United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 19-0710**
	)	**Issued: September 9, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Springfield, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 19, 2019 appellant filed a timely appeal from an August 29, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the August 29, 2018 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 evidence for the first time on appeal. *Id*.

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 13 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

Appellant filed a traumatic injury claim (Form CA-1) alleging that on February 19, 2014 he sustained an injury due to a fall which occurred while in performance of duty. OWCP accepted that he sustained thoracic/lumbosacral neuritis or radiculitis, spinal stenosis of the lumbar region, and lumbar radiculopathy. On February 19, 2015 Dr. Brian Russell, a Board-certified orthopedic surgeon, performed OWCP-authorized lumbar surgery, including microforaminotomy and microdiscectomy at L4-5.[3]

Dr. Russell continued to treat appellant's back and lower extremity conditions and noted in periodic reports dated in 2015 and 2016 that appellant reported weakness and sensory loss in his left lower extremity.

On February 19, 2016 appellant filed a claim for a schedule award (Form CA-7) due to his February 19, 2014 employment injury. In a March 11, 2016 development letter, OWCP requested that he submit a medical report evaluating his lower extremity permanent impairment under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[4] but appellant did not provide such evidence within the allotted 30 days. By decision dated September 12, 2016, it denied appellant's schedule award claim finding that he had not met his burden of proof to establish employment-related permanent loss, or loss of use, of a listed member or function of the body.

Appellant continued to claim entitlement to schedule award compensation. In a June 7, 2017 report, Dr. Neil Allen, a Board-certified internist and neurologist, reported the findings of his physical examination, noting that appellant had 4/5 strength of the extensor hallicus longus associated with the left L5 nerve distribution, as well as loss of sharp/dull discrimination over the L3 dermatome on the left and the L5 dermatome on the right. He indicated that he was applying the diagnosis-based impairment (DBI) method of rating the permanent impairment of appellant's lower extremities. Under Proposed Table 2 of *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*), appellant's severe sensory deficit associated with the L3 nerve distribution of the left lower extremity warranted a class 1 default value of four percent. Dr. Allen determined that appellant had a functional history grade modifier (GMFH) of 0 and a clinical studies grade modifier (GMCS) of 2. He found that the physical examination grade modifier (GMPE) was not applicable. Application of the net adjustment formula required no adjustment from the four percent default value, and resulted in appellant having four percent permanent impairment due to sensory deficit

[3] Appellant stopped work on February 19, 2014 and returned to full-duty work on March 4, 2015. OWCP paid him wage-loss compensation on the supplemental rolls.

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

associated with the L3 nerve distribution of the left lower extremity. Dr. Allen indicated that appellant's mild sensory deficit associated with the L5 nerve distribution of the left lower extremity warranted a class 1 default value of one percent. He determined that appellant had a GMFH of 2 and a GMCS of 2. Dr. Allen found that the GMPE was not applicable. Application of the net adjustment formula required +2 adjustment from the one percent default value, and resulted in appellant having two percent permanent impairment due to sensory deficit associated with the L5 nerve distribution of the left lower extremity.

Dr. Allen further found that, under Proposed Table 2, appellant's mild motor deficit associated with the L5 nerve distribution of the left lower extremity warranted a class 1 default value of five percent. He determined that appellant had a GMFH of 2 and a clinical studies grade modifier GMCS of 2. Dr. Allen found that the physical GMPE was not applicable. Application of the net adjustment formula resulted in +2 adjustment from the default value, and resulted in nine percent permanent impairment due to motor deficit associated with the L5 nerve distribution of the left lower extremity. Dr. Allen noted that adding the above-noted 4, 2, and 9 percent values resulted in 15 percent permanent impairment of appellant's left lower extremity. With respect to the right lower extremity, he indicated that appellant's severe sensory deficit associated with the right L5 nerve distribution warranted a class 1 default value of six percent. He determined that appellant had a GMFH of 2 and a GMCS of 2. Dr. Allen found that the GMPE was not applicable. Application of the net adjustment formula yielded +2 adjustment, but did not change the six percent default value. Therefore, appellant had six percent permanent impairment of the right lower extremity.

On September 26, 2017 OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). It requested that he review the case record, including Dr. Allen's June 7, 2017 report, and provide an opinion on the permanent impairment of appellant's lower extremities under the standards of the sixth edition of the A.M.A., *Guides.*

In a September 28, 2017 report, the DMA provided an extensive description of Dr. Allen's June 7, 2017 permanent impairment rating. He noted that Dr. Allen's impairment rating raised concerns because he identified sensory and motor deficits in appellant's right lower extremity which had not been identified by Dr. Russell or any other evaluator. The DMA recommended that appellant be referred to an orthopedic surgeon or physical medicine and rehabilitation physician for a second opinion examination and an impairment rating with respect to appellant's lower extremities.

In April 2018 OWCP referred appellant to Dr. Yibing Li, a Board-certified physical medicine and rehabilitation physician, for a second opinion examination. It requested that she provide an impairment rating of the lower extremities under the standards of the sixth edition of the A.M.A., *Guides.*

In her June 14, 2018 report, Dr. Li discussed appellant's factual and medical history and reported the findings of her physical examination. She noted that appellant had decreased sensation of the left L5 dermatomes and that muscle strength was 4/5 on the left side ankle dorsiflexor. Appellant had 5/5 on the strength in the left hip flexors, knee extension, and plantar flexors. For the right lower extremity, he had 5/5 strength in the key muscles and no sensory loss

was identified. Dr. Li calculated permanent impairment of the left lower extremity utilizing the DBI method found in *The Guides Newsletter*. She concluded that appellant had five percent permanent impairment due to sensory deficit associated with the L5 nerve distribution of the left lower extremity. Appellant also had 13 percent permanent impairment due to motor deficit associated with the L5 nerve distribution of the left lower extremity. Dr. Li noted that combining the 5 percent and 13 percent values, under the Combined Values Chart of the sixth edition of the A.M.A., *Guides*, resulted in 17 percent permanent impairment of appellant's left lower extremity. She did not identify any permanent impairment of appellant's right lower extremity.

On August 10, 2018 OWCP again referred appellant's case to Dr. Katz in his capacity as physician DMA. It requested that he review the case record, including the June 14, 2018 findings of Dr. Li, and provide an opinion on the permanent impairment of appellant's lower extremities under the standards of the sixth edition of the A.M.A., *Guides.*

In an August 13, 2018 report, the DMA indicated that he was applying the DBI method of rating the permanent impairment of appellant's left lower extremity. Under Proposed Table 2 of *The Guides Newsletter*, appellant's moderate sensory deficit associated with the L5 nerve distribution of the left lower extremity warranted a class 1 default value of three percent. Dr. Katz determined that appellant had a GMFH of 1, a GMPE of 2, and a GMCS of 2. Application of the net adjustment formula required +2 adjustment from the three percent default value, and resulted in appellant having 5 percent permanent impairment due to sensory deficit associated with the L5 nerve distribution of the left lower extremity. The DMA further found that, under Proposed Table 2, appellant's moderate motor deficit associated with the L5 nerve distribution of the left lower extremity warranted a class 1 default value of 13 percent. He determined that appellant had a GMFH of 1, a GMPE of 2, and a GMCS of 2. Application of the net adjustment formula resulted in +2 adjustment from the default value, and resulted in 13 percent permanent impairment due to motor deficit associated with the L5 nerve distribution of the left lower extremity. The DMA noted that combining the 5 percent and 13 percent values, under the Combined Values Chart of the sixth edition of the A.M.A., *Guides*, resulted in 17 percent permanent impairment of appellant's left lower extremity. The DMA indicated that the range of motion (ROM) method of rating permanent impairment was not available for appellant's left lower extremity condition. However, Proposed Table 2 provided that the maximum permanent impairment for impairment associated with a single nerve was 13 percent, and therefore the total permanent impairment of appellant's left lower extremity was 13 percent.

With respect to application of the DBI rating method for appellant's right lower extremity, the DMA indicated that, under Proposed Table 2, appellant had a class 0 permanent impairment rating for sensory deficit associated with the L3, L4, L5, and S1 nerve distributions. Therefore, appellant had no permanent impairment of his right lower extremity due to sensory deficit. In addition, Proposed Table 2 provided that appellant had a class 0 permanent impairment rating for motor deficit associated with the L3, L4, L5, and S1 nerve distributions and, therefore, he had no permanent impairment of his right lower extremity due to motor deficit. The DMA indicated that this assessment was based on Dr. Li's finding that appellant had no sensory or motor deficit in his right lower extremity. He also indicated that the ROM method of rating permanent impairment was not available for appellant's right lower extremity condition.

By decision dated August 29, 2018, OWCP granted appellant a schedule award for 13 percent permanent impairment of his left lower extremity. The award ran for 37.44 weeks from June 14, 2018 to March 3, 2019 and was based on the August 13, 2018 opinion of Dr. Katz in his capacity as the DMA, who evaluated the June 14, 2018 findings of Dr. Li.

LEGAL PRECEDENT

The schedule award provisions 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, 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]

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[9] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[10] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. Proposed Table 2 of *The Guides Newsletter* provides that the maximum permanent impairment for impairment associated with a single nerve is 13 percent. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[11]

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id. See also T.T.*, Docket No. 18-1622 (issued May 14, 2019).

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

[9] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[10] *Supra* note 8 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3) (March 2017).

[11] *Supra* note 8 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 13 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

The Board notes that on August 13, 2018 Dr. Katz, the DMA, properly evaluated the June 14, 2018 findings of Dr. Li and determined that appellant had 13 percent permanent impairment of his left lower extremity and 0 percent permanent impairment of his right lower extremity.[12]

In his August 13, 2018 report, the DMA applied the DBI method of rating the permanent impairment of appellant's left lower extremity, noting that, under Proposed Table 2 of *The Guides Newsletter,* appellant's moderate sensory deficit associated with the L5 nerve distribution of the left lower extremity warranted a class 1 default value of three percent. He determined that appellant had a GMFH of 1, a GMPE of 2, and a GMCS of 2. Application of the net adjustment formula required +2 adjustment from the three percent default value, and resulted in appellant having five percent permanent impairment due to sensory deficit associated with the L5 nerve distribution of the left lower extremity. The DMA provided a similar evaluation for motor deficit associated with the L5 nerve distribution which resulted in 13 percent permanent impairment due to motor deficit associated with the L5 nerve distribution of the left lower extremity. He combined the 5 percent and 13 percent values under the Combined Values Chart, which resulted in 17 percent permanent impairment of appellant's left lower extremity.[13] However, Proposed Table 2 provides that the maximum permanent impairment for impairment associated with a single nerve was 13 percent, and therefore the total permanent impairment of appellant's left lower extremity was 13 percent.[14] With respect to application of the DBI rating method for appellant's right lower extremity, the DMA indicated that, under Proposed Table 2, appellant had a class 0 permanent impairment rating for sensory deficit and motor deficits associated with the L3, L4, L5, and S1 nerve distributions. Therefore, appellant had no permanent impairment of his right lower extremity due to sensory or motor deficits. The DMA indicated that this assessment was based on Dr. Li's finding that appellant had no sensory or motor deficit in his right lower extremity. He also indicated that the ROM method of rating permanent impairment was not available for appellant's right lower extremity condition.

[12] The DMA had properly recommended that appellant be referred for a second opinion examination given his concerns that Dr. Allen's June 7, 2017 permanent impairment rating identified sensory and motor deficits in appellant's right lower extremity which had not been identified by Dr. Russell or any other evaluator. *See generally supra* note 8 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6f (February 2013) (regarding the role of DMA's in evaluating permanent impairment ratings).

[13] A.M.A., *Guides* 604, Combined Values Chart. The DMA properly indicated that the A.M.A., *Guides* does not contain any provision allowing for use of the ROM method of rating permanent impairment for appellant's left lower extremity condition.

[14] *See supra* note 11. The Board notes that Dr. Li had also initially calculated that appellant had 17 percent permanent impairment of his left lower extremity, but she failed to acknowledge that, under *The Guides Newsletter*, the maximum permanent impairment for impairment associated with a single nerve was 13 percent.

The Board therefore finds that the report of Dr. Katz serving as the DMA is well rationalized and makes proper citation to the applicable rating A.M.A., *Guides* and therefore is entitled to the weight of the evidence. As there is no rationalized medical report providing a rating of permanent impairment greater than that provided by the DMA, the Board finds that appellant had not met his burden of proof to establish more than 13 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing 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 more than 13 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2019
Washington, DC

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

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

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