United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
	)	
and	)	**Docket No. 20-1464**
	)	**Issued: July 14, 2021**
DEPARTMENT OF THE NAVY, NAVAL BASE SAN DIEGO PUBLIC WORKS CENTER, San Diego, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 31, 2020 appellant filed a timely appeal from a July 1, 2020 merit decision 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]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the July 1, 2020 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 16 percent permanent impairment of his left lower extremity for which he has received a schedule award.

FACTUAL HISTORY

On April 16, 1987 appellant, then a 38-year-old portable equipment operator, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower right back when lifting a jackhammer from the tool compartment of an air compressor, while in the performance of duty. He stopped work on April 14, 1987.

OWCP initially accepted the claim for sciatica and subsequently expanded acceptance of the claim to include lumbar intervertebral disc disorder with myelopathy, lumbar intervertebral disc degeneration, major depressive disorder, and noninfectious gastroenteritis and colitis. Appellant underwent OWCP-authorized lumbar laminectomy fusions in 1990 and 1994, and a pain pump implant in October 2001. The record reflects that OWCP paid appellant wage-loss compensation on the periodic rolls from June 16, 2002.

On August 28, 2018 appellant filed a claim for a schedule award (Form CA-7).

By letter dated June 28, 2019, OWCP referred appellant, along with a statement of accepted facts (SOAF), and a copy of the medical record to Dr. Blake R. Thompson, Board-certified in pain medicine, for a second opinion evaluation to obtain an assessment of appellant's employment-related condition and any resulting permanent impairment.

In a report dated August 14, 2019, Dr. Thompson noted his review of appellant's history of injury, and medical records. He provided physical examination findings related to appellant's lumbar spine. During appellant's lower extremity neurologic examination, Dr. Thompson found normal musculature without atrophy, no localizing tenderness on palpation, 4/5 weakness of the left foot dorsiflexion and plantar flexion, and symmetrical 5/5 strength in the bilateral lower extremities. He found good range of motion (ROM) without evidence of instability, decreased sensation along the anterior and lateral left calf into the anterior and lateral left food, and intact sensation with light touch on pinprick in the bilateral lower extremities. Dr. Thompson noted reflexes were normal in the knees and ankles bilaterally. He found that nerve compression testing revealed a positive straight leg raise on the left and negative on the right. Dr. Thompson found the supine straight leg test was positive for back pain at 60 degrees on the right and 30 degrees on the left, the Laseque test was negative bilaterally and knee to chest was positive on the left and negative on the right. He noted that appellant completed the health assessment questionnaire and advised that appellant required frequent assistance.

Dr. Thompson provided an impairment rating under Proposed Table 2 of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), which is a supplemental publication of the sixth edition of the American

Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] He noted that appellant had reached maximum medical improvement (MMI) as of the date of the examination. Dr. Thompson found that appellant had left L5 and S1 radiculopathy with mild sensory and motor deficit. He referred to Table 2 under *The Guides Newsletter* and noted that the left L5 radiculopathy placed appellant in a class (CDX) 1 with a default grade C, resulting in an impairment of 2 percent for mild sensory deficit and 5 percent for mild motor deficit.[4] Dr. Thompson then applied the grade modifier for functional history (GMFH) and grade modifier for clinical studies (GMCS) per the Table in *The Guides Newsletter*, which increased the grade from C to E for an L5 mild sensory deficit of 2 percent and mild motor deficit of 9 percent, resulting in 11 percent lower extremity impairment for the left L5 radiculopathy with mild sensory and motor deficit. Regarding the left S1 radiculopathy with mild sensory and motor deficit, he noted that, under Table 2, appellant had 1 percent impairment for a CDX 1 with a default grade C resulting in an impairment of 1 percent for mild sensory deficit and 3 percent for a mild motor deficit. Dr. Thompson then applied the grade modifiers, which increased the grade from C to E for an S1 mild sensory deficit of 1 percent and mild motor deficit of 5 percent, and a combined 6 percent lower extremity impairment for the left S1 diagnosis. He explained that the grade modifier adjustments were applicable only for functional history and clinical studies, since the physical examination defines the impairment values. Dr. Thompson applied the Combined Values Chart in Appendix A on page 604 of the A.M.A., *Guides* and determined that the 11 percent L5 and 6 percent S1 ratings resulted in a total left lower extremity impairment rating of 16 percent.

In an October 4, 2019 report, Dr. Michael Katz, a Board-certified neurologist acting as a district medical adviser (DMA), noted that he reviewed the record and Dr. Thompson's August 14, 2019 report. He applied Proposed Table 2, Spinal Nerve Impairment, Lower Extremity Impairment from *The Guides Newsletter*. For the L5 radiculopathy with mild sensory and motor deficit, Dr. Katz noted that the mild sensory deficit default value was 1 percent for CDX 1, grade C and that the grade modifiers of GMFH of 1, and GMCS of 3 resulted in CDX 1, grade E for a 2 percent impairment rating. He also noted that the mild motor deficit default value was 5 percent for CDX 1, grade C and the grade modifiers of GMFH of 1, and GMCS of 3 resulted in CDX 1, grade E for a 9 percent impairment rating. Combining the 2 percent for mild sensory deficit and 9 percent for mild motor deficit, Dr. Katz found a total of 11 percent impairment for the L5 radiculopathy with mild sensory and motor deficit. For the S1 radiculopathy with mild sensory and motor deficit, he noted that the mild sensory impairment resulted in 1 percent default value for CDX 1, grade C and the grade modifiers of GMFH of 1 and GMCS of 3 also resulted in one percent impairment for grade E. Dr. Katz found that the mild motor deficit default value was three percent for CDX 1, grade C and the grade modifiers of GMFH of 1 and GMCS of 3 resulted in five percent for grade E. Combining the one percent for mild sensory deficit and five percent for mild motor deficit, he calculated six percent impairment for the S1 radiculopathy with mild sensory and motor deficit. Dr. Katz applied the Combined Values Chart and calculated a combined total impairment of 16 percent to the left lower extremity. He also explained that the ROM method was

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

[4] The Board notes that a CDX of grade C for a mild sensory deficit at L5 equals one percent impairment, not a two percent impairment. However Dr. Thompson's finding in this regard is harmless error as he applied grade modifiers to reach a grade E impairment rating of two percent.

not applicable for the accepted condition under the A.M.A., *Guides.* Dr. Katz opined that MMI was reached on August 14, 2019.

By decision dated July 1, 2020, OWCP granted appellant a schedule award for 16 percent permanent impairment of the left lower extremity. The period of the award ran for 46.08 weeks from June 21, 2020 to May 9, 2021.

LEGAL PRECEDENT

The schedule award provisions 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 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]

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

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* provides an alternative approach to rating spinal nerve impairment, under the July/August 2009 edition of *The Guides Newsletter*.[12] OWCP has adopted this approach for rating permanent impairment of the upper or

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[9] *R.H.*, Docket No. 19-1670 (issued November 17, 2020); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *K.Y.*, Docket No. 18-0730 (issued August 21, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[10] *See* 5 U.S.C. § 8101(19).

[11] *D.L.*, Docket No. 20-0059 (issued July 8, 2020); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[12] *D.L., id.*; FECA Transmittal No. 10-04 (issued January 9, 2010); *supra* note 8 at Chapter 3.700, Exhibit 1 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

lower extremities caused by a spinal injury.[13] Specifically, it will address lower extremity impairments originating in the spine through Table 16-11[14] and upper extremity impairments originating in the spine through Table 15-14.[15]

In addressing upper or lower extremity impairment due to peripheral or spinal nerve root involvement, the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* require identifying the impairment class of diagnosis (CDX), which is then adjusted by the GMFH and the GMCS. The effective net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[16]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 16 percent permanent impairment of his left lower extremity for which he previously received a schedule award.

OWCP referred appellant to Dr. Thompson for a second opinion examination. In an August 14, 2019 report, Dr. Thompson referred to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter,* and provided his findings and calculations. He explained that appellant had left L5 and S1 radiculopathy with mild sensory and motor deficit. Dr. Thompson noted that the grade modifier adjustments for functional history and clinical studies were applicable and that the net adjustment formula was (GMFH-CDX) + (GMCS – CDX) or (1 - 1) + (3 – 1) = 2 (Grade E). For the left L5 radiculopathy, he determined that appellant had a mild sensory deficit, which resulted in a class 1, grade E rating of 2 percent, and a mild motor deficit, which resulted in a class 1, grade E rating of 9 percent, for a combined 11 percent lower extremity impairment for the L5 radiculopathy. Regarding the left S1 radiculopathy, Dr. Thompson determined that appellant also had mild sensory and motor deficits, which resulted in class 1, grade E ratings of one percent and five percent, respectively, and a combined impairment rating of six percent. He applied the Combined Values Chart for 11 percent impairment for L5 radiculopathy and 6 percent impairment for S1 radiculopathy to calculate a final combined left lower extremity permanent impairment rating of 16 percent.[17]

In accordance with its procedures, OWCP properly routed the case record to its DMA, Dr. Katz. In his October 7, 2019 report, Dr. Katz applied the A.M.A., *Guides* and *The Guides Newsletter* to the physical examination findings of Dr. Thompson. He accurately summarized the relevant findings on examination and reached conclusions about appellant's conditions that comported with these findings.[18] Based on the findings of left L5 and S1 radiculopathy with mild

[13] *Id.*

[14] A.M.A., *Guides* 533.

[15] *Id.* at 425.

[16] *See supra* note 8 at Chapter 3.700, Exhibit 4 (January 2010).

[17] A.M.A., *Guides* 604.

[18] *M.S.,* Docket No. 19-1011 (issued October 29, 2019); *W.H.,* Docket No. 19-0102 (issued June 21, 2019); *J.M.,* Docket No. 18-1387 (issued February 1, 2019).

sensory and motor deficit, Dr. Katz, the DMA, properly referred to *The Guides Newsletter* and calculated for the L5 radiculopathy, 2 percent impairment for mild sensory deficit and 9 percent for mild motor deficit, totaling 11 percent and for the S1 radiculopathy, 1 percent for mild sensory deficit and 5 percent for mild motor deficit, totaling 6 percent. He concurred with Dr. Thompson's calculation of 16 percent permanent left lower extremity impairment based upon the left L5 and S1 radiculopathy conditions. Dr. Katz also noted that the A.M.A., *Guides* did not allow for an impairment rating based on ROM for the relevant diagnoses.[19] As the DMA's report is detailed, well rationalized, and based on a proper factual background, his opinion represents the weight of the medical evidence.[20]

There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter* demonstrating a greater percentage of 16 percent permanent impairment of the left lower extremity. The Board notes that, in the July 1, 2020 schedule award decision, OWCP granted appellant 46.08 weeks of compensation, but did not specifically note the percentage of appellant's left lower extremity impairment. Section 8107 provides for 288 weeks of compensation for 100 percent permanent impairment of a lower extremity. Sixteen percent of 288 weeks equals the 46.08 weeks granted in the schedule award. Accordingly, the Board finds that appellant has not submitted medical evidence establishing greater than 16 percent permanent impairment of the left lower extremity for which he previously received a schedule award.

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 16 percent permanent impairment of his left lower extremity for which he previously received a schedule award.

[19] *C.W.*, Docket No. 19-1590 (issued September 24, 2020); *R.L.*, Docket No. 19-1793 (issued August 7, 2020).

[20] *M.S.*, *supra* note 18; *D.S.*, Docket No. 18-1816 (issued June 20, 2019).

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 14, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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