

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

_____)	
D.M., Appellant)	
)	
and)	Docket No. 19-0141
)	Issued: September 3, 2019
U.S. POSTAL SERVICE, MAIL PROCESSING & DISTRIBUTION CENTER, Tampa, FL,)	
Employer)	
_____)	

Appearances:
*Denise S. Prado, for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

On October 24, 2018 appellant, through his representative, filed a timely appeal from an October 1, 2018 decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellant Boards docketed the appeal as No. 19-0141.

On November 27, 2011 appellant, then a 51-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on November 26, 2011 he experienced pain in his neck and low back lifting flat tubs while in the performance of duty. OWCP accepted the claim for cervical sprain, lumbar sprain, bilateral sprains of shoulder and upper arms, displacement of lumbar intervertebral disc without myelopathy at L4-L5, and left lumbosacral neuritis or radiculitis.

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.

On December 16, 2014 appellant filed a claim for a schedule award (Form CA-7).

By decision dated February 10, 2015, OWCP denied appellant's schedule award claim.

On February 23, 2015 appellant requested a hearing before an OWCP hearing representative. In an August 14, 2015 decision, an OWCP hearing representative remanded the case for further development. She noted that to avoid piecemeal adjudication regarding the schedule award claim, the case should first be referred to an impartial medical specialist to resolve the conflict of medical opinion as to whether the effects of appellant's employment injuries had resolved.²

In a November 2, 2016 report, Dr. Fred Ferderigos, a Board-certified orthopedic surgeon selected as the impartial medical examiner (IME), opined that appellant's radiculopathy of the lower extremities had resolved without objective findings of radicular symptomatology, noting that appellant had a complete intact neurological evaluation with normal motor strength.

On December 1, 2016 OWCP requested clarification from Dr. Ferderigos. In a January 5, 2017 report, Dr. Ferderigos opined that appellant had not sustained permanent impairment based on the November 25, 2011 injury as all of his injury-related conditions had resolved.

By decision dated May 8, 2017, OWCP found that appellant had no permanent impairment of the lower extremities finding that the special weight rested with the opinion of the IME.

In a January 23, 2018 report, Dr. Mark A. Seldes, a Board-certified family practitioner, diagnosed lumbar radiculopathy with bilateral lower extremity S1 nerve root involvement, disc herniation at L4-L5, bulging discs at L5-S1 and L3-L4, and lumbar disc syndrome. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009), Dr. Seldes opined that appellant had 13 percent lower extremity impairment for the left lower extremity and 6 percent lower extremity impairment for the right lower extremity based on sensory and motor deficits of the S1 nerve root.

On February 20, 2018 appellant, through his representative, requested reconsideration.

In a March 8, 2018 report, Dr. Jovito Estaris, Board-certified in occupational medicine, acting as an OWCP district medical advisor (DMA), recommended that OWCP refer appellant for an impairment rating with a physician trained in the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*.

² A conflict in medical opinion was found between Dr. Jonathan Black a, Board-certified orthopedic surgeon and second opinion physician, who found that the effects of the injury had resolved, and Dr. Samy F. Bishai, a physician specializing in orthopedic surgery. Specifically, Dr. Bishai had opined that appellant had 24 percent permanent impairment in each lower extremity. In contrast, Dr. Black had opined in a July 30, 2014 report that "the accepted conditions are not clearly related to the reported work injury of November 26, 2011," and that "there are no objective findings on physical examination neurologically."

³ A.M.A., *Guides* (6th ed. 2009).

By decision dated May 21, 2018, OWCP denied modification.

On July 3, 2018 appellant, through his representative, requested reconsideration.

In a June 11, 2018 report, Dr. Seldes recommended that appellant undergo an impairment evaluation by a second opinion physician. In a September 27, 2018 report, the DMA concurred with Dr. Seldes' recommendation that appellant undergo an impairment evaluation by a second opinion physician.

By decision dated October 1, 2018, OWCP denied modification of its May 21 2018 decision.

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

OWCP previously determined that appellant had no ratable impairment of his lower extremities based on the November 2, 2016 report of Dr. Ferderigos, the impartial medical specialist, who opined that appellant's lower extremity radiculopathy had resolved.

Subsequently, Dr. Seldes examined appellant. Based on objective evidence of sensory and/or motor deficits on neurological examination and updated diagnostic testing, he provided a permanent impairment rating. Dr. Seldes also recommended that appellant be referred for a second opinion evaluation. The DMA reviewed Dr. Seldes' impairment calculations and concurred in the recommendation that OWCP refer appellant for an impairment evaluation with an appropriate physician.

It is well established that proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.⁴ In light of the DMA's recommendation for a second opinion examination, the Board will set aside OWCP's October 1, 2018 decision regarding the issue of permanent impairment of appellant's lower extremities and remand the case for a second opinion examination.

On remand OWCP shall update the statement of accepted facts and refer appellant to a second opinion physician for an evaluation concerning the extent of appellant's lower extremity permanent impairment in accordance with the A.M.A., *Guides* and *The Guides Newsletter*. After this and other such further development as may be deemed necessary, it shall render a *de novo* decision. Accordingly,

⁴ See *J.M.*, Docket No. 18-1467 (issued March 5, 2019); *D.S.*, Docket No. 15-0606 (issued July 2, 2015); *William J. Cantrell*, 34 ECAB 1223 (1983).

IT IS HEREBY ORDERED THAT the October 1, 2018 merit decision of the Office of Workers' Compensation Programs set aside and this case is remanded for further action consistent with this order of the Board.

Issued: September 3, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board