United States Department of Labor
Employees' Compensation Appeals Board

T.W., Appellant	)	
and	)	**Docket No. 20-0119**
	)	**Issued: January 12, 2021**
DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, OK, Employer	)	

Appearances:
Appellant, pro se
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 October 18, 2019 appellant filed a timely appeal from April 22 and 25, 2019 merit decisions 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.[2]

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish greater than 11 percent permanent impairment of his right lower extremity, for which he previously received a schedule award; (2) whether OWCP properly determined that appellant received an overpayment

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the April 25, 2019 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.*

of compensation in the amount of $20,749.38, for which he was not at fault, as he received a schedule award to which he was not entitled; and (3) whether OWCP properly denied appellant's request for waiver of recovery of the overpayment.

FACTUAL HISTORY

On March 8, 2005 appellant, then a 41-year-old sheet metal mechanic, filed a traumatic injury claim (Form CA-1) alleging that on March 1, 2005 he injured his right ankle and back when he slipped and fell on steps while in the performance of duty. On May 24, 2005 OWCP accepted the claim for sprain/strain of the lumbar region.

On February 17, 2009 appellant filed a schedule award claim (Form CA-7).

By decision dated April 8, 2011, OWCP granted him a schedule award for 11 percent permanent impairment of the right lower extremity based upon the review of the medical record by Dr. H. Mobley, an internist serving as a district medical adviser (DMA) who opined in a March 18, 2011 report that appellant had lumbar radiculopathy at the right L5 nerve level, which caused 4 percent sensory loss of the right lower extremity and 7 percent motor impairment of the right lower extremity, for a combined 11 percent permanent impairment of the right lower extremity pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*).

On April 23, 2018 appellant filed a claim for an increased schedule award (Form CA-7).

In a report dated April 10, 2018, Dr. David Dawson, a family practitioner, noted appellant's history of injury and that a January 7, 2016 magnetic resonance imaging (MRI) scan of appellant's lumbar spine revealed a small disc herniation. He also noted appellant's physical examination findings, including tenderness to palpation over the paraspinous musculature of the lumbar spine, inability to obtain ankle jerks bilaterally, and positive bilateral straight leg raising.[4]

In further support of his schedule award claim, appellant submitted an April 16, 2018 report in which Dr. John Hughes, an osteopathic physician specializing in orthopedic surgery, noted appellant's history of injury and that appellant's January 7, 2016 MRI scan revealed a small herniated disc in his low back and degenerative disc disease. Dr. Hughes also noted appellant's complaints of ongoing pain and disability referable to the lumbar area radiating into the right leg as well as cramping at times. He observed decreased back range of motion, normal reflexes, and palpatory tenderness in the low back area, and indicated that straight leg raising aggravated appellant's symptoms. Dr. Hughes diagnosed lumbosacral sprain/strain, degenerative disc disease, and lumbar radiculopathy. He indicated that appellant had never needed surgery and therefore he was at a point where he could receive a schedule award. However, Dr. Hughes also indicated that he had never reached maximum medical improvement (MMI) because he remained

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

[4] Appellant submitted treatment notes dated July 31, 2018 in which Dr. Dawson, described appellant's diagnoses and condition.

unable to work and was medically retired. He advised that, because appellant had ongoing lumbar spine injury and subsequent chronic low back pain and right leg radiculopathy, pursuant to the A.M.A., *Guides*, appellant had a class 2 impairment due to his ongoing documented residual radiculopathy at the clinically appropriate level. Dr. Hughes concluded that appellant had 12 percent whole body impairment.

On May 18, 2018 OWCP requested that Dr. Hughes evaluate appellant's permanent impairment utilizing *The Guides Newsletter*. Dr. Hughes was also asked to address whether he had reached MMI. He did not respond.

On January 23, 2019 OWCP referred appellant's case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as DMA, and requested that he provide an opinion regarding the extent of appellant's permanent impairment, if any, of his lower extremities.

In a January 24, 2019 report, Dr. Harris noted his review of Dr. Hughes report. He advised that Dr. Hughes had not used *The Guides Newsletter* in rating appellant's impairment. Dr. Harris noted that appellant's January 8, 2016 MRI scan demonstrated degenerative changes with bulging at L3-5 and protusion at L5-S1. He also noted that Dr. Hughes' examination did not demonstrate a neurologic deficit in the lower extremities consistent with lumbar radiculopathy. The DMA concluded that appellant had a Class 0 impairment based on the Spinal Nerve Impairment: Lower Extremity Impairments, Table 2 of *The Guides Newsletter*, which resulted in 0 percent lower extremity impairment for lumbar radiculopathy based on the methodology described in *The Guides Newsletter*. He indicated that appellant reached MMI on April 16, 2018, when appellant was seen by Dr. Hughes.

By decision dated February 7, 2019, OWCP denied appellant's claim for an increased schedule award finding that the DMA established he had zero percent permanent impairment.

In a March 19, 2019 notice, OWCP advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of $20,749.38 because he received a schedule award for 11 percent permanent impairment of the right lower extremity, whereas the current total impairment was 0 percent. It explained that he was paid $20,749.38 for the period February 23 through October 2, 2011, therefore creating an overpayment of compensation. OWCP determined that appellant was not at fault in the creation of the overpayment. It forwarded an overpayment action request form and overpayment recovery questionnaire (Form OWCP-20) for his completion. OWCP explained the importance of providing the completed overpayment recovery questionnaire and supportive financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver of recovery if he failed to furnish the requested financial information within 30 days.

On March 20, 2019 appellant requested reconsideration of the February 7, 2019 decision. He forwarded a February 25, 2019 report, in which Dr. Hughes reiterated his conclusion that appellant had not only chronic pain in his low back, but also radicular pain in his right leg with documented residual radiculopathy at the clinically appropriate level as confirmed by MRI scan and orthopedic examination. Dr. Hughes again opined that appellant had 12 percent whole person impairment.

On April 5, 2019 OWCP asked that the DMA review Dr. Hughes' February 25, 2019 report. In an April 16, 2019 report, the DMA noted his review of Dr. Hughes' February 25, 2019 report and repeated his assessment that appellant had no objective evidence of a neurologic deficit in the right lower extremity.

By decision dated April 22, 2019, OWCP denied modification of its February 7, 2019 schedule award decision.

By decision dated April 25, 2019, OWCP determined that an overpayment of compensation had been created in the amount of $20,749.38, for which appellant was not at fault, because he received schedule award compensation to which he was not entitled. It noted that he had not responded to the preliminary determination and denied waiver of recovery of the overpayment because there was no evidence to substantiate that recovery would defeat the purpose of FECA or be against equity and good conscience. OWCP indicated that appellant should repay the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA[5] and its implementing regulations[6] 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.[7] 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.[8]

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.[9] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[10] 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 in which 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

[5] *Supra* note 1.

[6] 20 C.F.R. § 10.404.

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

[8] *C.W.*, Docket No. 19-1590 (issued September 24, 2020); *H.K.*, Docket No. 18-0528 (issued November 1, 2019).

[9] 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).

[10] *Supra* note 7 at Chapter 2.808.5(c)(3) (March 2017).

affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in OWCP's procedure manual.[11]

ANALYSIS -- ISSUE 1

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

In an April 16, 2018 report, Dr. Hughes noted his review of appellant's January 7, 2016 MRI scan which revealed a small herniated disc at L5, and he indicated that straight leg raising aggravated appellant's symptoms. He noted appellant's ongoing complaints of pain in the low back radiating to the right lower extremity, with occasional cramping. Dr. Hughes diagnosed lumbosacral sprain/strain, degenerative disc disease, and lumbar radiculopathy. He indicated that appellant had never needed surgery and advised that, because appellant had an ongoing lumbar spine injury and subsequent chronic pain in appellant's low back with radicular pain in his right leg, due to his ongoing documented residual radiculopathy at the clinically appropriate level, appellant had 12 percent permanent impairment of the whole body.

OWCP thereafter wrote to Dr. Hughes and requested that he provide a permanent impairment evaluation utilizing *The Guides Newsletter*. Dr. Hughes did not respond.

In a January 24, 2019 report, Dr. Harris serving as a DMA, noted his review of Dr. Hughes' findings and determined that appellant had no right lower extremity permanent impairment. The DMA noted that Dr. Hughes had not used *The Guides Newsletter* in rating appellant's impairment. He also noted that Dr. Hughes had not found that appellant had a neurologic deficit of the right lower extremity consistent with radiculopathy and he advised that, in accordance with the methodology described in *The Guides Newsletter*, appellant had no permanent impairment of either lower extremity.

Dr. Hughes made physical examination findings supporting lumbar radiculopathy, which would provide a basis for a permanent impairment rating under *The Guides Newsletter*. After requesting a supplemental report from him and his failure to respond, OWCP forwarded the case record and a series of questions to a DMA for review and consideration of a rating of permanent impairment. The DMA found that appellant was not entitled to a rating of permanent impairment finding that there was no evidence of radiculopathy upon his record review. The Board finds that the DMA failed to base his opinion as to permanent impairment on the physical examination findings set forth in the report of Dr. Hughes, or to provide a rationalized basis for discounting the documented findings of radiculopathy made by Dr. Hughes. Under OWCP procedures, if an OWCP medical adviser neglects to provide medical explanation and rationale for the permanent impairment specified, the claims examiner should request clarification from the medical adviser.[12]

[11] *Supra* note 7 at Chapter 3.700, Exhibit 4 (January 2010); *see B.M.*, Docket No. 19-1069 (issued November 21, 2019).

[12] *Id.* at Chapter 2.808.6(f)(2) (February 2013). *See also C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

The case must therefore be remanded to OWCP for further development of the medical opinion evidence to determine whether appellant has entitlement to an increased schedule award greater than the 11 percent of the lower extremity previously awarded. Upon remand OWCP shall provide a statement of accepted facts and provide a complete copy of the medical record, including the prior physician's rating report which set forth the basis for the prior finding of 11 percent permanent impairment to a second opinion physician who should perform a physical examination and thereafter properly evaluate the findings from the medical evidence of record and provide a medical rationale explaining whether appellant has a permanent impairment of the right lower extremity due to lumbar radiculopathy pursuant to *The Guides Newsletter*. Following such further development as OWCP deems necessary, it shall issue a *de novo* decision regarding appellant's claim for an increased schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision with respect to the schedule award determination.[13]

[13] In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot. As the fact of overpayment, if any, is not in posture until resolution of the increased schedule award, the Board finds that the recoupment of an overpayment is premature.

ORDER

IT IS HEREBY ORDERED THAT the April 25 and 22, 2019 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: January 12, 2021
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