United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 20-0469**
	)	**Issued: September 3, 2020**
U.S. POSTAL SERVICE, POST OFFICE, East Saint Louis, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 30, 2019 appellant, through counsel, filed a timely appeal from an August 1, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.[3] 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 November 14, 2006 appellant, then a 37-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he pulled a muscle in his back under his left shoulder blade when he picked up a tray of mail when loading his long life vehicle (LLV) while in the performance of duty. He stopped work on January 3, 2007.

OWCP accepted appellant's claim for thoracic and cervical sprains. It subsequently expanded acceptance of his claim to include cervical disc herniation at C4-5 and C5-6.[4] OWCP paid wage-loss compensation beginning on January 3, 2007 and placed appellant on the periodic rolls, effective June 10, 2007. On August 7, 2007 appellant returned to full-duty work.

On June 15, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a December 29, 2014 report, Dr. Neil Allen, a Board-certified internist and neurologist, reviewed appellant's history and noted diagnoses of neck and thoracic sprain, and displacement of cervical intervertebral disc without myelopathy. He noted appellant's current complaints of neck and upper back pain, predominantly on the left side. Dr. Allen discussed the December 18, 2016 cervical spine MRI scan report and related that a November 4, 2014 electromyography and nerve conduction velocity (EMG/NCV) study revealed mild neurogenic changes in the left triceps. Upon examination of appellant's cervical spine, Dr. Allen observed tenderness and increased tone through the upper trapezius and serratus anterior and a golf-ball-sized area of edema noted to the left anterolateral aspect of the cervical spine, C6-T1. Neurovascular examination revealed soft touch and sharp/dull intact for the C5-T1 levels bilaterally, except for the C7 dermatome on the left, which showed reduced soft touch.

Dr. Allen utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[5] and *The Guides Newsletter,* Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*) to assess impairment. He indicated that under Table 1, Upper Extremity Impairment, of *The*

[3] Docket No. 18-1047 (issued February 13, 2019).

[4] A December 18, 2006 cervical spine magnetic resonance imaging (MRI) scan report revealed a large hard disc/osteophyte complex at the C3-4 level on the left with left foraminal narrowing, small, right-sided C4-5 hard disc/osteophyte complex with mild right foraminal narrowing, and hard disc/osteophyte complex at C6-7 on the left and mild left foraminal narrowing.

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

Guides Newsletter, appellant was a class 1 impairment, with a default value of five percent, for mild motor deficit at the C7 spinal level. Dr. Allen assigned a grade modifier for functional history (GMFH) of 2 due to a Pain Disability Questionnaire (PDQ) score of 75 and a grade modifier for clinical studies (GMCS) of 2 due to the cervical spine MRI scan report and EMG/NCV study. After applying the net adjustment formula, (2-1) + (2-1), which resulted in +2, he calculated that appellant had nine percent permanent impairment of the left upper extremity for motor deficit at the C7 level. Dr. Allen also determined that appellant was a class 1 impairment, default value of five percent, for mild sensory deficit at the C7 levels. He assigned GMFH of 2 due to a PDQ score of 75 and GMCS of 2 for cervical spine MRI scan and EMG/NCV study. After applying the net adjustment formula, (2-1) + (2-1), which resulted in +2, Dr. Allen calculated that appellant had five percent permanent impairment of the left upper extremity for sensory deficit at the C7 level. He reported that appellant had a total of 14 percent left upper extremity permanent impairment. Dr. Allen further reported that appellant had no motor or sensory deficits at the C5, C6, and C8 spinal levels, which translated to zero percent permanent impairment.

OWCP routed the case file to Dr. Michael Hellman, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review as to whether appellant sustained permanent impairment as a result of his accepted cervical injury. In a July 20, 2015 report, Dr. Hellman related that he had reviewed appellant's case file and noted that his claim was accepted for cervical sprain and cervical disc herniation at C4-5 and C5-6. He reviewed Dr. Allen's December 29, 2014 report and pointed out that while Dr. Allen had determined appellant's impairment rating based on sensation and motor deficit in the left C7 distribution, this condition was not accepted as work related and was not a preexisting condition. Dr. Hellman also noted that, although the December 18, 2006 cervical spine MRI scan showed a hard disc/osteophyte complex at the C6-7 level on the right, appellant did not have significant weakness or sensation loss according to doctor notes from 2007. For this reason, he explained that he would only grade neurologic deficits at C5 and C6 as work related.

Regarding appellant's left upper extremity, Dr. Hellman referenced *The Guides Newsletter* and indicated that in his December 29, 2014 report, Dr. Allen had noted normal sensation and motor examination at the C4-6 and C5-6 levels. He assigned class 0 diagnosis for normal sensory and motor examination, which resulted in zero percent permanent impairment. Regarding appellant's right upper extremity, Dr. Allen also determined that appellant was class 0 diagnosis for normal sensory and motor examination, which resulted in zero percent permanent impairment. He reported a date of maximum medical improvement (MMI) of December 29, 2014, the date of Dr. Allen's impairment rating report.

By decision dated October 28, 2015, OWCP denied appellant's schedule award claim. It found that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body as a result of his accepted November 14, 2006 employment injury. OWCP noted that the DMA had determined in a July 20, 2015 report that appellant did not have permanent impairment due to his accepted employment injury.

On November 4, 2015 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on July 12, 2016.

Appellant subsequently submitted a November 4, 2014 NCV study report, which revealed normal study, left triceps mild neurogenic changes on needle examination, and recommended clinical correlation suggestive of cervical radiculopathy. He also submitted a copy of the Board's decision in *J.R.*, Docket No. 15-1847 (issued March 4, 2016).

In a decision dated September 21, 2016, an OWCP hearing representative affirmed the October 28, 2015 denial decision.

On May 10, 2017 appellant, through counsel, requested reconsideration and submitted new medical evidence.

Appellant submitted an April 30, 2017 addendum to Dr. Allen's December 29, 2014 report. He indicated that he had reviewed the DMA's July 20, 2015 report and OWCP's September 21, 2016 decision. Dr. Allen disputed the DMA's finding that appellant's claim was not accepted for C7 disc pathology and asserted that appellant's claim was accepted for "'displacement of the cervical intervertebral disc without myelopathy' without mention of a specific spinal level." He also pointed out that the December 18, 2006 MRI scan also showed disc pathology at the C3-4, C4-5, and C6-7 levels. Dr. Allen argued that, if appellant's accepted conditions was based on this MRI scan, then appellant's accepted disc pathology should include the C7 spinal level. He further reported that the mechanism of injury at the C7 level was the same as the accepted conditions. Dr. Allen explained that the repetitive lifting described by appellant leads to fatigue of the postural muscles of the spine, resulting in forward head carriage and strain of the muscles of the neck and upper back.

In another addendum report dated May 30, 2017, Dr. Allen opined that appellant sustained a C7 disc pathology as a result of the November 14, 2006 employment injury. He concluded that his December 29, 2014 impairment rating report was accurate and representative of the functional loss sustained by appellant due to his November 14, 2006 employment injury.

By decision dated August 10, 2017, OWCP denied modification of the September 21, 2016 decision.

On September 8, 2017 appellant, through counsel, requested reconsideration. In a November 17, 2017 decision, OWCP denied appellant's request for reconsideration.

Appellant, on April 26, 2018, filed an appeal before the Board. By decision dated February 13, 2019, the Board affirmed the November 17, 2017 decision. The Board found that appellant's reconsideration request did not meet any of the regulatory requirements under 20 C.F.R. § 10.606(b)(3) sufficient to require further review of the merits of his claim.[6]

[6] *Supra* note 3.

On May 14, 2019 appellant, through counsel, requested reconsideration and submitted additional medical evidence.[7]

In an undated report, Dr. Allen indicated that he had reviewed the February 13, 2019 Board decision and noted his disagreement with the finding that appellant's C7 disc pathology was not work related, and therefore, that appellant was ineligible for any/all impairment calculated at the C7 level. He alleged that this finding contradicted FECA Transmittal No. 17-02, which states that "rated impairment should reflect the total loss as evaluated for the scheduled member at the time of the rating examination." Dr. Allen further noted that there were no provisions for apportionment under FECA and that an impairment assessment should include both work-related impairment, as well as nonindustrial impairment of the same scheduled member. Accordingly, he asserted that appellant was eligible for schedule award compensation related to the C7 spinal nerve impairment calculated on December 29, 2014.

Appellant also submitted a May 8, 2019 cervical spine MRI scan report, which revealed no fracture or listhesis of the cervical spine, congenital narrowing of the cervical spinal canal with superimposed spondylosis causing mild-to-moderate central canal stenosis at C3-4, C4-5, and C6-7, mild mass effect on the cervical spinal cord at the C3-4 and C4-5 levels, and significant neural foraminal stenosis at C3-4 bilaterally, C4-5 bilaterally, C5-6 on the left, and C6-7 bilaterally.[8]

By decision dated August 1, 2019, OWCP denied modification.

LEGAL PRECEDENT

The schedule award provisions of FECA[9] and its implementing regulations[10] 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. 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 and the Board has concurred in such

[7] Although appellant claimed to be filing a request for reconsideration from the Board's February 13, 2019 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. 20 C.F.R. § 501.6(d). Although the February 13, 2019 Board decision was the last decision of record, OWCP's August 10, 2017 merit decision is the appropriate subject of possible modification by OWCP.

[8] In a June 19, 2019 letter, appellant requested to expand acceptance of his claim to include congenital narrowing of the cervical spinal canal with superimposed spondylosis causing mild-to-moderate central canal stenosis at C3-4, C4-5, and C6-7, and significant neural foraminal stenosis at C3-4 bilaterally, C4-5 bilaterally, C5-6 on the left, and C6-7 bilaterally.

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

adoption.[11] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[12]

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.[13] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[14] The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The 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 the Federal (FECA) Procedure Manual.[15]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's 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.[16]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

OWCP properly relied on the opinion of the DMA, who reviewed the December 29, 2014 findings of Dr. Allen, appellant's treating physician, and properly determined that appellant did not have permanent impairment under the standards of the A.M.A., *Guides*. In his July 20, 2015 report, the DMA related that appellant's claim was accepted for cervical sprain and cervical disc herniation at C4-5 and C5-6. He indicated that while Dr. Allen noted sensation and motor deficits in appellant's left C7 distribution, disc pathology at the C7 level was not accepted as work related. For this reason, the DMA explained that he would only grade neurologic deficits at C5 and C6 as

[11] *Id.* at § 10.404(a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

[13] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[14] *Supra* note 12 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(c)(3) (March 2017).

[15] *Supra* note 12 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[16] *Supra* note 12 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017). *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

work related. He noted that Dr. Allen had found normal sensation and motor examination at the C5-6 levels. The DMA correctly utilized *The Guides Newsletter* for rating appellant's permanent impairment and opined, that for each upper extremity, appellant did not have neurologic deficit consistent with radiculopathy stemming from the cervical spine.[17] He found that appellant had reached MMI on December 29, 2014 and properly concluded that he did not have permanent impairment of either upper extremity due to his accepted November 14, 2006 employment injury.[18]

Appellant submitted a December 19, 2014 permanent impairment evaluation report from Dr. Allen and a series of addendum notes. He determined that appellant had a total of 14 percent left upper extremity permanent impairment due to motor and sensory deficits at the C7 level. The Board notes, however, that OWCP has not accepted a cervical injury at the C7 level. A claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.[19] While Dr. Allen argued that an impairment assessment should include both work-related and nonindustrial impairment of the same scheduled member, the Board notes that a preexisting, underlying condition should be considered for rating impairment only to the extent that the work-related injury has affected any residual usefulness in whole or in part of the scheduled member.[20] Since appellant has not met his burden of proof to establish permanent impairment for his work-related cervical injury, the Board finds that he is not entitled to a schedule award for his nonwork-related condition.

On appeal counsel alleges that the decision was contrary to law and fact, but has not cited any basis for such assertion. As explained above, appellant has not met his burden of proof.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing 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 a scheduled member or function of the body, warranting a schedule award.

[17] *See supra* notes 13 and 14.

[18] *See J.C.*, Docket No. 19-1502 (issued January 15, 2020); *see also R.P.*, Docket No. 19-1118 (issued October 25, 2019).

[19] *See G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Veronica Williams*, 56 ECAB 367 (2005).

[20] *Supra* note 11 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5d; *see also F.T.*, Docket No. 16-1326 (issued March 12, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 3, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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