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

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| **K.D., Appellant** | ) | |
| **and** | ) | **Docket No. 20-1076** |
| | ) | **Issued: December 2, 2020** |
| **DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Washington, DC, 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 April 25, 2020 appellant filed a timely appeal from a November 6, 2019 merit decision and a November 20, 2019 nonmerit 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.

### ***ISSUES***

The issues are: (1) whether appellant has met his burden of proof to establish greater than two percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation; and (2) whether OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On November 27, 2017 appellant, then a 45-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that on November 7, 2017 he sustained a strain and/or tendinitis in the iliopsoas muscle when running on a trail in the performance of duty. OWCP accepted the claim for lumbar intervertebral disc displacement and lumbar spinal stenosis. Appellant sustained intermittent periods of disability subsequent to his injury. On January 5, 2018 he underwent an anterior lumbar interbody fusion at L3-4 with a cage insertion. Appellant returned to part-time modified employment on March 6, 2018.

In an impairment evaluation report dated October 24, 2018, Dr. Stephanie Y. Clop, a Board-certified physiatrist, noted her review of appellant's history of groin pain while running at work on November 7, 2017. She noted that he had undergone an L3-4 extreme lateral interbody fusion (XLIF) on January 5, 2018. Dr. Clop discussed appellant's current symptoms of mild numbness in the toes and mild weakness with stairs or running. On examination she found mild left quadriceps atrophy, 4+/5 left quadriceps strength, and 5/5 strength in the remainder of the left lower extremity. Dr. Clop found intact sensation of the left lower extremity except for the distal third of the thigh and lateral left foot. She diagnosed status post L3-4 XLIF and residual left thigh atrophy and numbness. Dr. Clop indicated that she was using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[2] to rate appellant's residual left lower extremity symptoms. She found that he had 10 to 14 percent permanent impairment due to class 2 atrophy of the left quadriceps and thigh using Table 17-4 on page 570 of the A.M.A., *Guides*, relevant to determining impairments of the lumbar spine. Dr. Clop applied a grade modifier for functional history (GMFH) of one, grade modifier for physical examination (GMPE) of two and a grade modifier for clinical studies (GMCS) of two. She utilized the net adjustment formula and concluded that appellant had 11 percent whole person permanent impairment.

On October 26, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a November 1, 2018 development letter, OWCP requested that appellant submit an impairment evaluation from his attending physician rating his impairment in accordance with the A.M.A., *Guides* and addressing whether he had reached maximum medical improvement (MMI).

On April 17, 2019 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA), reviewed the evidence and diagnosed status post anterior lumbar interbody fusion at L3-4. He applied *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (*The Guides Newsletter*) (July/August 2009) to Dr. Clop's findings, noting that it provided a way to rate impairments of the lower extremity originating in the spine. Dr. Harris found that appellant had no impairment of the right lower extremity as he had no evidence of a neurological deficit. For the left lower extremity, he found that appellant had no impairment for mild pain and reduced sensation due to L3 radiculopathy. Dr. Harris determined that he had two percent impairment of the left lower extremity for mild

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

motor weakness from radiculopathy at L2. He concluded that appellant had two percent impairment of the left lower extremity and that he had reached MMI on October 24, 2018.

By decision dated November 6, 2019, OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity. The period of the award ran for 5.76 weeks from October 24 to December 3, 2018.

On November 13, 2019 appellant requested reconsideration. He agreed that *The Guides Newsletter* should be used to calculate the extent of his lower extremity impairment. Appellant contended, however, that the DMA had failed to correctly apply the provisions of *The Guides Newsletter*. He noted that radiculopathy from an L3 injury yielded a default value of one percent for a mild sensory deficit and three percent for a mild motor deficit. Appellant maintained that the DMA had reduced his sensory impairment to zero from the default value of one percent without explanation. He further asserted that the DMA had rated his motor deficit using a different level than L3. Appellant questioned why he identified the motor deficit as originating at L2 given that he had no L2 injury. He calculated that, using *The Guides Newsletter* and applying the grade modifiers found by his physician, he had one percent impairment for a sensory deficit and four percent impairment for motor deficit, for a combined five percent lower extremity permanent impairment.

By decision dated November 20, 2019, OWCP denied appellant's request for reconsideration as he had not raised an argument or submitted evidence sufficient to warrant reopening his case for further merit review under 5 U.S.C. § 8128(a).

## ***LEGAL PRECEDENT -- ISSUE 1***

The schedule award provisions of FECA,[3] and its implementing federal regulations,[4] 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 loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. 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.[5] The Board has approved the use by

[3] *Id*.

[4] 20 C.F.R. § 10.404.

[5] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

OWCP 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.[6]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).[7] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by the GMFH, GMPE, and GMCS.[8] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[10]

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.[11] Furthermore, the back is specifically excluded from the definition of organ under FECA.[12] 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 rating 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.[13] 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.[14]

## ***ANALYSIS -- ISSUE 1***

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

In an October 24, 2018 impairment evaluation, Dr. Clop found that appellant had mild left quadriceps atrophy, 4+/5 left quadriceps strength, and 5/5 strength in the remainder of the left lower extremity. She further found intact sensation of the left lower extremity with the exception

[6] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[7] A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[8] *Id*. at 494-531.

[9] *Id*. at 411.

[10] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[11] *See L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008).

[12] *See* 5 U.S.C. § 8101(19); *see also G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[13] *Supra* note 5 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[14] *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

of the distal third of the thigh and lateral left foot. Dr. Clop diagnosed status post L3-4 XLIF and residual left thigh atrophy and numbness. Citing the sixth edition of the A.M.A., *Guides*, she found that appellant had 10 to 14 percent impairment due to class 2 atrophy of the left quadriceps and thigh using Table 17-4 on page 570 of the A.M.A., *Guides*, the lumbar spine regional grid. Dr. Clop applied a GMFH of one, and a GMPE and a GMCS of two, and concluded that appellant had 11 percent whole person permanent impairment. However, a schedule award is only payable for permanent impairment originating in the spine if permanent impairment of an extremity is established pursuant to *The Guides Newsletter*.[15] Dr. Clop failed to use *The Guides Newsletter* in calculating appellant's permanent impairment and thus her opinion lacks probative value.[16]

On April 17, 2019 Dr. Harris, the DMA, referenced *The Guides Newsletter* and indicated that appellant had no impairment of the right lower extremity as he had no evidence of a neurological deficit. He further found that he had zero percent impairment of the left lower extremity due to mild pain and reduced sensation at L3 and two percent impairment for mild motor weakness at L3, for a total left lower extremity impairment of two percent.[17] Dr. Harris did not, however, address application of grade modifiers or the net adjustment formula in rating appellant's spinal nerve impairment at L3 using Proposed Table 2 of *The Guides Newsletter*.[18] T*he Guides Newsletter* provides that the examiner should adjust the sensory and motor ratings for functional history and, if applicable, clinical studies.[19] As Dr. Harris did not explain his impairment rating in accordance with the provisions of *The Guides Newsletter*, his opinion is insufficient to establish the extent of appellant's lower extremity impairment.

It is well established that proceedings under FECA are not adversarial in nature and that while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[20] The case will be remanded for OWCP to obtain clarification from Dr. Harris regarding the extent of appellant's permanent impairment after proper application of *The Guides Newsletter*. If Dr. Harris is unable to provide clarification, OWCP should further develop the evidence as necessary to resolve the issue. The Board notes that in its development letter OWCP requested that appellant provide a rating of permanent impairment in accordance with the sixth edition of the A.M.A., *Guides.* However, the rating should have been requested in accordance with *The Guides Newsletter*.

[15] *E.F.*, Docket No. 18-1723 (issued May 1, 2019).

[16] *See A.H.*, Docket No. 19-1788 (issued March 17, 2020); *R.B.*, Docket No. 19-0848 (issued February 11, 2020).

[17] Dr. Harris indicated that he was rating appellant for mild motor weakness at L2 rather than L3; however, this appears to be a typographical error.

[18] *See R.B.*, Docket No. 17-1995 (issued August 13, 2018).

[19] *Supra* note 12. *See V.B.*, Docket No. 14-1850 (issued January 28, 2015).

[20] *J.O.*, Docket No. 17-1156 (issued September 13, 2017).

After this and any further development deemed necessary, it should issue a *de novo* decision.[21]

## ***CONCLUSION***

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 20 and 6, 2019 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 2, 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

[21] In light of the Board's disposition of the merits, the issue of whether OWCP properly denied appellant's request for reconsideration under section 8128(a) is rendered moot.