

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

K.M., Appellant	)	
	)	
and	)	Docket No. 20-0601
	)	Issued: December 14, 2020
U.S. POSTAL SERVICE, MILILANI STATION	)	
POST OFFICE, Mililani, HI, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
JANICE B. ASKIN, Judge

**JURISDICTION**

On January 24, 2020 appellant filed a timely appeal from a December 12, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the December 12, 2019 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 three percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

## FACTUAL HISTORY

On February 27, 2012 appellant, then a 53-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that he injured his shoulder and back while in the performance of duty. He explained that he was cut off by another employee while he was pushing heavy equipment and had difficulty stopping his momentum. On the reverse side of the claim form the employing establishment indicated that appellant was injured in the performance of duty and had stopped work on February 27, 2012. On March 22, 2012 OWCP accepted the claim for an unspecified disorder of bursae and tendons in the right shoulder region and a sprain of the lumbar region of the back.<sup>3</sup> Appellant returned to modified-duty work on April 21, 2012. On February 1, 2013 he stopped work again and underwent right rotator cuff surgery. Appellant returned to modified-duty work on October 15, 2013 and full-time regular-duty work on January 24, 2014. On February 19, 2016 he stopped work again and underwent an arthroscopy, acromioplasty, and right rotator cuff repair and returned to modified-duty work on June 14, 2016.

On September 4, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated September 26, 2017, OWCP requested that appellant submit a permanent impairment evaluation from his attending physician in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>4</sup> It afforded him 30 days to submit the requested evidence.

An October 27, 2017 medical report from Dr. Lan Nguyen, Board-certified in occupational medicine, indicated that appellant presented with intermittent lower back pain and left leg pain from twisting his back in an awkward position at work when he tried to halt two rolling cages. Dr. Nguyen reviewed appellant's history of medical treatment and diagnostic imaging and indicated that he was currently working a sedentary job and had reached maximum medical improvement (MMI). Appellant's physical examination revealed normal results. Dr. Nguyen diagnosed lumbar radiculopathy and indicated that appellant possibly had a permanent impairment.

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<sup>3</sup> Under subsidiary claim OWCP File No. xxxxxx384, OWCP accepted a left shoulder and upper arm acromioclavicular sprain and granted appellant a schedule award for 11 percent permanent impairment of the left upper extremity. It administratively combined OWCP File No. xxxxxx384 with the present claim, with the latter serving as the master file. Under OWCP File No. xxxxxx906, OWCP accepted an unspecified rotator cuff tear or rupture of the right shoulder and granted appellant a schedule award for a nine percent permanent impairment of the right upper extremity (shoulder). Its April 3, 2018 statement of accepted facts (SOAF) indicated that OWCP administratively combined OWCP File No. xxxxxx906 with the present claim, with the latter serving as the master file; however, the record indicates that they are not combined.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

She suggested that he obtain an impairment rating of his low back from another physician and indicated that appellant could continue working full-time sedentary duty.

In a letter dated October 30, 2017, appellant noted that Dr. Nguyen had requested that a permanent impairment rating be provided by another physician.

OWCP prepared a statement of accepted facts (SOAF) on April 3, 2018, which noted that the accepted conditions in appellant's claim were right shoulder disorder of bursae and tendons, and lumbar sprain.

In a report dated May 8, 2018, Dr. Neelesh Fernandes, Board-certified in physical medicine and rehabilitation, acting as OWCP's second opinion physician, reviewed the SOAF, appellant's medical record, and his history of injury. He indicated that appellant presented with intermittent right anterior shoulder pain and intermittent left lower lumbar spine pain. Appellant stated that his lumbar pain worsened with lifting heavy objects and sitting for over an hour and was alleviated by rest and ice. He noted that he experienced associated numbness and tingling in his left posterior thigh, calf, and lateral foot. Physical examination of appellant's lower extremities revealed a 30 percent decrease in light touch and pin prick sensations in the left L5 distribution in comparison to the right side. Reflex was absent in the bilateral medial hamstring, and manual muscle testing revealed 4/5 strength in the left extensor hallucis longus, flexor hallucis longus, and gastrocnemius. The straight leg test was positive on the right, and atrophy of the left gastrocnemius was noted. The left lower lumbar paraspinals were tender upon palpation, and appellant had a mild antalgic gait. Dr. Fernandes indicated that appellant's MMI was April 28, 2018, which was the date of appellant's examination.

Referencing *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*), Dr. Fernandes indicated that appellant's left L5 lumbar radiculopathy caused moderate sensory deficit, which fell under the class of diagnosis (CDX) of 1 in the Proposed Table 2 Spinal Nerve Impairment: Lower Extremity Impairments, with the default value of three percent permanent impairment. Dr. Fernandes assigned grade modifier for functional history (GMFH) of 1, did not assign a grade modifier for physical examination (GMPE), and assigned a grade modifier for clinical studies (GMCS) of 3. He found a net adjustment of two and calculated five percent left lower extremity permanent impairment for sensory deficit. Dr. Fernandes indicated that appellant's left L5 lumbar radiculopathy had mild motor deficit, which fell under the CDX of 1 in the Proposed Table 2, with the default value of five percent permanent impairment. He used the same grade modifiers and net adjustment and calculated nine percent left lower extremity permanent impairment for motor deficit. Dr. Fernandes calculated a total final left lower extremity permanent impairment rating of 14 percent.

A May 30, 2018 letter from Dr. Peter Lum, Board-certified in physical medicine and rehabilitation, indicated that appellant reached MMI either on September 19, 2016 or on April 24, 2017 and could return to work full time in a sedentary position with the restriction of lifting no more than 10 pounds.

In an August 23, 2018 medical report, Dr. Michael Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), indicated that he reviewed a SOAF,

appellant's medical record and history of injury, and the second opinion medical report from Dr. Fernandes. He indicated that Dr. Fernandes' findings of mild motor deficit and moderate sensory deficit in appellant's left lower extremity were not supported by findings of other physicians, for example, Dr. Nguyen's finding that appellant had normal lower extremity motor deficit examination findings. The DMA recommended a new second opinion impairment evaluation.

In medical reports and work status notes dated October 26, 2018 and January 25, April 19, July 17, and October 2, 2019, Dr. Stella Tadaki, Board-certified in internal medicine, noted her review of appellant's history of injury and diagnostic imaging. She noted that a September 10, 2016 magnetic resonance imaging (MRI) scan of appellant's lumbar spine revealed multilevel degenerative changes of the spine, worst at the L5-S1 level with chronic grade 1 anterolisthesis contributing to severe bilateral neural foraminal narrowing, likely impinging the exiting bilateral L5 nerve roots. Dr. Tadaki reported that appellant presented with intermittent lower back pain and associated intermittent left leg pain, he had difficulty with a heel toe walk and that his gait was normal.

In an August 5, 2019 report, Dr. Wei Chin Chen, a Board-certified orthopedic surgeon serving as a second opinion physician, indicated that he reviewed a SOAF, appellant's history of injury, and the medical record. He noted that appellant complained left lower extremity radiculopathy and axial lumbar pain. Physical examination of appellant's lumbar spine revealed tenderness to palpation along the midline of the lumbosacral region. There was decreased sensation to light touch in appellant's left lateral dorsal foot and the posterior aspect of his foot and decreased sensation in his hallux interphalangeal joint, large toe, and distal of his left side. Appellant also had decreased sensory loss to the lateral dorsal aspect of his left foot. His knee flexion was 5/5 on the right and 4+/5 on the left, dorsiflexion was 5/5 on the right and 4+ /5 on the left, and his extensor hallucis longus was 5/5 on the right and 4+/5 on the right. Appellant also had positive Faber and straight leg tests on the left. Dr. Chen opined that his subjective complaints of left lower extremity radiculopathy were consistent with the previous magnetic resonance imaging (MRI) scans of his lumbar spine.

Dr. Chen indicated that appellant had reached MMI on the date of his examination of August 5, 2019. He indicated that appellant had sensory deficits along his superficial peroneal nerve distribution, which corresponded to his L5-S1 distribution. Using the A.M.A., *Guides* Table 16-12 on page 534, Dr. Chen assigned appellant's superficial peroneal and sural nerve sensory deficits as a CDX of 1, Grade C. He assigned a GMFH of 0, a GMPE of 3, and a GMCS of 0. Dr. Chen calculated that appellant sustained three percent left lower extremity permanent impairment of the superficial peroneal nerve and three percent left lower extremity impairment of the sural nerve, totaling six percent left lower extremity impairment. He indicated that, if radiculopathy was not accepted by OWCP, then appellant would have zero percent impairment under this method.

Dr. Chen recalculated appellant's lower extremity impairment using *The Guides Newsletter*, noting that it was unclear as to whether OWCP had accepted lumbar radiculopathy or just a lumbar sprain. He indicated that the left L5 nerve root experienced moderate sensory loss and assigned CDX of 1, Grade C under Proposed Table 2. Dr. Chen noted that the grade modifiers were the same as in his first method, equaling three percent left lower extremity impairment. He

classified appellant's L5 motor deficiency using Table 16-11 on page 533 of the A.M.A., *Guides*, as severity 1 because he had a 4/5 motor strength, which corresponded to five percent impairment, and equaled a total of five percent impairment with the same modifiers. Dr. Chen classified both appellant's S1 moderate sensory changes and his mild motor loss as a CDX of 1, Grade C, which equaled two percent and three percent total impairment, respectively, when the same grade modifiers were applied. He calculated a total of 13 percent left lower extremity impairment, and indicated that this was the most accurate evaluation of appellant's impairment due to his lumbar sprain with radiculopathy. In an addendum to his report, Dr. Chen provided his *The Guides Newsletter* impairment calculations, which indicated that he calculated two percent impairment due to the left L5 moderate sensory deficit, zero percent impairment due to the left L5 mild motor deficit, one percent impairment of the left S1 moderate sensory deficit, and zero percent impairment of the left S1 mild motor deficit, totaling three percent lower extremity impairment.

In a SOAF dated October 2, 2019, OWCP noted that the claim was accepted for disorder of bursae and tendons in the right shoulder region, lumbar sprain, and left-sided lumbar radiculopathy.

In an October 8, 2019 report, the DMA indicated that he again reviewed a SOAF and appellant's medical records, including Dr. Chen's IME report. He determined that additional clarification from Dr. Chen was needed because his left lower extremity impairment calculations from his narrative report and addendum were contradictory. The DMA noted that Dr. Chen's calculations for the L5 and S1 nerve root moderate sensory deficit and mild motor deficit as a CDX 1, grade A impairment resulted in a total left lower extremity impairment of 3 percent, while he alternatively rated the same impairments as CDX 1, grade C, which resulted in 13 percent permanent impairment.

On October 15, 2019 OWCP requested clarification from the Dr. Chen. It asked Dr. Chen to review the SOAF and the DMA's October 8, 2019 report and identify which permanent impairment rating applied.

In an October 24, 2019 supplemental report, Dr. Chen indicated that he reviewed the DMA's October 8, 2019 report and related that appellant sustained three percent left lower extremity permanent impairment, as he had explained in his August 23, 2019 report.

By decision dated December 12, 2019, OWCP granted appellant a schedule award for three percent permanent impairment of the left lower extremity. The award ran for 8.64 weeks from October 3 through December 2, 2019. OWCP noted that the left lower extremity schedule award payments for three percent permanent impairment commenced October 3, 2019 as he had been receiving schedule award compensation on a weekly basis for a finding of nine percent right upper extremity permanent impairment for a prior schedule award.

## LEGAL PRECEDENT

The schedule award provisions of FECA<sup>5</sup> and its implementing federal regulations<sup>6</sup> 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.<sup>7</sup> The Board has approved OWCP's use 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.<sup>8</sup>

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.<sup>9</sup> Furthermore, the back is specifically excluded from the definition of organ under FECA.<sup>10</sup> The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rate spinal nerve impairments consistent with sixth edition methodology. 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.<sup>11</sup> The Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.<sup>12</sup>

## ANALYSIS

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

OWCP prepared a SOAF on April 3, 2018 which only noted appellant's accepted lumbar condition as lumbar sprain. In a May 8, 2018 report, OWCP's second opinion examiner,

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>8</sup> *See M.G.*, Docket No. 19-1627 (issued April 17, 2020).

<sup>9</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see B.W.*, Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>10</sup> *See id.* at § 8101(19); *T.M.*, Docket No. 19-1126 (issued September 22, 2020); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

<sup>11</sup> *Supra* note 7 at Chapter 3.700

<sup>12</sup> *A.H.*, Docket No. 19-1788 (issued March 17, 2020).

Dr. Fernandes, provided an impairment rating for appellant's left lower extremity. Upon reviewing Dr. Fernandes' report, the DMA, Dr. Katz, indicated that another second opinion evaluation was needed to resolve contradictions between findings made by Dr. Fernandes and previous medical evidence of record.

In an August 5, 2019 report, Dr. Chen, acting as OWCP's second opinion physician, provided a permanent impairment rating for appellant's left lower extremity in which he explained that it was unclear as to whether appellant's lumbar radiculopathy was an accepted condition. He therefore offered alternative left lower extremity permanent impairment ratings of 3 and 13 percent. OWCP thereafter prepared a new SOAF, noting that lumbar radiculopathy was an accepted condition and on October 15, 2019 OWCP requested clarification from Dr. Chen regarding appellant's left lower extremity permanent impairment. In an October 24, 2019 supplemental report, Dr. Chen reiterated that appellant sustained three percent total left lower extremity impairment, but without noting the new SOAF and without providing further medical rationale explaining why appellant's accepted lumbar radiculopathy resulted in the lower rating.

OWCP procedures provide that, when OWCP undertakes to develop the evidence by referring the case to an office-selected physician, it has an obligation to seek clarification from its physician upon receiving a report that did not adequately address the issues that OWCP sought to develop. As such, the claims examiner should seek clarification from the referral physician and request a supplemental report to clarify specifically-noted discrepancies or inadequacies in the initial second opinion report. If the second opinion physician does not respond, or does not provide a sufficient response after being asked, the claims examiner should request scheduling with another second opinion physician.<sup>13</sup>

The Board finds that in this case OWCP did prepare a new SOAF and asked that Dr. Chen clarify his prior reports. However, Dr. Chen reissued his finding of three percent permanent impairment of the left lower extremity without apparent review of the new SOAF and without rationale.<sup>14</sup> As Dr. Chen's response was insufficiently rationalized, OWCP should have referred appellant for another second opinion evaluation.

On remand OWCP shall refer appellant and the October 2, 2019 SOAF to another second opinion physician to determine appellant's permanent impairment of his left lower extremity. Following this and any such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

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

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<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.810.9(b)(6)j (June 2015).

<sup>14</sup> See *J.D.*, Docket No. 19-0527 (issued September 5 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 12, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: December 14, 2020  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board