

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

D.D., Appellant)	
)	
and)	Docket No. 19-1676
)	Issued: July 29, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Poland, OH, Employer)	
)	

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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 6, 2019 appellant, through counsel, filed a timely appeal from a July 11, 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish any permanent impairment of the right lower extremity (RLE) warranting a schedule award and/or whether he has

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.*

established more than six percent permanent impairment of his left lower extremity (LLE), for which he previously received a schedule award.

FACTUAL HISTORY

On November 13, 2014 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his mid to lower back and left leg on October 8, 2014 when he slid a postal door shut while in the performance of duty. He did not stop work, but began modified duty. On January 23, 2015 OWCP accepted appellant's claim for a lumbar sprain.

A lower extremity electromyogram and nerve conduction velocity (EMG/NCV) study on October 21, 2015 was interpreted as consistent with left L5 radiculopathy.

In a report dated March 23, 2016, Dr. Richard H. Deerhake, a Board-certified orthopedic surgeon serving as a second opinion physician, reviewed a statement of accepted facts (SOAF) and the medical record, and performed a physical examination. He described the history of injury and noted that appellant was working full duty. Dr. Deerhake advised that appellant had not suffered significant residuals from the lumbar back sprain, and that although he had some left calf atrophy related to lumbar radiculopathy, the back sprain would have healed within four to six months. He opined that appellant had signs and symptoms of L5 radiculopathy and a lumbar disc bulge at L4-5 causally related to the accepted October 8, 2014 work injury.

On June 28, 2016 OWCP expanded acceptance of appellant's claim to include lumbar (L5) radiculopathy and lumbar (L4-5) intervertebral disc displacement.

In a letter dated July 25, 2016, Dr. Joseph Cordova, Board-certified in family medicine, indicated that appellant had reached maximum medical improvement (MMI).

On August 29, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated September 9, 2016, OWCP advised appellant that the medical evidence submitted was insufficient to establish his schedule award claim. It requested that he provide a medical report from his attending physician, which included a statement that the accepted conditions had reached MMI and an impairment rating utilizing the appropriate sections of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ OWCP afforded appellant 30 days to submit the necessary evidence.

On September 23, 2016 counsel requested authorization for a one-time appointment to obtain an impairment rating. He repeated this request on November 11, 2016.

By decision dated November 22, 2016, OWCP denied appellant's schedule award claim finding that he had not submitted sufficient medical evidence to demonstrate a measureable impairment or a date of MMI based on objective findings.

³ A.M.A., *Guides* (6th ed. 2009).

On November 29, 2016 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. In correspondence dated December 23, 2016, he again requested authorization for an impairment evaluation.

In a report dated April 4, 2017, Dr. Catherine Watkins Campbell, a family medicine specialist, reviewed appellant's history of injury and described examination findings, noting difficulty with heel to toe walking, deficits of strength in the LLE, left-sided calf atrophy, and LLE decreased sensation of the S1 distribution. She noted that the EMG/NCV dated October 21, 2015 was consistent with left L5 lumbar radiculopathy. Referencing *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), Dr. Watkins Campbell advised that, based on the accepted conditions, appellant had a moderate L5 motor deficit. She indicated that all grades from A to E under *The Guides Newsletter* resulted in 13 percent extremity impairment, and therefore determined that appellant had 13 percent permanent impairment of the LLE due to a moderate L5 motor deficit.

By decision dated April 24, 2017, an OWCP hearing representative set aside the November 22, 2016 decision and remanded the case for further development, including authorization for an impairment evaluation.

In May 2017 OWCP referred appellant, along with a SOAF and the medical record, to Dr. Victoria M. Langa, a Board-certified orthopedic surgeon, for a second opinion examination and impairment evaluation. In a May 26, 2017 report, Dr. Langa noted her review of the SOAF and medical record. On examination she observed that appellant had the ability to stand and walk on both his heels and toes, had discomfort on straight leg raising on the left at 70 degrees, with visible left calf atrophy, and altered sensation in the LLE in a stocking distribution below the knee. Dr. Langa diagnosed degenerative disc bulging at L3-4 and L4-5 and findings of L5 radiculopathy on electrodiagnostic studies, but indicated that despite the October 21, 2015 EMG/NCV findings, appellant had no lower extremity physical findings consistent with a residual/chronic L5 radiculopathy. She further advised that, while appellant had some calf atrophy on the left, he had a history of left Achilles tendon surgery in 2010, and residual calf atrophy was commonly seen following Achilles tendon surgery. Referring to *The Guides Newsletter*, Dr. Langa determined that, as there was no evidence of residual radiculopathy, appellant would be entitled to zero percent lower extremity impairment. She indicated that appellant had long since reached MMI and that his lower back condition was medically stable.

In a letter dated July 3, 2017, OWCP asked Dr. Watkins Campbell to respond to Dr. Langa's May 26, 2017 report with regard to her finding of no residuals of his accepted conditions and her permanent impairment rating of zero percent.

On July 6, 2017 OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon acting as a district medical adviser (DMA), and requested that he evaluate appellant's LLE permanent impairment under the sixth edition of the A.M.A., *Guides*. In a July 12, 2017 report, the DMA determined that Dr. Langa had presented well-reasoned support for her assessment of zero percent permanent impairment of the bilateral lower extremities and concurred with her rating. He noted that the date of MMI was May 26, 2017.

By decision dated August 22, 2017, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On August 31, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a report dated January 25, 2018, Dr. Watkins Campbell noted her review of Dr. Langa's May 26, 2017 impairment evaluation. She opined that, while Dr. Langa elected to assign complete causality of the LLE's calf atrophy to his previous Achilles tendon injury and surgery, physical examination had not demonstrated weakness in plantar flexion, which could be attributed to the Achilles tendon. Dr. Watkins Campbell advised that on physical examination she had found weakness in dorsiflexion that she attributed to L5 radiculopathy. She opined that it was not reasonable for Dr. Langa to ignore objective EMG/NCV studies from 2015 and for her to blame muscle atrophy on a history of having a partial Achilles tendon tear and repair. Dr. Watkins Campbell maintained that her finding of 13 percent permanent impairment of the LLE was correct.

A telephonic hearing was held on February 14, 2018. Counsel requested that Dr. Watkins Campbell's report be forwarded for review by a DMA.

By decision dated April 30, 2018, OWCP's hearing representative set aside the August 22, 2017 decision and remanded the case for referral to a DMA to review the medical evidence of record, including the reports of Drs. Deerhake, Langa, and Watkins Campbell, and opine as to whether appellant had sustained a permanent impairment due to accepted lumbar conditions.

On May 15, 2018 OWCP referred appellant's case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon acting as DMA, for evaluation of appellant's LLE permanent impairment. In a report dated May 16, 2018, the DMA reviewed the history of injury and the medical evidence of record, and found the diagnoses of lumbar disc bulges at L2,L3 and L4 and disc protrusion at L4-5 established. Referencing *The Guides Newsletter*, he indicated that appellant had zero percent LLE and zero percent RLE permanent impairment, noting that he did not have a neurological deficit in the lower extremities consistent with lumbar radiculopathy. The DMA explained that, as he was unable to explain the differences on examination between Dr. Campbell and Dr. Langa, he based his impairment calculations on the more recent evaluation of Dr. Langa. He found that the date of MMI was May 26, 2017.

By decision dated June 8, 2018, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On June 14, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated September 27, 2018, an OWCP hearing representative set aside the June 8, 2018 decision, finding that the case was not in as a conflict in the medical evidence existed between treating physician Dr. Watkins Campbell and second opinion physician Dr. Langa and DMA Dr. Harris. The case was remanded for referral to a referee examiner to resolve the conflict of medical opinion.

On December 7, 2018 OWCP referred appellant, along with a SOAF and the medical record, to Dr. Mark S. Berkowitz, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion evidence. In a report dated January 16, 2019, Dr. Berkowitz, the impartial medical examiner (IME) noted his review of the SOAF and medical records, including Dr. Watkins Campbell's January 25, 2018 report. Physical examination demonstrated no lumbar spine muscle spasm or tenderness, and seated straight leg raising was negative. He found a mild decrease in pinprick sensation of 4/5 over the S1 nerve distribution of the left leg, and reduced strength for left ankle dorsiflexion at 4/5+. Referring to Proposed Table 2 of *The Guides Newsletter*, the IME noted that for a class 1, grade C, L5 condition with mild motor deficit, the percentage of permanent impairment would be five percent, with a grade modifier for clinical studies (GMCS) of 1 due to the EMG/NCV findings. As such, the IME determined that appellant had zero percent permanent impairment of the RLE and six percent permanent impairment of the LLE. Dr. Berkowitz determined that MMI occurred on January 16, 2019.

By decision dated February 12, 2019, OWCP granted appellant a schedule award for six percent permanent impairment of the LLE and zero percent permanent impairment of the RLE. The award ran for 17.28 weeks from January 16 through May 16, 2019. OWCP noted that the schedule award was based on the January 16, 2019 report of Dr. Berkowitz, the IME.

On March 4, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on June 10, 2019.

By decision dated July 11, 2019, OWCP's hearing representative affirmed the February 12, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ and its implementing federal regulations⁵ 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 2009.⁶ 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.⁷

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ 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 3.700.2 and Exhibit 1 (January 2010).

⁷ *See M.G.*, Docket No. 19-1627 (issued April 17, 2020).

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.⁸ Furthermore, the back is specifically excluded from the definition of organ under FECA.⁹ 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.¹⁰ 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.¹¹

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹² When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹³ Where a case is referred to an impartial medical examiner (IME) for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish any permanent impairment of his RLE warranting a schedule award, or more than six percent permanent impairment of his LLE, for which he previously received a schedule award.

OWCP found a conflict in the medical opinion evidence between appellant's attending physician, Dr. Watkins Campbell who found 13 percent LLE impairment, and its second opinion physician, Dr. Langa and the DMA who found no LLE impairment. It properly referred

⁸ 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).

⁹ *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁰ Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 3.700.

¹¹ *A.H.*, Docket No. 19-1788 (issued March 17, 2020).

¹² 5 U.S.C. § 8123(a); *see R.C.*, Docket No. 18-0463 (issued February 7, 2020).

¹³ *See M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

¹⁴ *Id.*

appellant's case to Dr. Berkowitz pursuant to 5 U.S.C. § 8123(a) for an impartial medical examination in order to resolve the conflict in medical opinion.¹⁵

In a January 16, 2019 report, Dr. Berkowitz, the IME, discussed appellant's history of injury and reviewed his medical records. He observed examination findings of a mild decrease in pinprick sensation of 4/5 over the S1 nerve distribution of the left leg, and reduced strength for left ankle dorsiflexion at 4/5+. Referring to Proposed Table 2 of *The Guides Newsletter*, the IME noted that a class 1, grade C, L5 lumbar intervertebral disc herniation with mild motor deficit, yielded five percent impairment, with an addition of one percent clinical studies grade modifier due to EMG/NCV findings. The IME concluded that appellant had zero percent permanent impairment of the RLE and six percent permanent impairment of the LLE.

The Board finds that Dr. Berkowitz's January 16, 2019 report is entitled to special weight and established that appellant had six percent permanent impairment of the LLE and no ratable impairment of the RLE.¹⁶ Dr. Berkowitz's opinion was based on a proper factual and medical history, which he reviewed, and on the proper tables and procedures in the A.M.A., *Guides*. He referenced *The Guides Newsletter* in finding that appellant had six percent permanent impairment of the LLE and zero percent permanent impairment of the RLE. Dr. Berkowitz provided medical rationale for his impairment ratings. The Board finds that appellant has not established permanent impairment of his RLE or more than six percent impairment of his LLE due to his accepted spinal conditions.

On appeal counsel asserts that OWCP failed to adjudicate the claim with the proper standard for causation and failed to give due diligence to findings of the attending physician. However, causal relationship is not an issue in this case. Further, appellant has not provided a rationalized medical opinion to dispute Dr. Berkowitz's impairment rating. The record contains no other probative, rationalized medical opinion which supports that appellant had an RLE impairment or a greater impairment of the LLE based upon the A.M.A., *Guides*.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing a 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 the RLE warranting a schedule award, or more than six percent permanent impairment of his LLE, for which he previously received a schedule award.

¹⁵ See *W.C.*, Docket No. 19-1740 (issued June 4, 2020).

¹⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 29, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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