

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

A.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Englewood Cliffs, NJ, Employer**

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**Docket No. 21-0506
Issued: July 20, 2021**

Appearances:

*Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 16, 2021 appellant, through counsel, filed a timely appeal from a September 16, 2020 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.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 issuance of the September 16, 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 six percent permanent impairment of his left lower extremity for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on August 1, 2002 appellant, then a 54-year-old mail carrier, sustained temporary aggravation of degenerative disc disease, lumbar disc displacement, and spinal stenosis as a result of carrying bags while in the performance of duty. It paid him wage-loss compensation on the daily, periodic, and supplemental rolls.

On March 9, 2016 appellant filed a claim for a schedule award (Form CA-7) and submitted a December 15, 2015 medical report from Dr. Arthur Becan, an attending orthopedic surgeon, who determined that appellant had 10 percent permanent impairment of the left lower extremity.

On April 11, 2016 OWCP routed Dr. Becan's December 15, 2015 report, a statement of accepted facts (SOAF), a series of questions, and the case file to Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and a determination of permanent impairment of appellant's left lower extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ and his date of maximum medical improvement (MMI).

On May 15, 2016 the DMA, Dr. Berman, reviewed the findings in Dr. Becan's December 15, 2015 report. He utilized Proposed Table 2 of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), to evaluate appellant's permanent impairment. The DMA determined that he had two percent permanent impairment of the left lower extremity.

OWCP, by decision dated July 1, 2016, granted appellant a schedule award for two percent permanent impairment of the left lower extremity. The award ran for 5.76 weeks from December 15, 2015 to January 24, 2016 and was based on the impairment rating of the DMA, Dr. Berman.

On July 13, 2016 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on October 5, 2016.

By decision dated November 23, 2016, an OWCP hearing representative set aside the July 1, 2016 decision and remanded the case to OWCP for further medical development regarding additional permanent impairment of appellant's left lower extremity. She instructed OWCP to

⁴ Docket No. 09-1566 (issued June 2, 2010).

⁵ A.M.A., *Guides* (6th ed. 2009).

obtain a supplemental report from the DMA, Dr. Berman, clarifying how he determined that the examination findings reported by Dr. Becan established only mild sensory loss and the assignment of severe sensory loss was incorrect.

On February 21, 2017 OWCP requested that the DMA, Dr. Berman, provide a supplemental report, which addressed the concerns expressed by OWCP's hearing representative in her November 23, 2016 decision.

In a March 30, 2017 supplemental report, the DMA, Dr. Berman, advised that Dr. Becan's assignment of severe sensory deficit at the left L5 and S1 nerve roots was incorrect for several reasons. Dr. Becan did not provide any information indicating that there was a severe sensory deficit. Further, sensory testing was not consistent with the severe sensory deficit assigned by Dr. Becan. Additionally, a November 1, 2012 electromyogram (EMG) did not indicate severe loss specifically, left superficial peroneal sensory nerve was unremarkable. The DMA noted that Dr. Becan's finding regarding the L5 nerve root sensory loss was also incorrect. He concluded that, based on these reasons, there was no change in his prior impairment rating.

By decision dated May 18, 2017, OWCP denied appellant's claim for an additional schedule award based on Dr. Berman's March 30, 2017 report.

On May 23, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A video hearing was held on August 16, 2017.

In an October 26, 2017 decision, another OWCP hearing representative affirmed the May 18, 2017 decision. He found that the opinion of the DMA, Dr. Berman, constituted the weight of the medical opinion evidence.

On February 5, 2018 counsel requested reconsideration and submitted an October 20, 2017 report from Dr. Becan. Dr. Becan noted deficiencies in the reports of the DMA, Dr. Berman, and restated his opinion that appellant had 10 percent permanent impairment of the left lower extremity in accordance with the sixth edition of the A.M.A., *Guides*.

On April 19, 2018 OWCP determined that a conflict in the medical opinion evidence existed between Dr. Becan and the DMA, Dr. Berman, and referred appellant for an impartial medical examination in order to resolve the conflict. In a May 18, 2018 report, Dr. Stanley Soren, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME), noted his review of the SOAF and appellant's medical records. He reported findings on physical examination and diagnostic test results. Dr. Soren diagnosed degenerative lumbar disc disease with disc herniation at L4-5 impinging on the thecal sac and left neural foramen and broad bulge at L5-S1 with canal and foraminal stenosis, lumbar radiculopathy, and lumbosacral sprain/strain. He determined that appellant had six percent permanent impairment of the left lower extremity in accordance with the sixth edition of the A.M.A., *Guides*. Dr. Soren reported that appellant had reached MMI as of the date of his impairment evaluation.

In an August 7, 2018 decision, OWCP modified the hearing representative's October 26, 2017 decision, finding that the special weight of the medical opinion evidence was accorded to Dr. Soren, the IME. It determined that appellant had an additional four percent permanent impairment of the left lower extremity.

In a separate decision dated August 17, 2018, OWCP granted appellant an additional schedule award for four percent permanent impairment of the left lower extremity. The period of the award ran for 11.52 weeks from May 18 through August 6, 2018.

On August 28, 2018 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated November 28, 2018, another OWCP hearing representative, following a preliminary review, set aside the August 17, 2018 decision, finding that Dr. Soren did not constitute the special weight of the medical evidence as he did not utilize *The Guides Newsletter* to determine left lower extremity permanent impairment. The hearing representative directed OWCP to obtain a supplemental report from Dr. Soren providing an impairment rating in accordance with *The Guides Newsletter*.

By letter dated December 12, 2018, OWCP requested that Dr. Soren provide an impairment rating in accordance with the concerns expressed by the OWCP hearing representative in the November 28, 2018 decision.

In a May 24, 2019 report, Dr. Soren referenced *The Guides Newsletter* and tables in the A.M.A., *Guides* and again determined that appellant had four percent permanent impairment of the left lower extremity.

OWCP, in a June 5, 2019 decision, denied appellant's claim for an additional schedule award. It accorded the weight of the special weight of the medical evidence to the May 24, 2019 supplemental report of Dr. Soren.

On June 13, 2019 counsel, on behalf of appellant, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a September 23, 2019 decision, another OWCP hearing representative set aside the June 5, 2019 decision and remanded the case for additional development on the issue of permanent impairment. She directed that a DMA review Dr. Soren's May 24, 2019 report and indicate whether Dr. Soren properly utilized *The Guides Newsletter*.

On September 24, 2019 OWCP requested that Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP DMA, review Dr. Soren's May 18, 2018 and May 24, 2019 reports and Dr. Becan's October 20, 2017 report and provide an opinion as to whether he agreed with their findings. In an October 1, 2019 report, the DMA related that he was unable to determine if Dr. Soren correctly utilized the methodology in *The Guides Newsletter*. He recommended, given the complexity of this case, a new referee impairment evaluation be performed.

OWCP, on November 8, 2019, referred appellant, together with a SOAF, the case record, and a set of questions, to Dr. Alan Crystal, a Board-certified orthopedic surgeon, for an impartial medical examination to determine the extent of permanent impairment to the left lower extremity.

In a December 5, 2019 report, Dr. Crystal reviewed the SOAF and medical record. He noted that appellant had no complaints of radiculopathy, numbness, loss of sensation, weakness, paresthesias, or gait problems. Dr. Crystal provided physical examination findings, which included a depressed left patella reflex and no motor or sensory deficits in either lower extremity.

He noted that appellant's decreased range of motion of the lumbar spine was no longer used to rate impairment. Using Table 15-14 of the sixth edition of the A.M.A., *Guides* and Table 1 of *The Guides Newsletter*, Dr. Crystal determined that appellant had zero percent permanent impairment of each lower extremity because he had no motor deficit and normal sensation. He also determined that, under Table 2 of *The Guides Newsletter*, appellant had a class 0 impairment for the lumbar root level, which represented zero percent permanent impairment of his right and left lower extremities. Dr. Crystal disagreed with Dr. Becan's finding that appellant had severe sensory loss in the left L5 and S1 root dermatome based on the medical record and his examination findings. He also disagreed with Dr. Berman's findings as he relied on the medical records whereas he had the opportunity to examine appellant. Dr. Crystal advised that appellant reached MMI on November 1, 2002, noting that back sprains heal within three months.

On February 5, 2020 OWCP routed Dr. Crystal's December 5, 2019 report and the case file to DMA, Dr. Katz, for review and a determination of permanent impairment of appellant's left lower extremity under the sixth edition of the A.M.A., *Guides*, and his date of MMI.

On February 7, 2020 Dr. Katz agreed with Dr. Crystal that appellant had zero percent left lower extremity permanent impairment. He listed the date of MMI as December 5, 2019.

By decision dated February 27, 2020, OWCP continued to deny appellant's claim for an additional schedule award. It found that the reports of Dr. Crystal and the DMA, Dr. Katz, represented the weight of the medical opinion evidence.

On March 5, 2020 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on July 13, 2020.

In a September 16, 2020, a fifth OWCP hearing representative affirmed the February 27, 2020 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ and its implementing regulations⁷ 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁸ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁹ The Board has approved the use

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

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.¹⁰

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based impairment method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health.¹¹ Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the class of diagnosis (CDX), which is then adjusted by grade modifier of functional history (GMFH), grade modifier of physical examination (GMPE), and the grade modifier of clinical studies (GMCS).¹² The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹³ The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.¹⁴

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.¹⁵ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹⁶ 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.¹⁷

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 CDX, which is then adjusted by the GMFH and the GMCS. The effective net adjustment formula is (GMFH-CDX) + (GMCS-CDX).¹⁸

¹⁰ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ A.M.A., *Guides*, page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹² *Id.* at 493-556.

¹³ *Id.* at 521.

¹⁴ *A.D.*, Docket No. 20-0553 (issued April 19, 2021); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁵ 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); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹⁶ *See supra* note 9 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3) (March 2017).

¹⁷ *Id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹⁸ *The Guides Newsletter*; A.M.A., *Guides* 430.

Section 8123(a) of FECA provides in pertinent part: “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.”¹⁹ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.²⁰

ANALYSIS

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

OWCP properly declared a conflict in medical opinion based on the differing opinions regarding the extent of appellant’s left lower extremity impairment. Appellant’s treating physician, Dr. Becan, found 10 percent permanent impairment of the left lower extremity, Dr. Berman, OWCP’s DMA, found two percent permanent impairment of the left lower extremity. On remand from its July 1, 2016 decision granting appellant a schedule award for two percent permanent impairment of the lower extremity, OWCP further developed the medical record and denied appellant’s claim for an additional schedule award. It subsequently properly referred appellant to Dr. Soren for an impartial medical examination and opinion on permanent impairment, pursuant to 5 U.S.C. § 8123(a). In his May 18, 2018 report, Dr. Soren applied the FECA-approved methodology for rating spinal nerve extremity impairment and correctly found that appellant had six percent permanent impairment of the left lower extremity. OWCP, by decision dated August 7, 2018, modified an October 26, 2017 decision denying appellant’s claim for an additional schedule award and granted him an additional four percent permanent impairment of the left lower extremity based on Dr. Soren’s report. In its August 7, 2018 decision, OWCP found that he did not utilize *The Guides Newsletter* to determine left lower extremity permanent impairment. It obtained a supplemental report dated May 24, 2019 from Dr. Soren, who reiterated that appellant had an additional four percent left lower extremity permanent impairment. Following the continued denial of appellant’s claim for an increased schedule award on June 5, 2019 and subsequent remand of this decision on September 23, 2019, the DMA, Dr. Katz, recommended that appellant undergo a new impartial impairment evaluation because he could not determine whether Dr. Soren properly utilized the rating methodology in *The Guides Newsletter*. On remand OWCP referred appellant to Dr. Crystal for an impartial medical examination. In a December 5, 2019 report, Dr. Crystal applied the FECA-approved methodology for rating spinal nerve extremity impairment and properly found that appellant had zero percent permanent impairment of each lower extremity. On February 7, 2020 the DMA, Dr. Katz, agreed with Dr. Crystal’s that appellant had zero percent permanent impairment of each lower extremity.

As noted, when a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual

¹⁹ 5 U.S.C. § 8123(a).

²⁰ *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *D.M.*, Docket No. 18-0476 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002).

background, must be given special weight.²¹ Dr. Crystal provided a well-reasoned report based on a proper factual and medical history. Additionally, his report included detailed findings on physical examination, provided a thorough review of the record, and provided medical rationale supporting his opinion. Dr. Crystal properly referenced *The Guides Newsletter* and explained that appellant had no sensory or motor deficits at the nerve root level during the December 5, 2019 examination. He indicated that, as appellant had normal examination findings, according to Table 1 and Proposed Table 2 of *The Guides Newsletter*, there would be no impairment given for motor or sensory deficits of the lower extremities. As the IME, Dr. Crystal's well-rationalized December 5, 2019 opinion is entitled to special weight.²²

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

On appeal counsel contends that appellant is entitled to an additional schedule award. As discussed, however, the special weight of the medical evidence, as accorded to Dr. Crystal's opinion, establishes that appellant has no more than six percent permanent impairment of the left lower extremity.

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.

CONCLUSION

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

²¹ *Id.*

²² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 20, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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