United States Department of Labor
Employees' Compensation Appeals Board

T.S., Appellant	)	
and	)	**Docket No. 22-0977**
	)	**Issued: October 31, 2022**
U.S. POSTAL SERVICE, POST OFFICE, Yucaipa, CA, 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 June 2, 2022 appellant filed a timely appeal from a December 17, 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.

ISSUE

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

FACTUAL HISTORY

On April 2, 1990 appellant, then a 32-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 24, 1990 he injured his left knee and low back while in the

[1] 5 U.S.C. § 8101 *et seq*.

performance of duty. OWCP accepted the claim, under OWCP File No. xxxxxx554, for neck and lumbar sprains and old bucket handle medial meniscus tear of the left knee.[2] Appellant underwent OWCP-authorized surgeries to the lumbar spine on December 15, 1992 and August 22, 1994. He returned to modified-duty work in 1998 and retired from federal service effective June 30, 2017.

On February 26, 1999 Dr. Leonard A. Simpson, an orthopedic surgeon serving as a district medical adviser (DMA), reviewed the medical record and evaluated appellant's permanent impairment under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] He found one percent permanent impairment of the right lower extremity and opined that he had reached maximum medical improvement (MMI) as of May 27, 1998. On that basis, OWCP granted a schedule award for one percent permanent impairment of the right lower extremity. The award ran from June 9 through 29, 1998.

By decision dated April 28, 2008, OWCP denied appellant an increased schedule award.

On June 29, 2020 appellant requested authorization from OWCP to undergo an updated evaluation of permanent impairment by Dr. Phillip Yuan, a Board-certified orthopedic surgeon, for purposes of an increased schedule award.

By letter dated July 13, 2020, OWCP advised appellant of the evidence necessary to establish an entitlement to an increased schedule award under the sixth edition of the A.M.A., *Guides*.[4]

In a report dated August 14, 2020, Dr. Yuan indicated that appellant related complaints of low back pain with right greater than left lower extremity pain, numbness, and tingling. He noted his history of lumbar and knee surgeries and obtained static and dynamic x-rays of the lumbar spine, which revealed degenerative changes from L3 through S1, evidence of prior laminectomy from L3 through the sacrum, and facet fusion with screws across the facets at L5-S1, but no instability. Dr. Yuan performed a physical examination and documented diffuse reduced strength in the right lower extremity, intact strength in the left lower extremity, diminished sensation in the right foot, absent but symmetric reflexes, and pain with lumbar extension. He diagnosed chronic back and right lower extremity pain and sciatica with numbness, tingling, and weakness, prior laminectomy and L5-S1 fusion, and failed back syndrome. Dr. Yuan opined that appellant had reached permanent and stationary status and apportioned 50 percent of his condition to his March 24, 1990 employment injury and 50 percent to previous private employment in the 1980s.

[2] OWCP subsequently accepted a March 5, 2010 traumatic injury claim for lumbar sprain and a November 4, 2011 traumatic injury claim for bilateral shoulder sprain, right bicep tendon rupture, and right partial tear of rotator cuff under OWCP File Nos. xxxxxx500 and xxxxxx255, respectively. OWCP has administratively combined these claims, with OWCP File No. xxxxxx554 with OWCP File No. xxxxxx255 serving as the master file.

[3] A.M.A., *Guides* (4th ed. 1993).

[4] *Id.* at (6th ed. 2009).

He referred to the fifth edition of the A.M.A., *Guides*,[5] Table 15-3, page 384, and found a 28 percent whole person impairment.

In an amendment to the August 14, 2020 report, Dr. Yuan referred to the sixth edition of the A.M.A., *Guides*,[6] Table 17-4, page 571, and found a 28 percent whole person impairment.

On May 17, 2021 appellant filed a claim for compensation (Form CA-7) for an increased schedule award.

On May 18, 2021 OWCP prepared a statement of accepted facts (SOAF) which listed the accepted conditions as neck and lumbar sprains and old bucket handle medial meniscus tear of the left knee and noted the prior schedule award for one percent permanent impairment of the right lower extremity under the March 24, 1990 claim.

On June 11, 2021 OWCP referred appellant to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, along with the medical record and SOAF, for evaluation of his permanent impairment, date of MMI, and medical status.

In a July 29, 2021 report, Dr. Einbund diagnosed lumbar spine degeneration, history of three lumbar spine surgeries including a fusion from L4 through the sacrum, history of left knee medial meniscus tear, and history of contusion of the soft tissue of the left knee. He performed a physical examination, which revealed paravertebral tenderness in the lumbar spine, a healed surgical scar, a limping gait, an inability to heel or toe walk, positive straight leg raise testing bilaterally, weakness of dorsiflexion of the right ankle and right large great toe, decreased sensation to light touch over the lateral aspect of the right leg, and decreased sensation over the dorsum of the left foot, which he found was consistent with a sensory perception deficit of the left L5 nerve root. On examination of the knees, Dr. Einbund documented tenderness, restricted range of motion, reduced extension, and healed arthroscopic scars bilaterally and a one-half inch deficit in circumference of the left thigh compared with the right. He also noted that appellant related constant left knee pain with popping and grinding. Dr. Einbund applied the sixth edition of the A.M.A., *Guides*, and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) and found one percent permanent impairment of the left lower extremity based upon spinal nerve impairment and one percent permanent impairment of the left lower extremity based upon left knee impairment, for a combined two percent left lower extremity impairment. He found no ratable impairment in the right lower extremity. Dr. Einbund opined that appellant had reached MMI on July 29, 2021, the date of his evaluation.

On October 28, 2021 OWCP referred the record and SOAF to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as DMA and requested that he evaluate appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.

[5] *Id.* at (5th ed. 2001).

[6] *Supra* note 4.

In a report dated November 2, 2021, Dr. Harris reviewed the medical record, including the July 29, 2021 report of Dr. Einbund. He diagnosed status-post lumbar spine surgery in 1982, December 15, 1992, and August 22, 1994; status-post bilateral knee surgeries, date unknown; lumbar multilevel degenerative changes with post-surgical changes consistent with probable fusion L5-S1; lumbar spine strain; and left knee strain with probable tear of medial meniscus. For the right lower extremity, under the diagnosis-based impairment (DBI) method, Dr. Harris referenced Table 16-11, page 533, and *The Guides Newsletter*, proposed Table 2, Spinal Nerve Impairment: Lower Extremity Impairment, and found severity 0 and class 0, which resulted in no ratable impairment of the right lower extremity. For the left lower extremity/lumbar spine, under the DBI method, he found residual problems with mild pain/impaired sensation due to left L5 radiculopathy, which corresponded with class of diagnosis (CDX), a class 1C, resulting in a one percent permanent impairment of the left lower extremity. For the left lower extremity/knee, under the DBI method, Dr. Harris utilized Table 16-3 (Knee Regional Grid), page 509, for knee strain with probable medial meniscal tear of the left knee, which resulted in one percent permanent impairment of the left lower extremity. He explained that a range of motion (ROM) impairment rating was not available as an alternative to the DBI method because appellant's accepted diagnoses were not eligible for the ROM method under the A.M.A., *Guides*. Dr. Harris then referred to the Combined Values Chart and found two percent permanent impairment of the left lower extremity. He further noted that appellant had previously been awarded one percent left lower extremity impairment and, therefore, was entitled to an additional one percent impairment of the left lower extremity. Dr. Harris concluded that he had reached MMI as of Dr. Einbund's examination of July 29, 2021.

By decision dated December 17, 2021, OWCP granted appellant a schedule award for two percent left lower extremity impairment. It found that one percent was previously paid under the claim and, therefore, the award represented an additional one percent permanent impairment of the left lower extremity. The award ran for 2.88 weeks from July 29 through August 18, 2021 and was based on the impairment rating of the DMA.

LEGAL PRECEDENT

The schedule award provisions of FECA[7] and its implementing regulations[8] 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 of loss of a member shall be determined. OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the *World Health Organization's International Classification of Functioning, Disability and Health*

[7] *Supra* note 1.

[8] 20 C.F.R. § 10.404.

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

(ICF): A Contemporary Model of Disablement.[10] Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the CDX, which is then adjusted by a grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and/or grade modifier for clinical studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] 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.[13]

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

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).[17]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and extent of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.[18]

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[10] A.M.A., *Guides*, page 3, section 1.3.

[11] *Id*. at 493-556.

[12] *Id*. at 521.

[13] *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).

[14] 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).

[15] *Supra* note 9 at Chapter 2.808.5c(3) (February 2022).

[16] *Id*. at Chapter 3.700, Exhibit 4 (January 2010); *see L.H.*, Docket No. 20-1550 (issued April 13, 2021); *N.G.*, Docket No. 20-0557 (issued January 5, 2021).

[17] *G.W.*, Docket No. 22-0301 (issued July 25, 2022); *see also The Guides Newsletter*; A.M.A., *Guides* 430.

[18] *See supra* note 9 at Chapter 2.808.6(f) (March 2017).

ANALYSIS

The Board finds that this case is not in posture for decision.

Dr. Yuan, in his August 14, 2020 reports, found that appellant had a 28 percent whole person impairment. The Board notes that his reports are of limited probative value as FECA does not allow schedule awards for impairment of the body as a whole.[19] In addition, in his initial August 14, 2020 report, Dr. Yuan utilized the fifth edition of the A.M.A., *Guides*, rather than the sixth edition, to rate appellant's impairment of the left lower extremity.[20] Accordingly, his reports do not comport with OWCP's procedures and are insufficient to establish any ratable impairment.[21]

In accordance with its procedures, OWCP properly referred the evidence of record to Dr. Einbund for a second opinion examination and permanent impairment evaluation. It thereafter referred the evidence of record, including Dr. Einbund's July 29, 2021 report to a DMA, who, in a November 2, 2021 report, reviewed the medical record and determined that appellant's date of MMI was July 29, 2021, the date of Dr. Einbund's impairment examination. Using the DBI methodology under the sixth edition of the A.M.A., *Guides*, the DMA found that appellant's diagnoses of left knee strain with probable medial meniscal tear of the left knee and residual problems with mild pain/impaired sensation due to left L5 radiculopathy each resulted in one percent impairment of the left lower extremity, for a combined two percent impairment of the left lower extremity. While the impairments would be pursuant to Table 16-3 and Table 16-11, respectively, the DMA neither referenced nor explained how the grade modifiers were applied to determine the default impairment rating for appellant's diagnosis to reach the two percent permanent impairment.[22] In addition, the DMA found that appellant had previously received an award of one percent permanent impairment of the left lower extremity. The Board notes, however, that the prior award of one percent permanent impairment was granted with respect to his right lower extremity, not the left lower extremity. For these reasons, the Board finds that Dr. Harris' report requires clarification.[23]

It is well established that, proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[24] Once OWCP undertook development of the evidence by referring appellant's file to a DMA, it had an obligation to do a complete job and

[19] *See D.K.*, Docket No. 21-0303 (issued July 8, 2021); *M.M.*, Docket No. 17-0197 (issued May 1, 2018); *J.G.*, Docket No. 12-0995 (issued October 22, 2012).

[20] *See supra* note 9; *G.M.*, Docket No. 19-1931 (issued May 28, 2020).

[21] *See M.M.*, *supra* note 19.

[22] *See J.H.*, Docket No. 21-1215 (issued May 5, 2022).

[23] *M.W.*, Docket No. 20-1303 (issued June 28, 2021); *G.M.*, *supra* note 20.

[24] *See W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

obtain a fully-rationalized opinion regarding the issue in this case.[25] The case shall, therefore, be remanded for OWCP to have its DMA conduct a proper analysis under the A.M.A., *Guides*. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an increased schedule award.

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: October 31, 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

[25] *See* 5 U.S.C. § 8101(19); *J.K.*, Docket Nos. 19-1420 & 19-1422 (issued August 12, 2020); *Francesco C. Veneziani*, 48 ECAB 572 (1997).