

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

M.S., Appellant)

and)

DEPARTMENT OF JUSTICE, U.S. MARSHALS)
SERVICE, Alexandria, VA, Employer)

**Docket No. 19-1401
Issued: July 8, 2020**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 13, 2019 appellant, through counsel, filed a timely appeal from an April 3, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 appellant submitted additional evidence following OWCP's April 3, 2019 decision. 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 four percent permanent impairment of his right lower extremity and three percent permanent impairment of his left lower extremity, for which he has received schedule awards.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 2, 2013 appellant, then a 41-year-old law enforcement officer, filed an occupational disease claim (Form CA-2) alleging that he sustained spondylolisthesis, spondylosis, severe degenerative disc disease, torn discs, and severe foraminal stenosis as a result of factors of his federal employment, including the wearing of body armor weighing over 50 pounds and extreme physical exertion while pursuing and apprehending fugitives and conducting tactical operations. OWCP accepted his claim on April 28, 2014 for: aggravation of cervical spondylosis without myelopathy; aggravation of lumbosacral spondylosis without myelopathy; aggravation of unspecified arthropathy; aggravation of degeneration of the lumbar or lumbosacral intervertebral disc; thoracic or lumbosacral neuritis or radiculitis; aggravated-acquired spondylolisthesis; and displacement of the lumbar intervertebral disc without myelopathy.

On August 5, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a report dated October 27, 2014, Dr. Neil Allen, a Board-certified neurologist and internist, examined appellant and rated his permanent impairment of the lower extremities as 7 percent for motor impairment and 6 percent for sensory impairment, for a combined 13 percent permanent impairment of each lower extremity. He rendered his rating according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ Dr. Allen used the spinal nerve impairment method of calculating impairment according to proposed Table 2, p.6 of *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition, July/August 2009 (*The Guides Newsletter*) and Table 15-14, p. 425 of the A.M.A., *Guides*.

OWCP forwarded Dr. Allen's report, along with a statement of accepted facts (SOAF), to a district medical adviser (DMA), Dr. Morley Slutsky, Board-certified in occupational medicine, for review. In a December 1, 2014 report, the DMA, referring to *The Guides Newsletter* agreed with Dr. Allen's rating except for the class of diagnosis (CDX) and grade modifiers based upon the medical records. The final percentage of permanent impairment according to the DMA was four percent for the right lower extremity and three percent for the left lower extremity. Regarding appellant's motor deficit, the DMA concluded however that appellant had zero percent impairment for L5 motor deficit, as he had no significant motor loss. The date of maximum medical improvement (MMI) was October 2, 2014.

⁴ Docket No. 16-0891 (issued December 19, 2017); Docket No. 14-1925 (issued April 20, 2015).

⁵ A.M.A., *Guides* (6th ed. 2009).

By decision dated May 11, 2015, OWCP granted appellant a schedule award for four percent permanent impairment of the right lower extremity and three percent permanent impairment for the left lower extremity. It noted that the weight of medical evidence rested with its DMA.

On May 18, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The hearing was held on January 11, 2016.

By decision dated February 26, 2016, the hearing representative affirmed OWCP's May 11, 2015 decision finding that appellant had not met his burden of proof to establish a higher rating for schedule award purposes.

Appellant appealed the February 26, 2016 decision to the Board. By decision dated December 19, 2017, the Board found that the DMA had not sufficiently explained the basis for his impairment rating. The Board set aside the decision of February 26, 2016 and remanded the case for referral to a second opinion physician for an opinion as to whether appellant had more than four percent permanent impairment of his right lower extremity and three percent permanent impairment of his left lower extremity.⁶

On January 8, 2018 OWCP referred appellant for a second opinion examination with Dr. Allan Brecher, a Board-certified orthopedic surgeon. In a report dated April 13, 2018, Dr. Brecher reviewed appellant's medical record, the SOAF, and performed a physical examination. On neurological examination, he noted symmetric deep tendon reflexes, a normal Babinski sign, and 5/5 strength of the quadriceps, hamstring, and extensor hallucis longus (EHL). The examination also noted grossly intact sensation, a negative straight leg raise, and a negative flexion, abduction, and external rotation (FABER) test. On musculoskeletal examination, Dr. Brecher observed a healed, nontender scar over the lumbar spine, toe touch to the toes, full extension, and lateral banding. He indicated that appellant had reached MMI as of November 10, 2014 when he was released to work by his treating physician and had a normal examination. Dr. Brecher determined that the diagnosis on which appellant's impairment was based was spondylolisthesis and lower back pain, but that appellant was neurologically intact upon his examination. He noted that appellant had undergone spinal fusion and laminectomy and that he was now doing extremely well. Dr. Brecher opined that appellant had no permanent impairment based on the rating of spinal nerve extremity impairment using *The Guides Newsletter*, as he could not rate back pain alone. He explained that based on spinal nerve ratings, he had no impairment, and that he had full range of motion, which also indicated no impairment.

OWCP routed Dr. Brecher's January 8, 2018 report, a SOAF, and the case file to Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon serving as a DMA, for review. In a May 2, 2018 report, the DMA noted his review of Dr. Brecher's April 13, 2018 report and found that appellant had zero permanent impairment under the sixth edition of the A.M.A., *Guides*. He explained that appellant had no impairment in function and was neurologically intact, while experiencing occasional back pain that was managed with nonsteroidal anti-inflammatory drugs. The DMA noted that appellant had incurred no additional impairment and concurred with Dr. Brecher that there were no objective findings supporting an impairment rating. He explained that he agreed with Dr. Brecher's assessment because using *The Guides Newsletter*, with regard to rating spinal nerve extremity impairment, examination established that appellant had no nerve root

⁶ *Supra* note 4.

dysfunction that would allow an impairment rating. Further, the DMA explained that using the sixth edition of the A.M.A., *Guides*, appellant would have an impairment rating of zero due to no objective findings. He also concurred with Dr. Brecher that the date of MMI was November 10, 2014.

By decision dated May 3, 2018, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record failed to demonstrate a permanent impairment.

On May 11, 2018 appellant, through counsel, requested a telephonic hearing.

Following the hearing, by decision dated August 17, 2018, a hearing representative set aside the May 3, 2018 decision and remanded the case to obtain a supplemental report from Dr. Brecher. The hearing representative found that he had failed to discuss specific sensory and motor strength testing, nor did he explain how this testing would impact appellant's impairment in accordance with the A.M.A., *Guides* and previous impairment ratings.

On August 30, 2018 OWCP requested a supplemental report from Dr. Brecher.

In a supplemental report dated September 18, 2018, Dr. Brecher responded to OWCP's requests. He explained that, based on the A.M.A., *Guides* and *The Guides Newsletter*, appellant had no permanent impairment as he had a normal examination. Dr. Brecher noted that the EMG study of record was four years old. He further explained that there were no sensory or motor deficits on his examination, which were tested grossly, and indicated no impairment. Dr. Brecher concluded that because appellant had improvement upon his examination compared to the examinations of Drs. Allen and Slutsky, the date of MMI would be the date of his examination on April 13, 2018. He explained his disagreement with Drs. Allen and Slutsky, noting that, while they found decreased strength and sensation, he had not found such decreased strength or sensation in his examination.

OWCP again forwarded the case record and a SOAF to Dr. Ugokwe, serving as a DMA, on October 16, 2018. In an October 24, 2018 report, the DMA reviewed Dr. Brecher's September 18, 2018 report, again concurring with Dr. Brecher that appellant did not have an impairment in function and was neurologically intact, and therefore had no permanent impairment. On reviewing Dr. Brecher's supplemental report, the DMA noted that he concurred with Dr. Brecher's zero impairment rating because appellant had no objective findings. Dr. Ugokwe concluded that the date of MMI was November 10, 2014.

By decision dated November 14, 2018, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record failed to demonstrate a ratable impairment.

On November 26, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The hearing was held on February 25, 2019.

By decision dated April 3, 2019, OWCP's hearing representative affirmed the November 14, 2018 decision finding that Dr. Brecher's opinion was properly afforded the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provision of FECA,⁷ and its implementing federal regulations,⁸ 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 the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.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

OWCP's procedures provide that, if a claimant's physician provides an impairment rating, the case should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹⁵

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden to establish entitlement to FECA benefits; however, OWCP

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at § 10.404(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹¹ *See L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

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 10 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).

¹⁵ *See supra* note 10 at Chapter 2.808.6(e) (March 2017); *Tommy R. Martin*, 56 ECAB 273 (2005).

shares responsibility in the development of the evidence to see that justice is done.¹⁶ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁷

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's February 26, 2016 merit decision. The Board considered that evidence in its December 19, 2017 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹⁸

On January 8, 2018 OWCP referred appellant for a second opinion examination with Dr. Brecher. In a report dated April 13, 2018, Dr. Brecher found no ratable impairment of the lower extremities based on a nerve root impairment. Dr. Ugokwe, acting as DMA, concurred with this rating. By decision dated May 3, 2018, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record failed to demonstrate a ratable permanent impairment.

After a hearing representative remanded the case to obtain a supplemental report, OWCP requested a supplemental report from Dr. Brecher, asking him to address whether appellant had any sensory or motor deficits with results of testing included according to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. It advised that specific reference must be made to the testing that was performed to assess these deficits, with reference to the applicable page numbers and tables from the A.M.A., *Guides* and *The Guides Newsletter*. In a supplemental report dated September 18, 2018, Dr. Brecher explained that there were no sensory or motor deficits on his examination, which were tested grossly, and indicated no impairment. He noted his disagreement with Drs. Allen and Slutsky, stating that, "while they found decreased strength and sensation", he had not found such decreased strength and sensation in his examination. In an October 24, 2018 report, Dr. Ugokwe reviewed Dr. Brecher's September 18, 2018 report, concurring with Dr. Brecher that appellant did not have any impairment in function and was neurologically intact.

It is well established that proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁹ Once OWCP undertook development of the evidence by referring appellant to a second opinion physician, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.²⁰ Dr. Brecher's supplemental report of September 18, 2018 did not address whether appellant had

¹⁶ *B.C.*, Docket No. 19-1983 (issued June 8, 2020); *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁷ *Richard F. Williams*, 55 ECAB 343, 346 (2004).

¹⁸ *R.B.*, Docket No. 19-0848 (issued February 11, 2020).

¹⁹ *See B.B.*, Docket No. 17-1949 (issued October 16, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

²⁰ *See B.B., id.*; *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

any sensory or motor deficits with results of testing noted, did not reference the applicable page numbers and tables from the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, and did not address points of disagreement with the reports of Drs. Allen and Slutsky along with thorough medical rationale. Rather, he simply noted that he had not found deficits of strength or sensation, on gross examination, without providing specific results of testing or contrasting these results to the specific examination findings of Dr. Allen²¹, and this was the only rationale provided for his disagreement with the results of Drs. Allen and Slutsky. The supplemental report of September 18, 2018 was not sufficiently rationalized and did not sufficiently address OWCP's inquiries to resolve the issues in this case.²²

The Board will, therefore, set aside OWCP's April 3, 2019 decision and remand the case for a qualified physician to perform updated EMG/NCV testing and physical examination, followed by a proper analysis under the A.M.A., *Guides* in order to determine the extent of appellant's lower extremity impairment, if any. After such further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an increased lower extremity schedule award.

CONCLUSION

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

²¹ Although Dr. Brecher commented upon examination findings by Dr. Allen and Dr. Slutsky, only Dr. Allen was an examining physician for rating purposes. Dr. Slutsky served as a DMA who did not perform a physical examination in rendering his opinion as to the extent of permanent impairment.

²² See *B.B.*, *supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: July 8, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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