United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
	)	**Docket No. 22-0157**
and	)	**Issued: August 26, 2022**
U.S. POSTAL SERVICE, POST OFFICE, Clearwater, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 12, 2021 appellant filed a timely appeal from a November 5, 2021 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 November 5, 2021 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 more than 11 percent permanent impairment of the left upper extremity and 2 percent permanent impairment of the right upper extremity for which he previously received schedule award compensation.

FACTUAL HISTORY

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

On October 10, 2017 appellant, then a 41-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day he injured his lower back as a result of an automobile accident while in the performance of duty. After an initial denial, by decision dated March 6, 2018, OWCP accepted the claim for lumbar and cervical strains, lumbar and cervical bulging discs, and left ankle/foot strain and sprain.

On June 8, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award. By decision dated January 8, 2019, OWCP denied his schedule award claim, finding that he had not reached maximum medical improvement (MMI).

On January 11, 2019 appellant filed an appeal to the Board.

On January 14, 2019 appellant underwent OWCP-authorized cervical procedures at C5-6 and C6-7 including arthrodesis, complete anterior cervical discectomy, anterior segmental spinal instrumentation with insertion with spinal fixation, application of intervertebral biomechanical devices, and application of bone autograft.

On June 17, 2019 appellant filed another Form CA-7 claiming a schedule award.

In a report dated July 2, 2019, Dr. Angelo Alves, a Board-certified neurologist, opined that appellant had reached MMI and that he had 10 percent permanent impairment due to residual cervical injury with a residual impairment of the left upper extremity, status post cervical spine surgery; 20 percent permanent impairment due to chronic low back pain syndrome with disc herniations and signs of radiculopathy; and 5 percent permanent impairment due to bilateral carpal tunnel syndrome (CTS).

By decision dated August 8, 2019, the Board affirmed OWCP's January 8, 2019 decision, finding that, as appellant had not established that he had reached MMI, he had not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.[4]

[3] *Order Remanding Case*, Docket No. 20-1479 (issued March 29, 2021); Docket No. 19-1643 (issued July 20, 2020); Docket No. 19-0540 (issued August 9, 2019).

[4] Docket No. 19-0540 (issued August 9, 2019).

In a statement of accepted facts (SOAF) dated October 7, 2019, OWCP noted that on January 11, 2019 appellant filed an occupational disease claim (Form CA-2) for carpal tunnel syndrome.[5] It also noted that he had filed a notice of recurrence (Form CA-2a) due to a cervical pinched nerve.[6]

OWCP referred appellant to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion regarding appellant's entitlement to a schedule award. In a report dated March 27, 2020, Dr. Dinenberg noted appellant's diagnoses of cervical and lumbar sprain, left foot sprain, and cervical and lumbar disc bulges. He related that he would need to obtain a new electromyogram/nerve conduction velocity (EMG/NCV) study to render a permanent impairment rating. In a supplemental report dated June 4, 2020, Dr. Dinenberg opined that no permanent impairment rating was appropriate for appellant's bilateral lower extremities as appellant had intact motor strength and sensation. Based on chronic left C7 radiculopathy with mild sensory deficit and minimal loss of strength, he opined that appellant had 10 percent left upper extremity permanent impairment secondary to C7 radiculopathy, under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[7] and *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*).

Dr. Dinenberg's report was referred by OWCP to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). Dr. Katz determined in a report dated June 25, 2020 that, as Dr. Dinenberg found no objective motor/sensory deficits in the right upper extremity, left lower extremity, or right lower extremity, appellant had no ratable permanent impairment due to spinal nerve impairment of the right upper extremity or bilateral lower extremities. Regarding the left upper extremity, he concurred with Dr. Dinenberg's findings of 10 percent permanent impairment due to mild motor and sensory loss, but he also explained that *The Guides Newsletter* capped an upper extremity impairment at 9 percent for an upper extremity permanent impairment due to a single spinal nerve impairment.

By decision dated July 30, 2020, OWCP denied appellant's claim for a schedule award for the right upper extremity and the bilateral lower extremities. It based its decision on the March 27 and June 4, 2020 reports of Dr. Dinenberg.

On August 5, 2020 appellant filed an appeal to the Board.

By decision dated August 6, 2020, OWCP granted appellant a schedule award for nine percent permanent impairment of the left upper extremity (left arm) due to his C7 radiculopathy. The period of the award ran for 28.08 weeks from July 19, 2020 to January 31, 2021.

[5] Appellant has a claim under OWCP File No. xxxxxx959 which, following a remand by the Board (Docket No. 19-1643, issued July 20, 2020), OWCP accepted for bilateral carpal tunnel syndrome.

[6] Appellant's Form CA-2a was converted to a new occupational disease claim by OWCP, to which it assigned OWCP File No. xxxxxx617.

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

By order dated March 29, 2021, the Board found that the case was not in posture for decision. The Board explained that proper adjudication depended on cross-referencing between files where two or more injuries occurred to the same part of the body, and OWCP had not administratively combined appellant's OWCP File Nos. xxxxxx959 and xxxxxx617 with the present claim. The Board remanded the case file to OWCP for administrative consolidation of appellant's claims and directed OWCP to issue a *de novo* merit decision on appellant's schedule award claim for the right upper extremity and bilateral lower extremities.[8]

By letter dated May 6, 2021, OWCP notified appellant that, in response to the Board's order of remand, OWCP File Nos. xxxxxx617 and xxxxxx959 were administratively combined with the present claim. It stated that action was being taken to initiate another referral to a DMA for review with an amended SOAF to reflect all of his cases in order to determine if all aspects of the medical file had been considered for permanent impairment rating purposes.

By decision dated May 18, 2021, OWCP granted appellant an additional award for 2 percent permanent impairment of the left upper extremity (left arm) due to his CTS, for a total 11 percent permanent impairment of the left upper extremity (left arm). The award ran for 6.24 weeks during the period October 29 through December 11, 2020.

On June 4, 2021 OWCP referred the medical evidence of record and a revised SOAF to Dr. Katz, serving as a DMA, for review of the record regarding rating of appellant's permanent impairment of the bilateral upper and lower extremities, and an opinion regarding the date of MMI.

In a report dated June 5, 2021, Dr. Katz opined that he did not have access to the prior DMA reports under OWCP File Nos. xxxxxx617 and xxxxxx959, and that without them, he would be unable to determine if there were overlapping impairments. He also requested clarification as to whether the nine percent permanent impairment award for the left upper extremity was based on his most recent report of June 25, 2020, or if it preceded that report. Finally, Dr. Katz noted that, if additional impairments had been recommended under OWCP File No. xxxxxx959, he recommended that those impairment evaluations be provided to him with a detailed memorandum and a SOAF to support the findings, as at that time, there was no list of accepted diagnoses.

On July 7, 2021 OWCP referred appellant to Dr. Jeffrey Fried, a Board-certified orthopedic surgeon, for a second opinion evaluation to review the medical record and conduct a physical examination to rate appellant's permanent impairment and determine the date of MMI. It enclosed a SOAF, which addressed the combined accepted claims. In a report dated August 25, 2021, Dr. Fried examined the medical record and conducted a physical examination. He related that appellant's physical examination demonstrated normal gait; negative impingement; no focal atrophy of the lower extremities; mild decreased lumbar spine motion; 50 percent of normal cervical spine motion; negative Waddell signs; no atrophy of the upper extremities; decreased left two-point discrimination at 8 millimeters on the C7 distribution and 4 to 5 left triceps strength; otherwise normal strength in the upper extremities; negative Tinel's and Phalen's tests; and no thenar atrophy. Appellant's *Quick*DASH score was 36.4.

[8] *Order Remanding Case,* Docket No. 20-1479 (issued March 29, 2021).

Dr. Fried diagnosed cervical bulging discs with clinical findings of cervical radiculopathy, bulging lumbar discs without radiculopathy, bilateral CTS, and resolved cervical and lumbar strain. Referring to the sixth edition A.M.A., *Guides*, and *The Guides Newsletter*, he rated appellant's permanent impairment based on his C7 radiculopathy, with findings of mild weakness in the C7 and left triceps, and moderate loss of sensation in the C7 distribution on the left. Dr. Fried assigned a grade modifier for clinical studies (GMCS) of 2 due to EMG findings, which resulted in a Grade D or 7 percent impairment for loss of strength, and 3 percent impairment for loss of sensation, for a total 10 percent left upper extremity permanent impairment due to cervical radiculopathy at C7. Regarding appellant's bilateral CTS, the grade modifier for physical examination (GMPE) was 1 bilaterally due to delayed latency; the grade modifier for functional history (GMFH) was 1 for intermittent symptoms; the GMPE was 0 due to normal sensation and no weakness. The average of the grade modifiers was 1, and with a *Quick*DASH score of 36.5. Dr. Fried applied the net adjustment formula to find that appellant had 2 percent bilateral permanent impairment of the upper extremities due to CTS. Therefore, he concluded that appellant had a total 12 percent permanent impairment of the left upper extremity, and 2 percent permanent impairment of the right upper extremity.

OWCP forwarded Dr. Fried's report to Dr. Katz, serving as DMA, for review. In a report dated September 30, 2021, Dr. Katz noted that he required a revised memorandum explaining the prior awards paid for the bilateral upper extremities, as well as the supporting DMA reports so that overlapping impairments could be identified.

In response, OWCP issued a revised memorandum and again forwarded Dr. Fried's report, along with SOAF dated June 4, 2021, and the medical record, to Dr. Katz, serving as DMA.

In a report dated October 26, 2021, the DMA, Dr. Katz, noted the accepted conditions and that appellant had received prior schedule awards totaling 11 percent for the left upper extremity due to CTS and C7 radiculopathy, and 2 percent for right upper extremity CTS. The DMA stated that he had reviewed submitted medical records, including the August 25, 2021 report from Dr. Fried.

Referring to the sixth edition A.M.A., *Guides*, the DMA, Dr. Katz, rated appellant's left upper extremity impairment using *The Guides Newsletter*. For a moderate sensory deficit resulting from a C7 condition, the default value was 2 percent. The GMFH was 1, the GMPE was inapplicable, and the GMCS was 2. This resulted in a net adjustment of +1 from the default value C, which equaled Class 1, Grade D at 3 percent. For the mild motor deficit, the default value was 5 percent. The GMFH was 1, the GMPE was inapplicable, and the GMCS was 2. This resulted in a net adjustment of +1 from the default value of C, which equaled Class 1, Grade D at seven percent. The total percentage of permanent impairment at this point in the calculation was 10 percent, which the DMA reduced to 9 percent based upon the cap for single nerve root injury, as noted on page 3 of *The Guides Newsletter*. Referring to Table 15-23, page 449 of the A.M.A., *Guides*, the DMA also rated appellant's bilateral CTS permanent impairments. For median nerve entrapment, test findings of electrodiagnostic delay resulted in a GMCS of 1, a GMPE of 0, and a GMFH modifier of 1 for mild intermittent symptoms. The average rounded to two, and the range of impairment was one to three percent. The grade modifier was 1 for a *Quick*Dash score of 36. The DMA concluded that appellant's bilateral permanent impairment due to median nerve entrapment was two percent. The total combined percentage of permanent impairment of the left

upper extremity was therefore 11 percent. Appellant's right upper extremity impairment due to CTS was two percent.

With regard to impairment to the lower extremities relating to spinal conditions, the DMA noted that Dr. Fried had determined that appellant had no neurological deficits and no lumbar radiculopathy in either lower extremity; hence, he determined no ratable impairment of any spinal nerve, and no ratable impairment for the accepted spinal conditions. The DMA concurred and noted that this finding was in agreement with Dr. Dinenberg. He found that the date of MMI was August 25, 2021.

The DMA, Dr. Katz, concluded that because the present permanent impairment of two percent of the right upper extremity did not exceed appellant's prior schedule award for two percent permanent impairment of the right upper extremity based upon CTS, he was not due any additional award for the right upper extremity. Similarly, as the present impairment of 11 percent of the left upper extremity did not exceed appellant's prior schedule award for the left upper extremity, including 9 percent for C7 radiculopathy and 2 percent for CTS, appellant was not due an additional award for the left upper extremity.

By *de novo* decision dated November 5, 2021, OWCP denied appellant's claim for an increased schedule award. It noted that he had been previously paid schedule awards for the bilateral upper extremities and the medical evidence did not support an increase in the impairment already compensated.

LEGAL PRECEDENT

The schedule award provisions of FECA[9] and its implementing regulations[10] 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 of a member 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 has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[11] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (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]

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *Id*. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id*. Chapter 3.700.2 and Exhibit 1 (January 2010).

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

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).[14] In evaluating lower extremity impairments, the sixth edition requires identifying the impairment for the class of diagnosis (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[15] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[16]

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.[17] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[18] The sixth edition of the A.M.A., *Guides* (2009) 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. 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.[19]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 11 percent permanent impairment of the left upper extremity and 2 percent of the right upper extremity for which he previously received schedule award compensation.

On August 25, 2021 Dr. Fried examined the medical record and conducted a physical examination. Referring to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, Dr. Fried calculated that appellant's total percentage of permanent impairment for the left upper extremity was 12 percent and for the right upper extremity was 2 percent.

In accordance with its procedures, OWCP forwarded Dr. Fried's report to Dr. Katz, serving as the DMA, for review. In a report dated October 26, 2021, the DMA noted the accepted conditions in appellant's combined claims. He noted that the record reflected prior awards totaling

[14] A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, *International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement*.

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

[16] *See M.P.*, Docket No. 18-1298 (issued April 12, 2019); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[17] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see B.W.*, Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[18] *Id*. at § 8107(c); *id*. at § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[19] *Supra* note 12 at Chapter 3.700, Exhibit 4 (January 2010).

11 percent permanent impairment for appellant's left upper extremity due to CTS and C7 radiculopathy, and 2 percent permanent impairment of right upper extremity due to CTS. The DMA explained that he had reviewed appellant's records, including the August 25, 2021 report from Dr. Fried. Referring to the sixth edition A.M.A., *Guides*, the DMA rated appellant's left upper extremity permanent impairment due to his C7 radiculopathy using *The Guides Newsletter*. He determined the default values and applied the grade modifiers for moderate sensory and mild motor weakness to find that the total percentage of permanent impairment at this point in the calculation was 10 percent for C7 radiculopathy. However, the DMA found that the rating would be reduced to a combined 9 percent permanent impairment left upper extremity impairment, based upon the instructions found on page 3 of *The Guides Newsletter*, which relate that the combined sensory and motor impairment cannot exceed 9 percent.

Regarding appellant's bilateral upper extremity permanent impairment due to CTS, the DMA determined the default value for appellant's median nerve entrapment, and applied the appropriate grade modifiers. He concluded that appellant had 2 percent permanent impairment of each upper extremity due to his CTS median nerve entrapment, pursuant to Table 15-23, page 449 of the A.M.A., *Guides*.

With regard to permanent impairment of appellant's lower extremities relating to spinal conditions, the DMA noted that Dr. Fried had determined no neurological deficits and no lumbar radiculopathy in either lower extremity; hence, he determined no ratable impairment of any spinal nerve, and no ratable impairments per FECA for the accepted spinal conditions. He concurred with and noted that this finding was in agreement with Dr. Dinenberg. The DMA found that the date of MMI was August 25, 2021.

The DMA, Dr. Katz, concluded that because appellant's present impairment of two percent of the right upper extremity did not exceed appellant's prior schedule award for two percent permanent impairment of the right upper extremity based upon CTS, he was not due any additional award for the right upper extremity. Similarly, as the present impairment of 11 percent of the left upper extremity did not exceed appellant's prior schedule award for the left upper extremity, including 9 percent for the C7 nerve root radiculopathy, and 2 percent for CTS, appellant was not due any additional award for the left upper extremity.

The Board finds that Dr. Katz, serving as DMA, adequately explained how he arrived at his rating of permanent impairment by listing specific tables and pages in the A.M.A., *Guides* and *The Guides Newsletter* and explained why his rating differed from that of Dr. Fried. Dr. Katz properly interpreted and applied the standards of the sixth edition of the A.M.A., *Guides* to conclude that appellant was not due any additional schedule award payment for his bilateral upper and lower extremities. His opinion, therefore, represents the weight of the medical evidence and supports the conclusion that appellant does not have a greater left upper extremity impairment than the 11 percent previously awarded, or a greater right upper extremity impairment than the 2 percent previously awarded.

The Board finds that there is no current medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than 11 percent permanent impairment of the left upper extremity and more than 2 percent impairment of the right

upper extremity. Accordingly, appellant has not established entitlement to a schedule award greater than that previously awarded.[20]

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 permanent impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than 11 percent permanent impairment of the left upper extremity and 2 percent permanent impairment of the right upper extremity, for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 26, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[20] *See M.P., supra* note 14.