United States Department of Labor
Employees' Compensation Appeals Board

O.W., Appellant	)	
and	)	**Docket No. 21-0836**
	)	**Issued: September 29, 2022**
DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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 May 7, 2021 appellant, through counsel, filed a timely appeal from April 21 and 22, 2021 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish greater than 11 percent permanent impairment of the left lower extremity for which he received schedule award compensation; (2) whether appellant received an overpayment of compensation in the amount of

[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*.

$9,022.62 for the periods March 16 to August 24, 2008 and May 2 to July 1, 2018 for which he was without fault because he had less permanent impairment than previously awarded; and (3) whether OWCP properly denied appellant's request for waiver of recovery of the overpayment.

FACTUAL HISTORY

The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference.[3] The relevant facts are set forth below.

On June 28, 1995 appellant, then a 39-year-old rubber worker, filed a traumatic injury claim (Form CA-1) alleging that he injured his low back on that day when he bent over to lift a T-156 track.[4] OWCP accepted the claim for herniated lumbar disc and authorized L4-5 laminectomy and discectomy, which was performed on January 5, 1996. As of December 15, 1997, it paid appellant on the periodic rolls for disability.[5] Appellant subsequently accepted a limited-duty job offer as a clerk and returned to work on February 20, 2007.[6]

On November 26, 2007 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated March 26, 2008, OWCP granted appellant a schedule award for an eight percent permanent impairment of the left lower extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[7] The period of the award ran for 23.04 weeks from March 16 to August 24, 2008.

On October 22, 2008 appellant requested reconsideration. By decision dated November 7, 2008, OWCP denied his request for reconsideration of the merits of his claim.

On December 1, 2008 appellant, through counsel, filed an appeal with the Board. By decision November 19, 2009, the Board affirmed OWCP's March 26, 2008 decision, finding that appellant had not established greater than eight percent permanent impairment of the left lower extremity for which he received a schedule award.[8] The Board further found that OWCP properly denied appellant's request for further merit review of his claim, pursuant to 5 U.S.C. § 8128(a).

OWCP thereafter received an October 25, 2010 permanent impairment rating from Dr. John W. Ellis, a Board-certified family medicine and environmental medicine physician, who

[3] Docket No. 09-427 (issued November 19, 2009).

[4] OWCP assigned the current claim OWCP File No. xxxxxx848. The record contains evidence that previously, on May 2, 1986, appellant strained his lower back while in the performance of duty. OWCP accepted the claim for a lumbosacral strain and assigned OWCP File No. xxxxxx321. It has administratively combined these claims with OWCP File No. xxxxxx848 serving as the master file.

[5] Appellant was terminated by the employing establishment effective April 27, 1997 due to an inability to perform his work duties.

[6] The employing establishment removed appellant for cause effective May 2, 2017.

[7] A.M.A., *Guides* (5th ed. 2001).

[8] *Supra* note 3.

noted appellant's history of injury and presented findings on examination. Dr. Ellis indicated that he applied the sixth edition of the A.M.A., *Guides* and found 10 percent right lower extremity permanent impairment due to L5 nerve root impingement and five percent right lower extremity permanent impairment due to S1 nerve root impingement, resulting in 15 percent right lower extremity permanent impairment. For the left lower extremity, he found 13 percent lower extremity permanent impairment due to L5 nerve root impingement and 10 percent lower extremity permanent impairment due to S1 nerve root impingement, resulting in 22 percent left lower extremity permanent impairment.

On November 8, 2010 appellant filed a Form CA-7 claim for an increased schedule award.

On November 26, 2010 OWCP referred appellant's case to an OWCP district medical adviser (DMA) for review of Dr. Ellis' October 25, 2010 report and to provide an opinion on permanent impairment under the sixth edition of the A.M.A., *Guides*.[9] In a December 7, 2010 report, Dr. Ronald Blum, a Board-certified orthopedic surgeon, serving as a DMA, indicated that Dr. Ellis incorrectly applied the fifth edition of the A.M.A., *Guides*. He requested that OWCP ask Dr. Ellis to reassess his impairment rating using *The Guides Newsletter, Rating Spinal Nerve Impairment Using the Sixth Edition*, which was published in the July/August 2009 (*The Guides Newsletter*).

In a report dated January 26, 2011, Dr. Ellis again found 22 percent permanent impairment of appellant's left lower extremity and 15 percent permanent impairment of the right lower extremity under "Table 16-2, page 498," of the sixth edition of the A.M.A., *Guides*.

In a February 23, 2011 report, Dr. Blum noted that Dr. Ellis did not provide an impairment rating using *The Guides Newsletter*. He recommended a second opinion examination in order to better determine permanent impairment.

On March 4, 2011 OWCP referred appellant to Dr. John A. Sklar, a Board-certified physiatrist, for a second opinion evaluation to provide an impairment rating using *The Guides Newsletter*. In an April 26, 2011 report, Dr. Sklar, based on a review of the medical record, statement of accepted facts (SOAF), and a clinical examination, opined that appellant had no impairment of either lower extremity due to lumbar nerve root impingement. Dr. Blum reviewed Dr. Sklar's report on May 6, 2011 and concurred with his findings and impairment rating.

By decision dated May 12, 2011, OWCP denied appellant's claim for an increased schedule award, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body. It noted that he had previously been granted a schedule award for eight percent left lower extremity permanent impairment.

On May 19, 2011 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on October 4, 2011.

By decision dated December 20, 2011, OWCP's hearing representative found a conflict in the medical opinion evidence between Dr. Sklar, an OWCP second opinion physician, and Dr. Ellis, appellant's physician, regarding appellant's physical examination findings. She set aside

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

the May 12, 2011 decision and remanded the case for referral to an impartial medical examiner (IME) to resolve the conflict.

On April 3, 2012 OWCP referred appellant, together with a SOAF, medical record, and series of questions, to Dr. David D. Sanderson, a Board-certified orthopedic surgeon, to resolve the conflict in physical examinations findings and to provide a permanent impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.

In a May 9, 2012 report, Dr. Sanderson, based upon a review of the SOAF and medical record, and physical examination findings, agreed with Dr. Sklar that appellant had zero percent permanent impairment of his lower extremities.

On May 24, 2012 OWCP forwarded Dr. Sanderson's May 9, 2012 report and the case file to Dr. Daniel D. Zimmerman, a Board-certified internist, serving as a DMA, for review. On May 29, 2012 Dr. Zimmerman agreed with Dr. Sanderson that appellant had zero percent left lower extremity permanent impairment.

On June 5, 2012 OWCP noted that Dr. Zimmerman had been involved with adjudication of appellant's original claim for a right lower extremity permanent impairment, it routed Dr. Sanderson's May 9, 2012 report and the case file to Dr. Sanjai Shukla a Board-certified orthopedic surgeon serving as a DMA, for review. On June 17, 2012 Dr. Shukla found that appellant had zero percent permanent impairment of the right and left lower extremities.

By decision dated June 18, 2012, OWCP denied appellant's claim for an increased schedule award, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body. It noted that the special weight of the medical evidence rested with Dr. Sanderson, the IME.

On June 25, 2012 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 7, 2012.

By decision dated January 28, 2013, OWCP's hearing representative affirmed the June 18, 2012 decision denying appellant's claim for an increased schedule award.

In an impairment evaluation dated May 2, 2018, Dr. Clinton McAlister, a Board-certified orthopedic surgeon, reviewed appellant's history of injury and medical record, and provided physical examination findings. He diagnosed severe lumbar stenosis at L3-4, L4-5, and L5-S1 and residual L5 radiculopathy. Dr. McAlister attributed the diagnosed L5 radiculopathy to the accepted June 28, 1995 employment injury. He noted that appellant had a very poor gait using a cane and could not heel or toe walk. Dr. McAlister noted that appellant's straight leg raising was positive on the left side at 40 degrees with pain in the hip and down the leg. A neurological examination revealed left extensor halluces longus weakness and foot dorsiflexor and evertor weakness at 4/5. Dr. McAlister reported appellant's right sensory examination was within normal limits, a left sensory examination showed decreased left knee reflexes, and both Achilles being decreased. He found that appellant had reached MMI on December 14, 2017. Utilizing the diagnosis-based impairment (DBI) method of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, Dr. McAlister in rating appellant's permanent impairment of the left lower extremity, under spinal nerve impairments, he identified the class of diagnosis (CDX), L5 radiculopathy, as a class 1 impairment with a default value of three percent for moderate sensory

loss and a class 1 impairment with a default value of five percent for mild motor weakness under Table 2, page 6 of *The Guides Newsletter*. He assigned a grade modifier for functional history (GMFH) of 3 in accordance with Table 17-6, page 575 of the sixth edition of the A.M.A., *Guides* as appellant had a questionnaire score of 124. Dr. McAlister assigned a grade modifier for physical examination (GMPE) of 2 for moderate decreased sensation using Table 17-7, page 576. He noted that clinical studies (GMCS) were not applicable as no clinical studies were done. Dr. McAlister calculated that appellant had a net adjustment of +3, resulting in movement from the default class of C to class E and corresponding to a nine percent left lower extremity permanent impairment. Next, he combined the 9 percent motor lower extremity permanent impairment with the 3 percent sensory impairment, resulting in a 12 percent left lower extremity permanent impairment.

On May 21, 2018 appellant filed a Form CA-7 claim for an increased schedule award.

In a July 10, 2018 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as OWCP's DMA, reviewed the SOAF and appellant's medical records. He related that appellant was injured at work on June 28, 1995 and noted his accepted conditions. Dr. Katz related that appellant had a moderate sensory deficit and mild motor deficit. Using *The Guides Newsletter*, he indicated that appellant's L5 moderate sensory default corresponded to the default value of three percent on the Proposed Table 2, page 6. Dr. Katz calculated a net adjustment of +1, resulting in a class 1 grade D impairment, which indicated a four percent left lower extremity permanent impairment. Next, he indicated that appellant's L5 mild motor deficit corresponded to the default value of five percent on the Proposed Table 2, page 6. Dr. Katz calculated a net adjustment of +1, resulting in class 1 grade D impairment, which indicated a seven percent left lower extremity permanent impairment. He combined the 7 percent motor lower extremity permanent impairment with the 4 percent sensory impairment, resulting in an 11 percent left lower extremity permanent impairment. Dr. Katz explained that his determination was lower based on the assignment of grade modifiers resulting in class 1 grade D for each determination rather than the class 1 grade E found by Dr. McAlister. He noted that physical examination was used for grid placement, and clinical studies were adjusted by 0. Dr. Katz found that appellant reached MMI on May 2, 2018, the date of Dr. McAlister's report.

In an August 2, 2018 report, Dr. Katz found appellant was entitled to an additional three percent left lower extremity permanent impairment noting that appellant had previously received a schedule award for an eight percent left lower extremity permanent impairment.

By decision dated August 13, 2018, OWCP granted appellant an increased schedule award for a 3 percent permanent impairment of the left leg, for a total 11 percent permanent impairment of the left leg. The period of the award ran for 8.64 weeks from May 2 to July 1, 2018.

On June 5 and 30, 2020 appellant filed Form CA-7 claims for an increased schedule award.

In an updated permanent impairment evaluation dated August 3, 2020, Dr. McAlister noted that appellant used a cane, walked with a limp on the left, and could not tandem, heel or toe walk. Examination findings included persistent pain with any paralumbar palpation near surgery scar, severe sensory deficit of the lateral aspect left thigh and calf and dorsal aspect of the left foot, 4/5 extensor hallucis longus weakness, and +1 reflex equal in the knees and left ankle. Dr. McAlister diagnosed severe lumbar stenosis at L3-4, L4-5, and L5-S1, lumbar disc displacement, and residual L5 radiculopathy. He attributed the diagnosed L5 radiculopathy to the accepted June 28, 1995

employment injury. Dr. McAlister found that appellant had reached MMI on August 3, 2020. Utilizing the DBI method of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, he identified the CDX, L5 radiculopathy, as one with a grade C default value of seven percent for severe sensory loss which is a class 1 impairment, and with a grade C default value of five percent for mild motor weakness, also a class 1 impairment under Table 2, page 6 of *The Guides Newsletter*. Dr. McAlister assigned a GMFH of 3 in accordance with 17-6, page 575[10] as appellant had a questionnaire score of 116. He noted that a GMFH and a GMPE were not applicable as they were used for class determination. Dr. McAlister calculated that appellant had a net adjustment of +2, resulting in movement from the default grade of C to grade E and corresponding to a nine percent left lower extremity permanent impairment. Next, he combined the nine percent motor lower extremity permanent impairment with the seven percent sensory impairment, resulting in a 15 percent left lower extremity permanent impairment.

On August 7, 2020 OWCP referred appellant to Dr. Richard B. Sharp, a Board-certified physiatrist, for a second opinion evaluation. In a report dated September 4, 2020, Dr. Sharp noted his review of the medical record and provided physical examination findings. He opined that appellant had reached MMI on April 27, 1997. On examination Dr. Sharp reported mild antalgic gait, 5/5 bilateral left hip, knee and ankle motor strength, no foot drop, negative bilateral straight leg test, no atrophy or muscle spasm, moderate decreased left L5 dermatone pinprick sensation, and moderate left lumbar paraspinal muscle tenderness. Utilizing the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, he identified the CDX, L5 radiculopathy, as class 1 with a default value of three percent for moderate sensory deficit. Dr. Sharp found no motor impairment. He assigned a GMFH of 2, in accordance with Table 17-6, page 575 as appellant had pain and symptoms with normal activity. Dr. Sharp reported a GMPE of 2, in accordance with Table 17-7, page 576, as appellant had diminished light touch. He reported a GMCS of 2 for magnetic resonance imaging scan findings. Dr. Sharp calculated that appellant had a net adjustment of +3, resulting in movement from the default grade of C to E and corresponding to five percent permanent impairment of the lower extremity.

On October 19, 2020 OWCP again referred appellant's case to Dr. Katz, the DMA, for review. In an October 20, 2020 report, Dr. Katz reviewed the SOAF and medical record. He concurred with Dr. Sharp's impairment rating noting that his physical examination findings were consistent with the medical record. Dr. Katz opined that Dr. Sharp's report could not be accepted as his characterization of sensory loss as severe did not meet the criterion set forth in Table 16-11 and his impairment rating of 15 percent for a single nerve exceeds the 13 percent cap for a single nerve in a lower extremity. Thus, he found Dr. Sharp's report to be a more accurate assessment of appellant's impairment than Dr. McAlister's report. Dr. Katz found the date of MMI to be September 1, 2020, the date of Dr. Sharp's examination.

On October 22, 2020 OWCP requested clarification from Dr. Katz as it was unclear he was referring to the correct physician when he wrote that Dr. Sharp incorrectly found 15 percent left lower extremity permanent impairment.

[10] *Id*.

Dr. Katz, in an October 27, 2020 report, clarified that he was referring to Dr. McAlister and not Dr. Sharp when he explained why Dr. McAlister's report could not be accepted as probative.

By decision dated October 29, 2020, OWCP denied appellant's claim for an increased schedule award, finding that the medical evidence of record was insufficient to establish greater than 11 percent permanent impairment of his left lower extremity for which he previously received schedule award compensation. It noted that the weight of the medical opinion evidence rested with the opinions of Dr. Sharp, a second opinion physician, and Dr. Katz, the DMA.

On November 2, 2020 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of $9,022.62 had been created, for the period March 16 to August 24, 2008 and May 2 to July 1, 2018, because appellant had previously received schedule award compensation for 11 percent permanent impairment of the left upper extremity when he had 5 percent left lower extremity impairment. It found that he was without fault in the creation of the overpayment and forwarded an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). OWCP requested that appellant provide supporting financial documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support his reported income and expenses. It afforded him 30 days to respond.

On November 6, 2020 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review regarding the claimed overpayment, which was held on February 19, 2021. He requested waiver of recovery of the overpayment.

On November 12, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review with respect to OWCP's October 29, 2020 schedule award decision, which was also held on February 19, 2021.

In an overpayment recovery questionnaire, signed on November 13, 2020, appellant reported $1,936.00 in monthly income, $1,676.00 in the monthly expenses, and no assets (cash, checking account, and savings account). Supporting financial documentation was received on April 5, 2021.

By decision dated April 21, 2021, OWCP's hearing representative affirmed the October 29, 2020 schedule award decision.

By decision dated April 22, 2021, OWCP's hearing representative finalized OWCP's preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of $9,022.62, for the periods March 15 to August 24, 2008 and May 2 to July 1, 2018, because he received schedule award compensation for the left lower extremity to which he was not entitled. The hearing representative further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record was insufficient to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. OWCP's hearing representative found that the $9,022.62 overpayment was due and payable in full and directed OWCP to collect the overpayment.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA[11] and its implementing regulations[12] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for 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 determination is a matter that rests in the discretion of OWCP. 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.[13] 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.[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 in which 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]

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."[18] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred

[11] *Supra* note 2.

[12] 20 C.F.R. § 10.404.

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

[14] *T.W.*, Docket No. 20-0119 (issued January 12, 2021); *C.W.*, Docket No. 19-1590 (issued September 24, 2020); *H.K.*, Docket No. 18-0528 (issued November 1, 2019).

[15] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see T.W., id.*; *C.S.*, Docket No. 19-0851 (issued November 18, 2019).

[16] *Supra* note 13 at Chapter 2.808.5c(3) (March 2017).

[17] *Supra* note 13 at *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010); *see T.W., supra* note 14; *B.M.*, Docket No. 19-1069 (issued November 21, 2019).

[18] 5 U.S.C. § 8123(a).

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.[19]

ANALYSIS -- ISSUE 1

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of the March 26, 2008 decision because the Board considered that evidence in its November 9, 2007 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[20]

The Board finds that a conflict remains in the medical opinion evidence between the opinion of Dr. McAlister, appellant's attending physician, on the one hand, and the opinions of Dr. Sharp, an OWCP referral physician, and Dr. Katz, a DMA, on the other hand, regarding the permanent impairment of appellant's left lower extremity.

In an August 3, 2020 report, Dr. McAlister determined that appellant had 15 percent permanent impairment of his left lower extremity. He reported that appellant had 4/5 extensor left hallucis longus weakness and severe left thigh, calf and foot sensory deficit. Dr. McAlister advised that the sensory examination showed pain on palpation of the paralumbar muscles. He applied the standards of *The Guides Newsletter* and identified the CDX, L5 radiculopathy, as a class 1 grade C impairment with a default value of seven percent for severe sensory loss and a class 1 grade C impairment with a default value of five percent for mild motor weakness. Next, Dr. McAlister found that appellant had a GMFH of 3 and that GMPE and GMCS were not applicable. He concluded that appellant had 15 percent permanent impairment of his left lower extremity based on motor and sensory deficits associated with the right L5 dermatomes.

In contrast, Dr. Sharp determined in his September 4, 2020 report that appellant had five percent left lower extremity impairment. He noted that no spasm or atrophy was found on examination, and that the left hip, knee, and ankle demonstrated 5/5 motor strength. Dr. Sharp reported moderate decreased left L5 dermatone pinprick sensation and moderate left lumbar paraspinal muscle tenderness. He applied the standards of *The Guides Newsletter* and identified the CDX, L5 radiculopathy, with a class 1 default value of three percent for the moderate sensory deficit. Dr. Sharp found no motor impairment. In rating appellant's impairment for sensory loss, he assigned a GMFH of 2 for pain and symptoms with normal activity. Next, Dr. Sharp assigned a GMPE of 2 for diminished light touch and a GMCS of 2 for magnetic resonance imaging scan findings. He calculated that appellant had a net adjustment of 3, resulting in movement from the default class of C to E and corresponding to five percent permanent impairment of the left lower extremity. As well, Dr. Katz indicated in his October 19 and 27, 2020 reports that he concurred with Dr. Sharp's assessment that appellant had five percent left lower extremity permanent impairment due to sensory deficits and no motor deficits pursuant to *The Guides Newsletter*.

[19] *D.C.*, Docket No. 20-0897 (issued August 11, 2021); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

[20] *A.D.*, Docket No. 20-0553 (issued April 19, 2021); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

The Board thus finds that Dr. McAllister identified the CDX as a class 1 impairment with a default value of seven percent for severe sensory loss and a class 1 impairment with a default value of five percent for mild motor weakness. However, Dr. Sharp and Dr. Katz identified the CDX with a default value of three percent for moderate sensory deficit, and no motor impairment. A conflict therefore exists in the medical examination findings regarding appellant's sensory and motor deficit resulting from his L5 peripheral nerve impairment.

Consequently, the case must be referred to an IME, pursuant to 5 U.S.C. § 8123(a), to resolve the existing conflict in the medical opinion evidence regarding permanent impairment of appellant's left lower extremity.[21] On remand OWCP shall refer appellant, along with the case file and the SOAF, to a specialist in the appropriate field of medicine for an impartial medical evaluation and report including a rationalized opinion on this matter. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's schedule award claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA[22] provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.[23] Section 8129(a) of FECA provides, in pertinent part:

> "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."[24]

If a claimant received a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.[25] If, during the course of the appeals process, it is determined that the initial schedule award decision must be set aside, a new schedule award decision should be issued that fully addresses the reasons for the change in rating. Declaring an overpayment thereafter is appropriate if the *de novo* decision substantiates a lesser degree of impairment than previously awarded, so long as both ratings are based on the same edition of the A.M.A., *Guides*. The resulting overpayment should have a finding of without fault.[26]

---

[21] *Id*.

[22] *Supra* note 2

[23] 5 U.S.C. § 8102(a).

[24] *Id*. at § 8129(a).

[25] *See M.F.*, Docket Nos. 21-0759 & 21-1037 (issued May 4, 2022); *D.M.*, Docket No. 21-1124 (issued July 7, 2022).

[26] *Id*. *See supra* note 13 at *Hearings and Review of the Written Record,* Chapter 2.1601.8c (February 2022).

ANALYSIS -- ISSUE 2

In light of the Board's disposition of Issue 1, the Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of $9,022.62 for the periods March 16 to August 24, 2008, and May 2 to July 1, 2018. Therefore, the April 22, 2021 decision must be reversed.[27]

CONCLUSION

The Board finds that this case is not in posture for a decision regarding whether appellant has met his burden of proof to establish greater than 11 percent permanent impairment of his left lower extremity. The Board further finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of $9,022.62 for the periods March 16 to August 24, 2008 and May 2 to July 1, 2018.

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2021 decision of the Office of Workers' Compensation Programs regarding the denial of an increased schedule award is set aside; the case is remanded for further proceedings consistent with this decision of the Board. The April 22, 2021 decision of the Office of Workers' Compensation Programs regarding the overpayment is reversed, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 29, 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

[27] In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.