

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

R.B., Appellant)	
)	
and)	Docket No. 19-0848
)	Issued: February 11, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Mableton, GA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 11, 2019 appellant filed a timely appeal from a December 28, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 December 28, 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 greater than five percent permanent impairment of his right lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 10, 2002 appellant, then a 52-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that on July 29, 2002 he injured his back when lifting a bag of mail while in the performance of duty. OWCP adjudicated the claim under OWCP File No. xxxxxx765. On March 10, 2004 it accepted the claim for lumbosacral disc syndrome and radiculitis.⁴

In a claim adjudicated by OWCP under File No. xxxxxx331, on October 25, 2012 appellant filed a traumatic injury claim (Form CA-1), alleging that on July 19, 2012 he reinjured his back assisting another employee. OWCP accepted the claim for sprain of lumbar region and displacement of lumbar intervertebral disc without myelopathy under this claim. It paid appellant wage-loss compensation on the supplemental rolls from September 4, 2012 through March 8, 2014 and on the periodic rolls from March 9 through June 28, 2014.

On November 17, 2013 appellant filed a schedule award claim (Form CA-7) under OWCP File No. xxxxxx331. By decision dated December 30, 2013, OWCP denied the claim. On May 27, 2014 it denied appellant's request for reconsideration of the merits of his claim.

In a report dated January 22, 2014, Dr. Craig Underset, an attending family physician, advised that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ appellant had eight percent whole person impairment.

By decision dated June 6, 2014, OWCP terminated appellant's medical benefits and wage-loss compensation under File No. xxxxxx331. Appellant retired from the employing establishment on November 30, 2014.

³ Docket No. 14-1469 (issued August 18, 2015).

⁴ Appellant was paid no wage-loss compensation under this claim.

⁵ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

On June 16, 2014 appellant appealed to the Board. By decision dated August 18, 2015, the Board affirmed the December 30, 2013 and May 27, 2014 decisions regarding appellant's schedule award claim.⁶

In July 2015 OWCP referred appellant to Dr. Vincent E. Boswell, a Board-certified orthopedic surgeon, for an impairment evaluation.⁷ In an August 29, 2015 report, Dr. Boswell advised that under Chapter 17, The Spine and Pelvis, of the sixth edition of the A.M.A., *Guides*,⁸ appellant had 17 percent right lower extremity impairment. On September 16, 2015 an OWCP district medical adviser (DMA) reviewed Dr. Boswell's report and advised that he disagreed with Dr. Boswell's analysis. The DMA found that, in accordance with Dr. Boswell's findings and *The Guides Newsletter*, appellant had no left lower extremity impairment and one percent permanent impairment of the right lower extremity.

OWCP determined that a conflict had been created between the DMA and Dr. Boswell and referred appellant to Dr. Craig Chebuhar, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a January 20, 2016 report, Dr. Chebuhar advised that under Chapter 17 appellant had a 14 percent right lower extremity impairment.

On March 29, 2016 Dr. Herbert White, Jr., a DMA Board-certified in occupational medicine, indicated that there were no medical reports of record in conformance with *The Guides Newsletter*.

Dr. Chebuhar provided an addendum report on August 3, 2016. Although he referenced *The Guides Newsletter*, he again referenced tables found in Chapter 17, and found that appellant had 12 percent whole person impairment. On August 13, 2016 Dr. White reviewed Dr. Chebuhar's addendum report. He noted that, as Dr. Chebuhar did not appropriately follow *The Guides Newsletter*, his report was insufficient to establish permanent impairment.

OWCP next referred appellant to Dr. Chad M. Kessler, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a November 30, 2016 report, Dr. Kessler noted his review of the medical record including all impairment evaluations and DMA reports. He described physical examination findings and noted that electrodiagnostic testing electromyogram/nerve conduction studies (EMG/NCS) confirmed neuropathy of the peroneal nerve.⁹ Dr. Kessler

⁶ *Supra* note 3.

⁷ OWCP advised Dr. Boswell to utilize *The Guides Newsletter* Rating, Spinal Nerve Extremity Impairment Using the Sixth Edition (*The Guides Newsletter*) (July/August 2009) to determine appellant's impairment.

⁸ A.M.A., *Guides* (6th ed. 2009).

⁹ Dr. Kessler's lumbar spine examination demonstrated paraspinal muscle tenderness and markedly reduced lumbar spine range of motion. Strength was 5/5 in all muscle groups, and sensation was diminished to light toucher primarily over L4 and L5 distribution on the right. Appellant's gait was somewhat feeble and assisted by a cane. An August 1, 2002 EMG/NCS was indicative of abnormal motor neuropathic changes consistent with right peroneal neuropathy. A July 3, 2012 EMG/NCS demonstrated left S1 nerve lesion vs. peroneal neuropathy vs. plexopathy. An April 1, 2014 EMG/NCS was within normal limits.

diagnosed lumbar radiculopathy, history of herniated disc, and degenerative disc disease. He advised that, based on all objective and subjective material available, in accordance with *The Guides Newsletter*, appellant had a moderate sensory deficit at L5 for a class 1 impairment of his lower extremity for six percent permanent impairment. Dr. Kessler opined that maximum medical improvement (MMI) was reached on January 22, 2014.

On February 1, 2017 appellant filed a schedule award claim (Form CA-7).

By decision dated June 27, 2017, OWCP credited the opinion of Dr. Kessler and granted appellant a schedule award for six percent permanent impairment of the right lower extremity. The award was for 17.28 weeks compensation, to run from January 22 to May 22, 2014.

On July 12, 2017 appellant requested a hearing before an OWCP hearing representative. By decision dated January 2, 2018, an OWCP hearing representative advised that, upon preliminary review, further development was necessary. She noted that OWCP had accepted back injuries in 2002 and 2012, and that the statement of accepted facts (SOAF) of record only referred to the 2012 injury. The hearing representative further found that a conflict had not been created because the DMA and Dr. Boswell both proffered opinions on behalf of the government and, therefore, Dr. Chebuhar and Dr. Kessler were not referee physicians, but second opinion physicians. She remanded the case for OWCP to combine File Nos. xxxxxx331 and xxxxxx765 and to revise the SOAF to reflect all accepted conditions and then refer the combined case record to Dr. Kessler for a supplemental report, to be followed by review by its DMA.

On remand OWCP combined File No. xxxxxx331 and File No. xxxxxx765, with the latter becoming the master file. It completed a revised SOAF that included both File No. xxxxxx765 and File No. xxxxxx331. In letters dated January 24 and March 6, 2018, OWCP asked that Dr. Kessler review the updated SOAF and provide a supplemental report. In a March 14, 2018 report, Dr. Kessler advised that there were no changes to his recommended impairment rating of six percent based on the revised SOAF and additional medical documentation. He indicated that he selected January 22, 2014 as the date of MMI because appellant had a functional capacity evaluation that day. Dr. Kessler wrote that his diagnosis was based on appellant's lumbar disc disorder with subsequent radiculopathy, and that his six percent impairment rating was based on his findings.

OWCP referred the record, including Dr. Kessler's supplemental report, to Dr. White, its DMA. In a May 7, 2018 report, the DMA noted Dr. Kessler's examination findings and agreed that appellant had a moderate sensory impairment at L5. Utilizing Proposed Table 2 of *The Guides Newsletter*, he found no strength impairment and three percent sensory impairment, the default value under Proposed Table 2 for moderate sensory impairment. Dr. White then applied the net adjustment formula, finding a net adjustment of 2, which increased appellant's L5 sensory impairment to five percent. He advised that he was unable to verify Dr. Kessler's six percent impairment rating because he did not indicate the grade modifiers he used, and also he also noted that, under *The Guides Newsletter*, the maximum impairment for a moderate sensory impairment at L5 was five percent. Dr. White found the date of MMI was January 22, 2014.

OWCP issued a *de novo* award of compensation on April 25, 2018. It granted appellant a schedule award for five percent permanent impairment of the right leg, for 14.4 weeks

compensation, to run from January 22 to May 22, 2014. OWCP found the weight of the medical evidence rested with the opinion of its DMA who noted that Dr. Kessler did not describe grade modifiers used to determine his rating of six percent permanent impairment of the right lower extremity, and that under *The Guides Newsletter*, the maximum allowed for L5 moderate sensory impairment was five percent.

Appellant requested a hearing before an OWCP hearing representative on May 8, 2018. At the hearing, held on October 15, 2018, he discussed his medical condition. The hearing representative advised appellant of the type of medical report needed to establish increased impairment.

Following the hearing, appellant submitted a September 17, 2013 magnetic resonance imaging (MRI) scan report that demonstrated lumbar spondylosis, multilevel lateral recess and neural foraminal stenosis, and mild central stenosis at L2-3. In an after visit summary report, dated October 22, 2018, Dr. Underset indicated that appellant was seen for further assessment for disability rating using the sixth edition of the A.M.A., *Guides*. He noted that appellant was referred to a neurologist.

By decision dated December 28, 2018, the hearing representative affirmed the April 15, 2018 schedule award decision. She discussed the impairment ratings of record, explaining deficiencies in the medical evidence, and found the weight of the evidence rested with the opinion of the DMA, Dr. White, who properly applied *The Guides Newsletter* in finding five percent permanent impairment of appellant's right lower extremity.

LEGAL PRECEDENT

The schedule award provisions of FECA¹⁰ and its implementing regulations¹¹ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for 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 determination is a matter that rests in the discretion of OWCP. 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 2009.¹² The Board has approved the use by 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.¹³

¹⁰ *Supra* note 1.

¹¹ 20 C.F.R. § 10.404.

¹² For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used, *supra* note 6. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹³ *H.K.*, Docket No. 18-0528 (issued November 1, 2019).

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.¹⁴ 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* provides a specific methodology for rating spinal nerve extremity impairment.¹⁶ 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 OWCP's procedures.¹⁷

For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.¹⁸ The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.¹⁹ In particular, 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.²⁰

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than five percent permanent impairment of his right lower extremity, for which he previously received schedule award compensation.²¹

Preliminarily, the Board notes that findings made in its prior decision are *res judicata* absent further review by OWCP under section 8128 of FECA and therefore the prior evidence need not be addressed again in this decision.²²

¹⁴ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see C.S.*, Docket No. 19-0851 (issued November 18, 2019).

¹⁵ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.808.5(c)(3) (March 2017).

¹⁶ *C.S.*, *supra* note 14.

¹⁷ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 3.700, Exhibit 4 (January 2010); *see B.M.*, Docket No. 19-1069 (issued November 21, 2019).

¹⁸ *Id.* at Chapter 3.700, Exhibit 1.

¹⁹ *J.F.*, Docket No. 19-0922 (issued October 4, 2019).

²⁰ *E.R.*, Docket No. 18-1646 (issued May 17, 2019).

²¹ The Board notes that the April 25, 2018 decision contains a typographical error. While it correctly indicated that appellant had five percent permanent impairment of the right leg for 14.4 weeks compensation and correctly reported the amount of schedule award compensation, it indicated that the period of compensation was from January 22 to May 22, 2014, a period of 17.28 weeks, not 14.4 weeks.

²² *G.W.*, Docket No. 19-1281 (issued December 4, 2019).

In his January 22, 2014 report, Dr. Underset advised that appellant had eight percent whole person impairment under the fifth edition of the A.M.A., *Guides*. As noted, neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.²³ Moreover, for decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.²⁴

Dr. Boswell and Dr. Chebuhar, in August 29, 2015 and January 20, 2016 reports, utilized Chapter 17 of the sixth edition of the A.M.A., *Guides* rather than *The Guides Newsletter* in evaluating appellant's lower extremity impairment. The above reports are, therefore, insufficient to establish entitlement to an increased schedule award because they are not in conformance with the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*.²⁵

Dr. Kessler indicated in his reports dated November 30, 2016 and March 14, 2018 that, in accordance with *The Guides Newsletter*, for a moderate sensory impairment at L5, appellant had six percent permanent impairment of the right lower extremity.

However, as noted by Dr. White, OWCP's DMA, for a moderate L5 sensory impairment, Proposed Table 2 of *The Guides Newsletter* indicates that the maximum allowed is five percent. Furthermore, the DMA also noted that Dr. Kessler did not indicate that he used any modifiers in adjusting appellant's impairment rating. *The Guides Newsletter* provides an explanation of the methodology to be used in rating impairment. As Dr. Kessler did not provide sufficient explanation for his impairment rating, his opinion was also insufficient to establish entitlement to an increased schedule award. The Board finds that the DMA properly used Dr. Kessler's findings and provided a clear explanation in conformance with the A.M.A., *Guides* and *The Guides Newsletter*, that appellant only had five percent permanent impairment of the right lower extremity, the maximum allowable award for L5 moderate sensory loss.²⁶

As appellant has not submitted medical evidence in conformance with the A.M.A., *Guides*, supporting increased permanent impairment of his right lower extremity the Board finds that he has not met his burden of proof to establish his claim for an increased schedule award.²⁷

Appellant may request a schedule award or increased schedule award at any time based on evidence of new exposure, or medical evidence showing a progression of an employment-related condition resulting in impairment or increased impairment.

²³ *Supra* note 14.

²⁴ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.808.5a (February 2013); *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

²⁵ *See E.R.*, *supra* note 20.

²⁶ *Id.*

²⁷ *C.S.*, *supra* note 14.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than five percent permanent impairment of his right lower extremity, for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the December 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 11, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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