impairment rating. Referring to Table 16-4, Hip Regional Grid, and *The Guides Newsletter*, Dr. Katz calculated 1 percent permanent impairment of the right lower extremity due to spinal nerve impairment and 25 percent permanent impairment due to total hip replacement, for a final combined value of 26 percent permanent impairment of the right lower extremity. He concurred with Dr. Draper that the date of MMI was March 2, 2018.

By decision dated April 3, 2018, OWCP granted appellant a schedule award for 26 percent permanent impairment of the right lower extremity. The award covered the period March 2, 2018 through August 8, 2019, and was based on the May 9, 2017 report of Dr. Diamond, the March 2, 2018 report of Dr. Draper, and the reports of Dr. Katz dated September 20, 2017 and March 28, 2018.

⁴ A.M.A., *Guides* (6th ed. 2009).

On April 9, 2018 appellant, through counsel, requested a hearing before an OWCP hearing representative.

On May 24, 2018 appellant underwent an OWCP-approved medial branch blocks at the left and right L3-4, L4-5, and L5-S1 under fluoroscopy.

A hearing was held on July 10, 2018. During the hearing, counsel argued that a conflict of medical opinion existed between Dr. Katz and Dr. Diamond, and noted that Dr. Katz had utilized an incorrect date of MMI.

By decision dated August 13, 2018, OWCP's hearing representative affirmed the April 3, 2018 decision. She noted that Dr. Diamond had not provided an explanation for a higher rating of impairment due to sensory deficit in light of Dr. Valentino's negative findings. The hearing representative further noted that his report was not definitive and as such, use of Dr. Diamond's report for the date of MMI was not warranted.

On September 5, 2018 appellant, through counsel, requested reconsideration. In support of his request, appellant submitted an addendum report from Dr. Diamond dated August 24, 2018. Dr. Diamond disagreed with Dr. Katz' impairment rating for the right lower extremity secondary to lumbar radiculopathy. He noted that Dr. Draper had not utilized the Semmes-Weinstein Monofilament method to document appellant's sensory deficit. Dr. Diamond referred to the A.M.A., *Guides*, page 532, which noted that grading was based on the results of sensibility testing and two-point discrimination to improve interrater reliability. He stated that the Semmes-Weinstein Monofilament method was an instrument widely in use, had greater accuracy, and was an optimum choice for objective touch threshold examination. Dr. Diamond further noted that Dr. Draper had used a grade modifier for physical examination in his impairment rating for the S1 nerve root sensory deficit, which was not used to grade spinal nerve root impairment. He disagreed with Dr. Draper's grade modifier of 2 for clinical studies and referred to Table 17-9, page 581 of the A.M.A., *Guides*, which stated that EMG evidence consisting of multiple nerve root radiculopathy was compatible with a grade modifier of 4. Dr. Diamond opined that appellant had a final combined right lower extremity impairment of 40 percent.

OWCP routed Dr. Diamond's August 24, 2018 report, a SOAF, and the case file to DMA Dr. Katz for review and commentary.

On November 16, 2018 Dr. Katz stated that Dr. Draper's neurological findings were consistent with that of other examiners of record. He noted that the Semmes-Weinstein testing method was not a requirement for the use of *The Guides Newsletter*. Dr. Katz opined that, while some degree of right hip muscle weakness may exist, it was likely that this was due, at least in part, to the coexistent hip replacement. He stated that, at that time, consideration might be given for a referee impairment evaluation.

By decision dated November 27, 2018, OWCP denied modification of its August 13, 2018 decision, finding that the DMA's opinion was unchanged by Dr. Diamond's August 24, 2018 report.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁵ and its implementing federal 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.⁹ For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.¹⁰ FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.¹¹

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹² The implementing regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹³

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ *Id.* at Chapter 3.700, Exhibit 4 (January 2010).

¹⁰ *Id.* at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4; *see also W.M.*, Docket No. 18-0957 (issued October 15, 2018); *G.N.*, Docket No. 10-0850 (issued November 12, 2010).

¹¹ *Supra* note 8 at Chapter 2.808.5c(3) (February 2013).

¹² 5 U.S.C. § 8123(a).

¹³ 20 C.F.R. § 10.321.

opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴

ANALYSIS

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

Although the DMA and Dr. Diamond agreed with respect to the extent of appellant's right lower extremity impairment due to his total hip arthroplasty, they disagreed regarding appellant's sensory nerve extremity impairment attributable to his accepted lumbar condition. Whereas Dr. Diamond found 25 percent right lower extremity permanent impairment due to sensory and/or motor deficits affecting the L4, L5, and S1 nerve roots, the DMA found only one (1) percent right lower extremity permanent impairment due to a mild sensory deficit affecting the S1 nerve root. In his November 16, 2018 supplemental report, the DMA advised that "consideration might be given for a referee impairment evaluation." However, OWCP did not heed his advice.

The Board finds that a conflict in the medical opinion evidence exists between appellant's attending physician, Dr. Diamond and OWCP's medical adviser, Dr. Katz, regarding whether he sustained greater than 26 percent impairment of the right lower extremity. As noted above, if there is disagreement between an employee's physician and the DMA, OWCP shall appoint a referee physician or impartial medical specialist who shall make an examination.¹⁵ The case is therefore remanded for OWCP to refer appellant to an appropriate specialist for an impartial medical examination pursuant to 5 U.S.C. § 8123(a) to determine the extent and degree of right lower extremity impairment in accordance with the sixth edition of the A.M.A., *Guides*.¹⁶ After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹⁴ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002); see also *W.M.*, *supra* note 10.

¹⁵ *Supra* note 12; see *V.G.*, Docket No. 17-1341 (issued July 16, 2018).

¹⁶ See *W.M.*, *supra* note 10; *P.R.*, Docket No. 18-0022 (issued April 9, 2018); *G.W.*, Docket No. 17-0957 (issued June 19, 2017).

ORDER

IT IS HEREBY ORDERED THAT the November 27, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 28, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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