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

| | | |
|---|---|---|
| **K.B., Appellant** | ) | |
| **and** | ) | **Docket No. 20-0355** |
| | ) | **Issued: January 26, 2021** |
| **DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Corpus Christi, TX, 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:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

## ***JURISDICTION***

On December 3, 2019 appellant, through counsel, filed a timely appeal from an October 30, 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.[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, following the October 30, 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.*

## ***ISSUE***

The issue is whether appellant has met his burden of proof to establish greater than two percent permanent impairment of each lower extremity for which he previously received schedule award compensation.

## ***FACTUAL HISTORY***

On June 26, 2008 appellant, then a 52-year-old contract specialist, filed a traumatic injury claim (Form CA-1) alleging that on July 24, 2007 he injured his back when bending and stooping to retrieve containers of water while in the performance of duty. OWCP accepted the claim for displacement of lumbar intervertebral disc without myelopathy. On January 13, 2009 appellant underwent decompressive total laminectomy L3-4 and L5 with bilateral L3-4, L4-5, and L5-S1 foraminotomies. OWCP paid appellant wage-loss compensation and he returned to full-duty work on March 9, 2009. Appellant resigned from his employment on March 26, 2010. In November 2011, he underwent placement of a dorsal column stimulator. In February 2012, appellant underwent dorsal column stimulator lead revision. On July 1, 2015 OWCP expanded acceptance of the claim to include the additional conditions of thoracic or lumbosacral neuritis or radiculitis.

On April 19, 2016 appellant filed a claim for a schedule award (Form CA-7). By decision dated June 28, 2016, OWCP granted appellant a schedule award for two percent permanent impairment of his left lower extremity and two percent permanent impairment of his right lower extremity based upon the opinion of Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA) and based upon the clinical findings of Dr. John Ortolani, a Board-certified neurologist. The award ran for 11.52 weeks for the period December 7, 2015 through February 25, 2016.

On August 11, 2017 appellant filed a claim for an increased schedule award (Form CA-7).

In a May 22, 2017 report, Dr. Neil Allen, a Board-certified neurologist, recounted appellant's history of injury and surgical treatment. He opined that appellant had reached maximum medical improvement (MMI). Dr. Allen noted appellant's physical examination findings as well as finding from diagnostic test studies. Regarding appellant's physical examination findings, he noted 4/5 muscle strength of the left L5 level from the extensor halluces longus. Based upon the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] and *The Guides Newsletter,* Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter),* Dr. Allen opined that appellant had 11 percent right lower extremity impairment comprised of 9 percent motor impairment at L4-5 nerve root and 2 percent sensory impairment. Regarding the left lower extremity, he concluded that appellant had zero percent motor and sensory deficit. Dr. Allen utilized the peripheral nerve evaluation process to determine grade modifiers and provided his calculations under the net adjustment formula.

In an August 21, 2017 development letter, OWCP advised appellant that Dr. Allen's May 22, 2017 report was insufficient to support his claim for an increased schedule award as he

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

failed to indicate if the percentage provided was in addition to or included the previous impairment rating for each lower extremity. It requested that Dr. Allen provide an opinion regarding permanent impairment consistent with the methodology set forth in the sixth edition of the A.M.A., *Guides.*

In an addendum to the May 22, 2017 report, dated September 21, 2017, Dr. Allen advised that his original impairment report did not consider any previously awarded impairment. He opined that appellant had 11 percent right lower extremity permanent impairment, an increase of 9 percent from the previous award. Dr. Allen further indicated that appellant's left lower extremity impairment was zero percent with no additional impairment detected/calculated for either motor or sensory impairment.

In a December 22, 2017 report, Dr. Berman, again serving as a DMA, noted that he had reviewed the statement of accepted facts (SOAF) along with appellant's medical records. He noted that Dr. Allen opined, in his May 22, 2017 report, that there was an additional nine percent motor deficit impairment at the L4-5 nerve root to the right lower extremity and two percent sensory deficit at L4-5 neve root. The DMA indicated, however, that Dr. Allen's right lower extremity finding of nine percent motor deficit was not substantiated by physical examination findings as his May 22, 2017 examination did not include any motor deficit findings. He further noted that the medical record was also devoid of any evidence of a motor deficit. Thus, the DMA indicated that Dr. Allen's nine percent right lower extremity motor deficit impairment could not be accepted. He indicated that the two percent right sensory deficit at L4-5 nerve root and two percent left sensory deficit at L4-5 nerve root could be accepted as there was evidence of radicular pain on electromyogram (EMG) scans bilaterally, and straight leg raising on the right was positive on Dr. Allen's examination, and there were various references of pain or decreased sensation. The DMA also re-reviewed his April 28, 2016 report, which recommended two percent impairment of the right lower extremity and two percent impairment of the left lower extremity, and found that there was no basis to change his original recommendation. He concluded that there was no increase in the previous schedule award of two percent right lower extremity and two percent left lower extremity.

By decision dated February 15, 2018, OWCP denied appellant's claim for an increased schedule award, finding that the weight of the medical evidence was accorded to the DMA's December 22, 2017 report.

On February 23, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. By preliminary hearing decision dated June 6, 2018, an OWCP hearing representative set aside OWCP's February 15, 2018 decision and remanded the case for further development and issuance of a *de novo* decision. The hearing representative found that appellant was not afforded a due process letter, which explained the deficiencies in the medical evidence and was not allowed an opportunity to perfect the claim. She further found that OWCP's February 15, 2018 decision failed to explain why the DMA was afforded the weight of the medical evidence.

In a June 19, 2018 letter, OWCP requested that Dr. Allen review the DMA's December 22, 2017 report. A copy of the DMA's December 22, 2017 and April 28, 2016 reports were included along with the most recent medical reports on file.

On August 17, 2018 OWCP received Dr. Allen's response which disagreed with the DMA's December 22, 2017 report. Dr. Allen indicated that he had documented 4/5 muscle strength of the left L5 level (specifically the extensor halluces longus per Table 17-8, page 578). He also indicated that there was a typographical error in the calculation of total impairment as sensory loss was detected on the right side and motor deficit on the left side and those two deficits were erroneously combined as being right sided. Dr. Allen opined that the correct permanent impairment rating for the right lower extremity was a sensory impairment of two percent and the left lower extremity permanent impairment rating was nine percent for motor impairment.

OWCP subsequently determined that a conflict in medical opinion evidence existed between the impairment ratings of Dr. Berman, the DMA, and Dr. Allen regarding the extent of appellant's impairment rating for the right and left lower extremities. It referred appellant, along with an updated SOAF dated September 7, 2018, a list of questions, and the medical record to Dr. Robert Hatch, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated November 18, 2018, Dr. Hatch noted his review of the SOAF and the medical record and reported appellant's November 8, 2018 physical examination findings addressing the accepted conditions. He noted appellant's history of a herniated disc with nonverifiable radicular complaints at clinically appropriate levels. Appellant's examination revealed no evidence of atrophy, loss of sensation, or primary musculature weakness. Dr. Hatch noted that appellant's right lower extremity strength was globally 5/5, but the same testing on the left side showed 5/5 weak strength 5/5 globally. Thus, he tested the extensor halluces longus three different ways and provided the results, which varied. There was also no demonstrated evidence for hardware failure, spasm or motion segment malalignment/deformity/abnormality. At the time of examination, there was also no active employment-related spinal nerve injury. Dr. Hatch indicated that he generally agreed with Dr. Berman's assessment that Dr. Allen found permanent impairment of the right lower extremity for which there was no clinical or historical evidence. He noted that, while his clinical examination identified appellant's left leg as generally more robust than the right leg at the thigh and calf, both his and Dr. Allen's examination documented no evidence for atrophy on the affected left leg and that the left leg, for whatever reason, seemed more robust than the right leg without any other pathological process, such as edema, to account for the discrepancy. Dr. Hatch concluded that both Dr. Allen's and his measurements revealed asymmetry in the legs. He indicated that he expanded the extensor halluces longus examination and identified no real loss of strength from objective sources to account for the illusion of extensor halluces longus weakness. Dr. Hatch opined that appellant had five percent whole person impairment for a class 1 grade A motion segment lesion under Chapter 17 of the A.M.A, *Guides.* He provided references for his grade modifier as well as calculations to the net adjustment formula.

In a December 17, 2018 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, found that Dr. Hatch failed to follow the proper methodology for determining spinal nerve impairment as described in *The Guides Newsletter*. Thus, he opined that Dr. Hatch's report was not probative. The DMA recommended that Dr. Hatch be asked to submit a supplemental report.

In a January 8, 2018 letter to Dr. Hatch, OWCP noted that FECA does not allow for a whole person impairment rating. It explained that *The Guides Newsletter* was to be used to rate spinal impairment and requested that Dr. Hatch use *The Guides Newsletter* as applied to his prior physical findings to determine whether appellant has an additional impairment to his bilateral lower extremities.

In a February 15, 2019 correction to his November 18, 2018 impairment rating report, Dr. Hatch indicated that, under *The Guides Newsletter*, appellant had a class 1 postsurgical resolution of a lower extremity radiculopathy. He opined that, under Table 2, appellant's mild sensory deficits were grade A modifier, and equaled 0 percent lower extremity permanent impairment for all spinal nerve roots.

On March 11, 2019 the DMA again reviewed the submitted records including Dr. Hatch's reports of November 18, 2018 and February 15, 2019. He opined that the date of MMI was November 8, 2018, the date of Dr. Hatch's permanent impairment examination. The DMA noted that, in his evaluation, Dr. Hatch observed no motor/sensory deficits in either lower extremity and, therefore, he determined no ratable impairment of any spinal nerve and no ratable impairment per FECA for the accepted spinal conditions. He explained that Dr. Hatch correctly applied the methodology set forth in the *The Guides Newsletter* in rendering his medical opinion that appellant had zero percent right lower extremity permanent impairment and zero percent left lower extremity permanent impairment. The DMA thus concluded that appellant was not entitled to a rating of impairment greater than that already awarded.

By decision dated April 9, 2019, OWCP denied appellant's claim for an increased schedule award, finding that the special weight of the medical evidence was accorded to Dr. Hatch, the impartial medical examiner (IME).

On April 16, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on August 15, 2019.

By decision dated October 30, 2019, an OWCP hearing representative affirmed OWCP's April 9, 2019 decision.

## ***LEGAL PRECEDENT***

The schedule award provision of FECA,[5] and its implementing federal regulations,[6] 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

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] For decisions issued after May 1, 2009, the sixth edition will be used.[8]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA, a schedule award is not payable for injury to the spine.[9] In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[10]

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's procedures indicate that *The Guides Newsletter* is to be applied.[11] 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.[12] Specifically, it will address lower extremity impairments originating in the spine through Table 16-11[13] and upper extremity impairment originating in the spine through Table 15-14.[14]

Section 8123(a) 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.[15] 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.[16] Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if

[7] *Id.* at § 10.404(a).

[8] 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, Exhibit 1 (January 2010).

[9] *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *Pamela J. Darling*, 49 ECAB 286 (1998).

[10] *See B.M.*, Docket No. 18-1683 (issued April 19, 2019); *J.M.*, *id.*; *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[11] *Supra* note 8 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[12] *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

[13] A.M.A., *Guides*, *supra* note 4 at 533.

[14] *Id.* at 425.

[15] 5 U.S.C. § 8123(a).

[16] *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

sufficiently well rationalized and based on a proper factual and medical background must be given special weight.[17]

## ***ANALYSIS***

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

In support of his claim for an increased schedule award, appellant submitted a May 22, 2017 impairment report from Dr. Allen. Based upon the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, Dr. Allen opined that appellant had 11 percent right lower extremity permanent impairment comprised of 9 percent motor impairment at L4-5 nerve root and 2 percent sensory impairment, and that appellant had 0 percent left lower extremity permanent impairment. In an addendum to the May 22, 2017 report, Dr. Allen opined that appellant had 11 percent total right lower extremity impairment, an increase of 9 percent from his previous award. He also opined that appellant had no additional left lower extremity impairment attributed to his lumbar conditions as he had no motor and sensory impairment. The case file and Dr. Allen's reports were routed to the DMA, Dr. Berman, who opined that Dr. Allen's right lower extremity finding of nine percent motor deficit was not substantiated as his May 22, 2017 examination did not include any motor deficit. Dr. Berman further noted that the medical record was also devoid of any evidence of a motor deficit. Thus, the DMA indicated that Dr. Allen's nine percent right lower extremity motor deficit impairment could not be accepted. As the evidence supported sensory deficits, the DMA indicated that appellant had two percent right lower extremity and two percent left lower extremity permanent impairment due to sensory deficit. He advised, however, that there was no increase in impairment previously awarded.

Following further development, Dr. Allen disagreed with the DMA's December 22, 2017 report. He opined that appellant's impairment was properly calculated on May 22, 2017 as appellant had documented 4/5 muscle strength of the left L5 level (specifically the extensor halluces longus) on physical examination. Dr. Allen further indicated that there was a typographical error in the calculation of total impairment as sensory loss was detected on the right side and motor deficit were noted on the left side and that those two deficits were erroneously combined. Based on his May 22, 2017 examination, Dr. Allen thus provided a total two percent right lower extremity, based on an sensory impairment of two percent and zero percent motor impairment, and nine percent left lower extremity impairment, based on nine percent motor impairment and zero percent sensory impairment.

In light of the differing medical opinions as to the extent of appellant's permanent impairment of appellant's bilateral lower extremities due to motor and sensory loss, between Dr. Allen and the DMA, OWCP properly referred appellant to Dr. Hatch for an impartial medical evaluation to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a).[18]

[17] *Id.*

[18] *See W.C.*, Docket No. 19-1740 (issued June 4, 2020). *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

On November 8, 2018 Dr. Hatch reviewed the medical evidence on file, the SOAF and conducted a physical examination. He noted multiple contradictory physical findings in the evidence of record, noting that they were not sufficiently detailed to support nerve root impairment findings. Dr. Hatch also indicated that appellant's physical evaluation failed to establish true motor or sensory findings to support lower extremity findings emanating from the spine. He noted that appellant's left leg was more robust than the right leg without any pathological process to account for the discrepancy, and concluded that Dr. Allen's measurements were correct and close enough to his measurements to reveal asymmetry in the legs. However, based on his expanded extensor halluces longus examination, Dr. Hatch found that there was no real loss of strength from objective sources to account for the illusion of extensor halluces longus weakness.

In his November 18, 2018 report, Dr. Hatch provided a whole person impairment rating of five percent. Whole person impairment ratings, however, are of no probative value as whole person permanent impairment ratings are not permitted under FECA.[19] This impairment rating, therefore, lacked probative value as he neither used the sixth edition of the A.M.A., *Guides* nor *The Guides Newsletter* in calculating appellant's permanent impairment.[20]

In a February 15, 2019 corrected impairment report, Dr. Hatch referenced *The Guides Newsletter* and found that appellant had postsurgical resolution of a lower extremity radiculopathy. Under Table 2 of *The Guides Newsletter*, he opined that appellant's mild sensory deficits were class 1, grade A or zero percent lower extremity impairment for all spinal nerve roots. Thus, Dr. Hatch opined that appellant had no permanent impairment as there was no involvement of his lower extremities due to a spinal nerve impairment. As Dr. Hatch's report negates permanent impairment, it is insufficient to establish appellant's increased schedule award claim.[21]

The Board finds that Dr. Hatch's reports are entitled to the special weight of the medical evidence and established that appellant had no additional ratable impairment of the left lower extremity or the right lower extremity.[22] Dr. Hatch's opinion was based on a proper factual and medical history, which he reviewed, and on the proper tables and procedures in *The Guides Newsletter*. In his February 15, 2019 corrected impairment report, Dr. Hatch referenced *The Guides Newsletter* in finding that appellant's mild sensory deficits rated a zero percent lower extremity impairment for all spinal nerve roots. Dr. Hatch's February 15, 2019 corrected impairment report, therefore, established that appellant did not have increased permanent impairment of the bilateral lower extremities.[23]

The Board, therefore, finds that OWCP properly determined that appellant had no more than two percent permanent impairment of the bilateral lower extremities, previously awarded. There is no probative medical evidence of record demonstrating greater permanent impairment

[19] *C.S.*, Docket No. 19-0851 (issued November 18, 2019); *Marilyn S. Freeland*, 57 ECAB 607 (2006).

[20] *A.R.*, Docket No. 17-1504 (issued May 25, 2018).

[21] *A.H.*, Docket No. 19-1788 (issued March 17, 2020); *L.G.*, Docket No. 16-0792 (issued June 24, 2016) (a medical report that finds no permanent impairment is insufficient to establish a claim for a schedule award).

[22] *See D.D.*, Docket No. 19-1676 (issued July 29, 2020).

[23] *A.H.*, *supra* note 21; *L.G.*, *supra* note 21 (when a medical report finds no permanent impairment it is insufficient to establish a claim for a schedule award).

than that previously awarded.[24] As the medical evidence of record does not establish an increased permanent impairment of a scheduled member or function of the body, in accordance with either the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter*, appellant has not met his burden of proof to establish an increased schedule award.

On appeal, counsel argues that the decision is contrary to law and fact and failed to give deference to the findings of the attending physician. Appellant, however, has not provided a rationalized medical opinion to dispute Dr. Hatch's impartial medical examination permanent impairment rating. As noted, the record contains no other probative, rationalized medical opinion which supports that appellant had a greater right lower extremity impairment or a greater left lower extremity impairment based upon the A.M.A., *Guides* than that previously awarded.

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 permanent impairment or increased impairment.

## ***CONCLUSION***

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the October 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed.[25]

Issued: January 26, 2021
Washington, DC

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

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

[24] *See J.M.*, Docket No. 18-1334 (issued March 7, 2019).

[25] Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.