United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 18-1205**
	)	**Issued: April 16, 2020**
DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Los Angeles, CA, 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:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 25, 2018 appellant, through counsel, filed a timely appeal from an April 9, 2018 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 *et seq*.

[3] The Board notes that, following the April 9, 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 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 right lower extremity, or more than two percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On November 4, 2011 appellant, then a 49-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on November 3, 2011 he breached a front door using a 50-pound ram and felt a "pop" in his lower back while in the performance of duty. OWCP initially accepted his claim for lumbar sprain and strain, and later expanded the accepted conditions to include displacement of lumbar intervertebral disc without myelopathy.[4]

Appellant stopped work on February 7, 2013 and, on that date, Dr. Devin Binder, a Board-certified neurosurgeon, performed OWCP-authorized spinal surgery, including hemilaminectomy, foraminotomy, and arthrodesis at L4-5.

Dr. Binder provided periodic follow-up treatment postsurgery and on December 4, 2013 he released appellant to full-duty work without restrictions starting January 10, 2014. Appellant returned to such work on February 5, 2014. In a June 25, 2014 report, Dr. Binder noted that appellant had complained of numbness in his left thigh and left little toe, as well as nagging pain in his left buttock. On physical examination, he noted no malalignment or tenderness in the joints, bones, or muscles, normal gait and station, and normal sensation and motor strength in the lower extremities.

The findings of an October 18, 2014 electromyogram and nerve conduction velocity (EMG/NCV) study of appellant's lower extremities demonstrated mild chronic L4-S1 polyradiculopathies of the left lower extremity, normal bilateral sural sensory responses, normal left peroneal and tibial motor responses, no abnormal spontaneous activity of tested muscles representing the left L2 through S1 myotomes, and no electrophysiologic evidence of generalized sensorimotor polyneuropathy of the lower extremities.

On February 3, 2015 appellant filed a claim for schedule award (Form CA-7) alleging permanent impairment as a result of his accepted employment conditions.

Appellant submitted a February 25, 2015 report from Dr. George Ricks, a Board-certified family practitioner, who reported the findings of his physical examination, noting that appellant had slightly reduced sensation and 4/5 strength in the left lower extremity. Dr. Ricks evaluated appellant's lower extremity permanent impairment under Table 16-12 (Peripheral Nerve Impairment) on page 535 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[5] and indicated that appellant had a nine

[4] A March 14, 2012 magnetic resonance imaging (MRI) scan of appellant's lumbar spine demonstrated mild levoscoliosis near L2, mild disc degeneration at L2-3 through L4-5, mild prevertebral spondylosis at L2-3, mild central canal stenosis at L4-5, mild-to-moderate lateral recess stenosis near the L5 nerve root bilaterally, and mild left foraminal stenosis.

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

percent default value (class 1) for lower extremity impairment due to mild motor deficit of the left sciatic nerve. Under Table 16-6 through Table 16-8 on pages 516 through 520, he determined that appellant had a grade modifier for functional history (GMFH) of 1, grade modifier for physical examination (GMPE) of 1, and grade modifier for clinical studies (GMCS) of 2. Application of the net adjustment formula on page on page 521 resulted in a final value for permanent impairment of the left lower extremity of 11 percent under the sixth edition of the A.M.A., *Guides*.

On July 24, 2015 OWCP referred appellant's case to Dr. Leonard Simpson, a Board-certified orthopedic surgeon, serving as a district medical adviser (DMA) for OWCP. It requested that he review the medical evidence of record, including Dr. Ricks' February 25, 2015 report, and provide an assessment of appellant's permanent impairment.

In an August 8, 2015 report, the DMA recommended assessing permanent impairment of appellant's lower extremities based on nerve root involvement utilizing *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*), rather than assessing sciatic nerve involvement as was done by Dr. Ricks. He explained that involvement of the left L5 nerve root had been identified, noting both the level of the February 7, 2013 surgery and results of the diagnostic studies. The DMA indicated that appellant had slightly decreased sensation and mild weakness (4/5) associated with the L5 nerve distribution of the left lower extremity. He then rated the permanent impairment of appellant's left lower extremity utilizing *The Guides Newsletter*. Under Proposed Table 2, appellant's mild sensory deficit associated with the L5 nerve distribution fell under class 1 for class of diagnosis (CDX) with a default value of one percent. The DMA determined that appellant had a GMFH of 1 and GMCS of 2, and that the GMPE was not applicable. Application of the net adjustment formula required +1 adjustment from the default value, and resulted in appellant having two percent permanent impairment due to sensory deficit associated with the L5 nerve distribution.

The DMA further found that, under Proposed Table 2, appellant's motor deficit associated with the L5 nerve distribution warranted a class 1 default value of five percent. Application of the net adjustment formula with the above-noted grade modifiers resulted in +1 adjustment from the default value, and yielded seven percent permanent impairment due to motor deficit associated with the L5 nerve distribution. The DMA noted that adding the two and seven percent values resulted in a total finding of nine percent permanent impairment of appellant's left lower extremity. He indicated that the medical evidence of record did not support ongoing right lower extremity symptomology or clinical findings, and he opined that appellant had zero percent impairment of the right lower extremity.[6]

In an undated report, Dr. Mesfin Seyoum, a Board-certified pediatrician, disputed the conclusions of the DMA's August 8, 2015 report. He based his conclusions on Dr. Ricks' February 25, 2015 examination and opined that appellant had lumbar radiculopathy involving both the left L4 and L5 nerve root distributions as indicated in an October 18, 2014 EMG/NCV study and November 7, 2013 MRI scan.[7] Dr. Seyoum rated the permanent impairment of appellant's left lower extremity utilizing *The Guides Newsletter*. Under Proposed Table 2, appellant's mild sensory deficit associated with the L5 nerve distribution fell under class 1 with a default value of

[6] The DMA noted that the date of maximum medical improvement (MMI) was February 25, 2015, the date of Dr. Ricks' examination.

[7] The case record does not contain a copy of a November 7, 2013 MRI scan.

one percent. Dr. Seyoum determined that appellant had a GMFH of 1 and GMCS of 2, and indicated that application of the net adjustment formula yielded two percent permanent impairment due to sensory deficit associated with the L5 nerve distribution. Under Proposed Table 2, appellant's motor deficit associated with the L5 nerve distribution warranted a class 1 default value of five percent. Application of the net adjustment formula resulted in seven percent permanent impairment due to motor deficit associated with the L5 nerve distribution. Dr. Seyoum noted that adding the two and seven percent values yielded a finding of nine percent permanent impairment of appellant's left lower extremity due to L5 nerve deficits. He also found that, with respect to the L4 nerve distribution, appellant had six percent permanent impairment comprised of a one percent loss for sensory deficit and five percent loss for motor deficit. Dr. Seyoum utilized the Combined Values Chart on page 406 of the A.M.A., *Guides* to combine the permanent impairment values associated with the L4 and L5 nerves and concluded that appellant had 14 percent permanent impairment of his left lower extremity.

On August 3, 2016 OWCP requested that a DMA review Dr. Seyoum's report and render a permanent impairment rating using *The Guides Newsletter*. In an August 5, 2016 report, Dr. Michael Katz, a Board-certified orthopedic surgeon serving as a DMA, indicated that Dr. Ricks' February 25, 2015 examination lacked sufficient detail to make an accurate assessment of spinal nerve impairment, because it provided little information as to which spinal nerve or nerves might be affected as no myotomal or dermatomal distribution was identified. He opined that, because Dr. Seyoum only referenced Dr. Ricks' examination and did not perform his own, he relied on vague information in forming an opinion. The DMA recommended that appellant undergo a second opinion examination.

OWCP referred appellant for a second opinion examination to Dr. Michael Einbund, a Board-certified orthopedic surgeon. It requested that he provide an opinion on the extent of the permanent impairment of appellant's lower extremities under the sixth edition of the A.M.A., *Guides*.

In a September 2, 2016 report, Dr. Einbund reported the findings of the physical examination he conducted on that date, noting range of motion findings for the back, straight-leg raising at 80 degrees on the right and 70 degrees on the left, and decreased sensation over the lateral/dorsal margin of the left foot.[8] Appellant had normal strength in his lower extremity muscles, including his quadriceps, hamstrings, extensor hallicis longus, and plantar flexors/extensors. Dr. Einbund indicated that there were no EMG/NCV studies available for appellant's lower extremities, and advised that he measured the severity of sensory deficit based on his physical examination findings.

Dr. Einbund rated the permanent impairment of appellant's left lower extremity utilizing *The Guides Newsletter*. Under Proposed Table 2, appellant's mild sensory deficit associated with the L4 nerve distribution fell under class 1 with a default value of one percent. He had a GMFH of 1 due to his reported difficulties with stairs/uneven terrain, left leg stiffness, and left leg pain which awakened him at night. Dr. Einbund found that the GMPE and GMCS were not applicable. He indicated that application of the net adjustment formula required no movement from the default value and concluded that appellant had one percent permanent impairment due to sensory deficit associated with the L4 nerve distribution. Dr. Einbund conducted a similar calculation to conclude

[8] Dr. Einbund noted subjective complaints of a burning sensation along the left anterior lateral thigh.

that appellant had one percent permanent impairment due to sensory deficit associated with the L5 nerve distribution. He utilized the Combined Values Chart to combine the permanent impairment values associated with the L4 and L5 nerves and concluded that appellant had two percent permanent impairment of his left lower extremity. With regard to appellant's right lower extremity, Dr. Einbund found no objective basis for impairment. He noted that appellant's date of MMI was September 2, 2016.

On October 11, 2016 OWCP requested that the current DMA, Dr. Katz, review the medical evidence of record, including Dr. Einbund's September 2, 2016 report, and provide an opinion on the extent of permanent impairment of appellant's lower extremities.

On October 13, 2016 the DMA indicated that he concurred with Dr. Einbund's determination in his September 2, 2016 report that appellant had two percent permanent impairment of his left lower extremity. He advised that Dr. Einbund's report was supported by the records reviewed and consistent with the methodology set forth in the A.M.A., *Guides* and *The Guides Newsletter*. The DMA noted that the grade modifiers were assigned according to the parameters set forth in the applicable tables.[9] He maintained that appellant's permanent impairment of the left lower extremity was two percent and that he had no permanent impairment of the right lower extremity. The DMA advised that the date of MMI was September 2, 2016.

By decision dated December 15, 2016, OWCP granted appellant a schedule award for two percent permanent impairment of his left lower extremity. The award ran for 5.76 weeks from September 2 through October 12, 2016 and was based on the opinions of Dr. Einbund and the DMA.

On December 21, 2016 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant submitted a March 1, 2017 report from Dr. Seyoum who noted that Dr. Einbund indicated that there were no EMG/NCV studies available for review, despite the existence of the October 18, 2014 EMG/NCV study. Dr. Seyoum advised that he still believed that, at the time of the February 25, 2015 evaluation, appellant had radiculopathies pertaining to his left L4 and L5 nerve roots which an impairment rating of 14 percent.

By decision dated April 18, 2017, OWCP's hearing representative set aside the December 15, 2016 schedule award decision prior to a hearing being held. She found that Dr. Einbund's report could not be given the weight of the medical evidence because he did not review the October 18, 2014 EMG/NCV study. The hearing representative determined that further development should be undertaken on remand by providing a copy of the October 18, 2014 EMG/NCV study to Dr. Einbund and requesting the provision of a supplemental report concerning whether the additional medical evidence supported greater than two percent permanent impairment of the left lower extremity.

[9] The DMA discussed Dr. Einbund's rating calculations, including those related to the L5 nerve distribution. He inadvertently indicated that Dr. Einbund provided a rating related to the S1 nerve distribution, but the content and context of the DMA's report show that he meant to refer to the rating Dr. Einbund made in connection with the L4 nerve distribution.

On remand OWCP requested a supplemental report from Dr. Einbund. In a June 19, 2017 report, Dr. Einbund discussed the October 18, 2014 EMG/NCV study, as well as Dr. Seyoum's March 1, 2017 report, and indicated that the EMG/NCV study did not augment the sensory grade deficit which remained mild. He noted that the EMG/NCV study did not reveal any motor involvement in that it detailed normal left peroneal and tibial motor responses and he concluded that there was no abnormal spontaneous activity in the tested muscles. Dr. Einbund advised that these normal findings were consistent with his examination of September 2, 2016 and that, as such, there was no basis for impairment as related to motor strength. He noted that there was no basis to alter his prior impairment rating of two percent.

On July 19, 2016 OWCP requested that the DMA review the medical evidence, including Dr. Einbund's June 19, 2017 report, and provide an opinion on the extent of permanent impairment of appellant's lower extremities. In a July 20, 2017 report, the DMA indicated that he had reviewed Dr. Einbund's June 19, 2017 report and noted that he concurred with his determination that the September 2, 2016 impairment rating should remain unchanged. He indicated that Dr. Einbund properly concluded that the October 18, 2014 EMG/NCV study did not require him to change his prior opinion that appellant's sensory impairment was mild, and that he had no motor strength deficits. The DMA opined that Dr. Einbund presented a well-reasoned defense of his earlier determination and advised that the permanent impairment of appellant's left lower extremity was two percent and the permanent impairment of his right lower extremity was zero percent.

By decision dated August 3, 2017, OWCP granted appellant a schedule award for two percent permanent impairment of his left lower extremity. The award ran for 5.76 weeks from September 2 through October 12, 2016 and was based on the opinions of Dr. Einbund and the DMA.

On August 8, 2017 appellant, through counsel, requested a hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on February 14, 2018 counsel argued that Dr. Einbund and the DMA incorrectly calculated appellant's percentage of permanent impairment.[10]

By decision dated April 9, 2018, OWCP's hearing representative affirmed the August 3, 2017 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,[11] and its implementing federal regulation,[12] 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

[10] Appellant submitted July 12 and September 20, 2017, and February 28, 2018 reports of Dr. Binder which did not address permanent impairment.

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[13] As May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[14]

Neither FECA nor the 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. However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[15] 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. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[16]

ANALYSIS

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

The Board finds that Dr. Einbund, OWCP's referral physician, properly applied the standards of *The Guides Newsletter*,[17] to determine that appellant has two percent permanent impairment of his left lower extremity and zero percent impairment of his right lower extremity. Under Proposed Table 2, appellant's mild sensory deficit associated with the L4 nerve distribution fell under class 1 with a default value of one percent. He had a GMFH of 1 due to his reported left leg symptoms and the GMPE and GMCS were not applicable. Dr. Einbund indicated that application of the net adjustment formula required no movement from the default value and concluded that appellant had one percent permanent impairment due to sensory deficit associated with the L4 nerve distribution. He conducted a similar calculation to conclude that appellant had one percent permanent impairment due to sensory deficit associated with the L5 nerve distribution. Dr. Einbund combined the permanent impairment values associated with the L4 and L5 nerves and properly concluded that appellant had two percent permanent impairment of his left lower extremity.[18] With regard to appellant's right lower extremity, he correctly found no objective basis for impairment.[19]

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[13] *Id*.

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

[15] 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).

[16] *Supra* note 14 at Chapter 3.700, Exhibit 4 (January 2010).

[17] *Id*.

[18] *See* A.M.A., *Guides* 406, Combined Values Chart.

[19] Dr. Einbund found that the date of MMI was September 2, 2016, the date of his examination.

In a supplemental report dated June 19, 2017, Dr. Einbund discussed an October 18, 2014 EMG/NCV study and indicated that it did not augment the sensory grade deficit which remained mild in nature. He noted that the EMG/NCV study did not reveal any motor deficits in the lower extremities. Dr. Einbund indicated that these normal motor findings were consistent with his examination of September 2, 2016 and noted that, as such, there was no basis for impairment due to motor strength deficits. He properly concluded that there was no basis to alter his prior calculation of permanent impairment.

The Board further finds that the DMA also properly determined that appellant has two percent permanent impairment of his left lower extremity and zero percent permanent impairment of his right lower extremity. On October 13, 2016 the DMA indicated that he had reviewed Dr. Einbund's September 2, 2016 report and noted that he concurred with his determination that appellant had two percent permanent impairment of his left lower extremity and zero percent permanent impairment of his right lower extremity. He found that Dr. Einbund's September 2, 2016 report was supported by the medical reports of record and consistent with the methodology set forth in the A.M.A., *Guides*. In a July 20, 2017 report, the DMA reviewed Dr. Einbund's June 19, 2017 report and concurred with his opinion that the September 2, 2016 impairment rating determination should remain unchanged even after consideration of the October 18, 2014 EMG/NCV study. He again properly advised that appellant had two percent permanent impairment of his left lower extremity and zero percent permanent impairment of his right lower extremity.

The Board finds that the weight of the medical evidence with respect to the permanent impairment of appellant's lower extremities rests with the opinions of Dr. Einbund and the DMA.

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 permanent impairment of his right lower extremity, or more than two percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 16, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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