United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 20-1666**
	)	**Issued: September 28, 2021**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTE, Sandstone, MN, Employer	)	

Appearances:
Appellant, pro se
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 September 21, 2020 appellant filed a timely appeal from an August 19, 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 OWCP received additional evidence following the August 19, 2020 decision. 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 3 percent permanent impairment of the right lower extremity and 11 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 17, 1995 appellant, then a 46-year-old cook/foreman, filed a traumatic injury claim (Form CA-1) alleging that on December 9, 1994, he sustained an injury to his back as he knelt down to lift steel elevator doors while in the performance of duty. OWCP accepted the claim for L5-S1 herniated disc, fracture nonunion at L3-4, pelvic and bilateral ankle sprains, and psychogenic pain disorder.[4]

OWCP developed the claim and, by decision dated December 30, 1996, it granted appellant a schedule award for three percent permanent impairment of the right lower extremity. The award ran for 8.64 weeks for the period September 13 to November 12, 1995.[5] On August 18, 1999 OWCP granted appellant a schedule award for 11 percent permanent impairment of the left lower extremity. The award ran for 31.68 weeks for the period from July 15, 1999 to February 21, 2000.[6]

On April 17, 2017 OWCP referred appellant to Dr. Anthony C. Nwakama, Board-certified in orthopedic surgery and sports medicine, for a second opinion examination to determine the extent of any employment-related permanent impairment. It advised him that he should rate appellant's impairment using *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment* (*The Guides Newsletter*) (July/August 2009), a supplemental publication of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[7]

[3] Docket No. 97-1861 (issued April 8, 1999); Docket No. 02-1628 (issued January 27, 2003); Docket No. 07-1374 (issued November 23, 2007); Docket No. 06-2009 (issued March 15, 2007), *petition for recon. denied*, Docket No. 06-2009 (issued July 15, 2008).

[4] Appellant retired from the employing establishment on December 3, 1998 and underwent surgical procedures in 1999, 2000, and 2002.

[5] On September 6, 2000 OWCP amended the award to reflect the correct pay rate.

[6] Appellant subsequently filed a claim for compensation (Form CA-7) for an increased schedule award. By decision dated August 23, 2006, OWCP denied appellant's claim for an increased schedule award. By decision dated February 2, 2007, an OWCP hearing representative affirmed the August 23, 2006 decision. In a November 23, 2007 decision, the Board found that appellant had not established that he had more than 11 percent permanent impairment of his left lower extremity. Docket No. 07-1374 (issued November 23, 2007).

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

In a July 12, 2017 report, Dr. Nwakama noted appellant's history of injury and medical treatment. He utilized the A.M.A., *Guides*, referenced the lumbar spine regional grid (Table 17-4) and opined that appellant had 15 percent lower extremity permanent impairment.

On November 6, 2017 appellant filed a Form CA-7 for an increased schedule award.

On June 29, 2018 OWCP prepared a statement of accepted facts (SOAF) and referred appellant's case record and Dr. Nwakama's July 12, 2017 report to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as the DMA, to determine the extent of any employment-related permanent impairment. It advised him that he should rate appellant's impairment using *The Guides Newsletter*.

In a July 2, 2018 report, the DMA explained that Dr. Nwakama determined appellant's permanent impairment using the lumbar spine regional grid (Table 17-4) in the A.M.A., *Guides*; however, this was not allowed because FECA did not allow a schedule award for the spine. The DMA explained that a diagnosed injury originating in the spine could be considered to the extent that it resulted in permanent impairment to the extremities, generally manifested as spinal nerve impairment, and *The Guides Newsletter* should be utilized. He advised that Dr. Nwakama's opinion could not be considered probative and recommended that Dr. Nwakama be contacted and offered the opportunity to submit a corrected supplemental report addressing spinal nerve impairment using *The Guides Newsletter*. The DMA also recommended that if Dr. Nwakama was unable to submit a supplemental report, then a second opinion was recommended. He also requested copies of the prior DMA reports so that any overlapping impairments could be identified.

In a letter dated July 11, 2018, OWCP notified appellant that he should provide a copy of the July 2, 2008 DMA report to Dr. Nwakama for an updated impairment rating. The physician did not provide a new report.

On October 30, 2018 OWCP referred appellant to Dr. John R. Ayres, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent of any employment-related permanent impairment.

In a January 9, 2019 report,[8] Dr. Ayres noted appellant's history of injury, medical treatment, and physical examination findings. He utilized the A.M.A., *Guides* and referred to Chapter 17, subsection 17.2, pages 561-76. Dr. Ayres opined that appellant had a lower extremity impairment of 15 percent. He explained that the cause of numbness in appellant's lateral thigh, lateral knee, lateral leg, lateral ankle, and the dorsum of his feet bilateral was either lumbosacral radiculopathy and work related, or peripheral neuropathy, which was not work related. Dr. Ayres opined that the only way to determine whether the conditions were work related was by an electromyography/nerve conduction velocity (EMG/NCV) study, and this study was also needed to determine any impairment rating for gait.

A May 9, 2019 EMG report interpreted by Dr. Joel I. Gedan, a Board-certified neurologist, revealed chronic bilateral polyradiculopathies in both lower extremities, evidence of chronic neurogenic changes in the right L5-S1 nerve root and the left L4 and L5 greater than S1 nerve roots, and no fibrillation potentials to indicate more recent ongoing denervation. He also noted

[8] The report was dated January 9, 2016, but that appears to have been a typographical error.

that there was no electrical evidence of a superimposed polyneuropathy in the lower extremities. Dr. Gedan explained that the electrical findings were seen with lumbar spinal stenosis and noted that appellant had a history of five lumbar spine surgeries.

In a June 3, 2019 report, Dr. Edward G. Santos, a Board-certified orthopedic surgeon, noted that appellant was referred by OWCP for EMG/NCV studies, which revealed chronic L5 and S1 radiculopathy with no active denervation. He found cervicalgia, low back pain, paresthesia of the foot and hand, and S/P lumbar spinal fusion.

In an August 29, 2019 report, Dr. Ayres reviewed the May 9, 2019 EMG/NCV study and provided an addendum. He opined that the additional study did not impact his impairment rating and repeated his opinion that appellant had a lower extremity permanent impairment of 15 percent. Dr. Ayres opined that the cause of numbness in appellant's lateral thigh, lateral knee, lateral leg, lateral ankle, and the dorsum of his feet bilaterally was from lumbosacral radiculopathy, which was work related. He further opined that any impairment of gait would, therefore, bundle into the diagnosis for lumbar radiculopathy for which he had calculated the impairment rating under Table 17-2 of the A.M.A., *Guides*.[9]

In an October 6, 2019 report, the DMA noted that Dr. Ayres' report could not be considered as probative because FECA did not allow a schedule award for the spine. He explained that permanent impairment ratings due to the spinal conditions should be determined using *The Guides Newsletter*.

In a letter dated November 7, 2019, addressed to Dr. Ayres, OWCP requested his opinion utilizing *The Guides Newsletter*.

In a January 20, 2020 report, Dr. Ayres utilized the A.M.A., *Guides* and referred to Table 16-12, pages 534-35, for the peripheral nerve. He related that appellant had poor balance, but no weakness in either lower extremity with 5/5 strength throughout the right and left lower extremities. Dr. Ayres found mild sensory deficits in the distribution of the L5 and S1 dermatomes on the right and L4, L5, S1 dermatomes on the left. He opined that appellant had 10 percent permanent impairment of the right and left lower extremities.

On February 27, 2020 OWCP requested that the DMA, Dr. Katz, review the record and provide a supplemental opinion regarding appellant's permanent impairment of the bilateral lower extremities.

In a March 5, 2020 report, the DMA noted that he had reviewed Dr. Ayres' January 20, 2020 report and explained that it was not probative because spinal nerve impairment should be rated using *The Guides Newsletter*. He related that Dr. Ayres determined appellant's permanent impairment using Table 16-12, peripheral nerve impairment, of the A.M.A., *Guides*, which was not acceptable. The DMA noted Dr. Ayres' "mild sensory deficits" findings in the distribution of the L5 and S1 dermatomes on the right and L4, L5, S1 dermatomes on the left. He also noted that Dr. Ayres found motor examination to be 5/5 throughout both lower extremities. The DMA referred to *The Guides Newsletter*, Proposed Table 2, Spinal Nerve Impairment Lower Extremity Impairments, for mild sensory deficits L5, S1 on the right and L4, L5, S1 on the left.

[9] A.M.A., *Guides* 561-76.

The DMA explained that appellant had a mild sensory deficit at L5 which had a default value in class of diagnosis (CDX) 1 of 1 percent, a grade modifier for functional history (GMFH) of 2 and a grade modifier for clinical studies (GMCS) of 1, which resulted in a net adjustment of 2 from the default value, and equaled a Class 1, grade E impairment rating of 2 percent. Regarding the S1 sensory deficit, he explained that CDX was 1, GMFH was 1 and GMCS was 1, therefore, the net adjustment was 2, which equaled CDX 1, grade E impairment rating of one percent. He concluded that appellant had three percent permanent impairment of the right lower extremity.

Regarding the left lower extremity, the DMA concluded that appellant had five percent permanent impairment of the left lower extremity. He explained that appellant had a mild sensory deficit at L4 which had a default value CDX 1 of 1 percent, a GMFH of 1 and a GMCS of 1, which resulted in a net adjustment of 2 from the default value, and equaled a CDX 1, grade E impairment rating of two percent. The DMA further explained that appellant had a mild sensory deficit at L5 which had a default value in CDX 1 of 1 percent, a GMFH of 2 and a GMCS of 1, which resulted in a net adjustment of 2 from the default value, and equaled a Class 1, grade E impairment rating of two percent. Regarding the S1 sensory deficit, he explained that CDX was 1, GMFH was 1 and GMCS was 1, therefore, the net adjustment was 2, which equaled CDX 1, grade E impairment rating of one percent.

The DMA concluded that appellant's three percent permanent impairment of the right lower extremity and five percent permanent impairment of the left lower extremity did not exceed the prior award and no additional award was due. He advised that appellant reached maximum medical improvement (MMI) on January 9, 2019, the date of Dr. Ayres' examination.

On April 3, 2020 OWCP received appellant's request for reconsideration. Appellant argued that Dr. Ayres' opinion that he had 10 percent left lower extremity impairment was correct. He indicated that the DMA found fault with every doctor's opinion and that his physicians found that he had a broad-based gait, which was a stand-alone impairment.

By decision dated June 24, 2020, OWCP denied modification of the March 10, 2020 decision.

On August 3, 2020 appellant requested reconsideration. He repeated his argument that his gait was a standalone impairment. Appellant indicated that the DMA misconstrued that 15 percent for the gait abnormality was a whole person impairment. He also argued that he was entitled to additional awards for his various surgical procedures. Appellant indicated that he believed his award should be 15 percent for his gait, 10 percent left lower extremity, and 10 or 15 percent right lower extremity.

By decision dated August 19, 2020, OWCP denied appellant's claim for an increased schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA,[10] and its implementing federal regulations,[11] 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 loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. 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.[12] 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.[13]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): Contemporary Model of Disablement*.[14] Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by grade modifiers based on functional history, physical examination and clinical studies.[15] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[16] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[17]

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.[18] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[19] 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

[10] *Supra* note 1.

[11] 20 C.F.R. § 10.404.

[12] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[13] *See T.K.*, Docket No. 19-1222 (issued December 2, 2019); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[14] A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3a ICF.

[15] *Id*. at 494-531.

[16] *Id*. 521.

[17] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[18] 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).

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

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. Proposed Table 2 of *The Guides Newsletter* provides that the maximum permanent impairment for impairment associated with a single nerve is 13 percent. The appropriate tables for rating spinal nerve extremity impairment are incorporated in OWCP's procedures.[20]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 3 percent permanent impairment of the right lower extremity and 11 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

OWCP referred appellant to Dr. Nwakama and then to Dr. Ayres for second opinion examinations to evaluate the extent of any permanent impairment of his lower extremities resulting from his accepted L5-S1 herniated disc and nonunion fracture at L3-4 in accordance with *The Guides Newsletter*. However, both Dr. Nwakama and Dr. Ayres failed to utilize *The Guides Newsletter* in rendering evaluation of appellant's permanent impairment.[21] The proper mechanism for rating impairments of the upper or lower extremities caused by a spinal injury is provided in section 3.700 of OWCP's procedures, which references proposed Table 2 from *The Guides Newsletter*.[22]

On March 5, 2020 the DMA reviewed Dr. Ayres' report and explained why it did not comport with the A.M.A., *Guides*, as noted above. He advised that he was, however, able to utilize Dr. Ayres' findings to rate appellant's permanent impairment. The DMA noted that appellant had no permanent impairment due to motor loss of the lower extremities as Dr. Ayres reported 5/5 strength of each lower extremity and no motor weakness.

The DMA also found that he could rate appellant's sensory loss from Dr. Ayres' findings. He determined that appellant had three percent permanent impairment of the right lower extremity, due to mild sensory deficit at L5 and S1, and five percent permanent impairment of the left lower extremity, due to sensory deficits at L4, L5, and S1, according to the net adjustment formula.[23] The Board has reviewed the DMA's rating and finds that he properly applied the net adjustment formula to the findings from Dr. Ayres' report, pursuant to *The Guides Newsletter*. The DMA's report does not support that appellant had greater than 3 percent permanent impairment of the right lower extremity and 11 percent permanent impairment of the left lower extremity. The record

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

[21] *See D.L.*, Docket No. 20-0059 (issued July 8, 2020); *see A.W.*, Docket No. 17-1350 (issued December 12, 2018); *M.M.*, Docket No. 17-0197 (issued May 1, 2018).

[22] *Supra* note 20; *see T.K.*, Docket No. 19-1222 (issued December 2, 2019); *see also C.K.*, Docket No. 16-1294 (issued January 13, 2017).

[23] *See supra* note 16.

contains no medical evidence in accordance with *The Guides Newsletter* demonstrating a greater percentage impairment of the right or left lower extremity.[24]

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 greater than 3 percent permanent impairment of the right lower extremity and 11 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 28, 2021
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

[24] *See E.G.*, Docket No. 19-1081 (issued September 24, 2020); *T.K.*, Docket No. 19-1222 (issued December 2, 2019); *C.S.*, Docket No. 18-0920 (issued September 23, 2019).