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

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| **T.T., Appellant**<br><br>**and**<br><br>**DEPARMENT OF VETERANS AFFAIRS, WEST LOS ANGELES VA MEDICAL CENTER, Los Angeles, CA, Employer** | **Docket No. 22-0649**<br>**Issued: September 22, 2022** |

*Appearances:*
*Brett Elliot Blumstein*, *Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

### *JURISDICTION*

On March 28, 2022 appellant, through counsel, filed a timely appeal from a March 16, 2022 merit decision 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.

[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*.

## *ISSUE*

The issue is whether appellant has met her burden of proof to establish permanent impairment of her lower extremities, warranting a schedule award.

## *FACTUAL HISTORY*

On October 10, 2017 appellant, then a 51-year-old dentist, filed an occupational disease claim (Form CA-2) alleging that she developed cervical myelopathy, cervical radiculopathy, cervical stenosis, and degenerative disc disease due to factors of her federal employment, including prolonged standing, bending, holding neck in an awkward position, and repetitive use of her hands and arms. She noted that she first became aware of her conditions and their relation to her federal employment on August 8, 2016. Appellant stopped work on August 26, 2016 and did not return. OWCP accepted the claim for aggravation spondylopathy, aggravation of C5-6 cervical disc disorder with radiculopathy, and aggravation of mid cervical region cervical disc disorder with myelopathy. It subsequently expanded the acceptance of the claim to include lumbar disc disorder with myelopathy, bilateral L5 and S1 spinal nerve radiculopathy, and lumbar disc disorder with radiculopathy.

On December 28, 2018 and December 20, 2019 appellant filed claims for a schedule award (Form CA-7).

In a report dated August 29, 2019, Dr. John W. Ellis, Board-certified in environmental medicine and family medicine, noted the history of appellant's injury. On examination of her lower extremities, he reported lumbar paraspinous muscle tightness and tenderness, iliolumbar muscle tenderness, decreased sensation to light touch, pin prick, monofilament testing, and 2-point discrimination, intact vibratory sensation, positive bilateral straight leg raising and Bragard's sign, negative Romberg, and bilateral foot dorsiflexion and plantar flexion weakness. Based on his examination findings, Dr. Ellis opined that appellant had reached maximum medical improvement as of August 29, 2019. He applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairmen*t (A.M.A., *Guides*)[3] and *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), to his findings and determined that she had nine percent permanent impairment of each lower extremity. Dr. Ellis also noted appellant's physical examination findings regarding her upper extremities, and found that pursuant to *The Guides Newsletter* she had 25 percent permanent impairment of each upper extremity.

In an August 8, 2020 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed Dr. Ellis' August 29, 2019 report and determined that appellant had 21 percent right upper extremity permanent impairment and 20 percent left upper extremity permanent impairment.

In a report dated October 29, 2020, Dr. Jeffrey Wang, a Board-certified orthopedic surgeon, noted appellant's history of injury and physical examination findings. Regarding her bilateral lower extremities, he reported 5/5 L2-S1 myotomes strength, intact sensation to light

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

touch in L2-S1 dermatomes, intact pedal pulses, no pain with passive range of motion (ROM), calves soft, nontender to palpation, and 4+ Patellar and Achilles reflexes, 2 beats clonus.[4]

On April 8, 2021 OWCP requested that Dr. Katz provide a permanent impairment rating for appellant's bilateral lower extremities using Dr. Ellis' report. In a report dated April 14, 2021, Dr. Katz reviewed appellant's physical examination findings provided by Dr. Ellis. He also reviewed her physical examination findings provided by Dr. Wang in his October 29, 2020 report. Dr. Katz concluded that the examination findings noted by Dr. Ellis and those by Dr. Wang were in conflict. He recommended a second opinion examination to address the discrepancies.

On August 5, 2021 OWCP referred appellant, including a SOAF and medical record, to Dr. Clive Segil a Board-certified orthopedic surgeon, for a second opinion evaluation regarding permanent impairment of her bilateral lower extremities.

In a September 15, 2021 report, Dr. Segil described appellant's employment injury and noted review of her ongoing symptoms. On physical examination, he reported positive bilateral straight leg raising, negative bilateral bowstring tests, negative bilateral Nafziger signs, and no evidence of any bilateral sciatic tenderness. A neurologic examination of appellant's lower extremities revealed no wasting or weakness and variable areas of increased and decreased sensation, which were nonreproducible. Dr. Segil diagnosed lumbosacral sprain and chronic lumbar degenerative changes. He applied the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* to his findings and determined that appellant had no bilateral lower extremity permanent impairment. Dr. Segil explained that her lumbar examination was essentially normal and the November 1, 2020 magnetic resonance imaging scan showed chronic degenerative disc changes with mild L1-2 and L5-S1 disc bulges without significant spinal canal stenosis or foraminal narrowing.

OWCP referred Dr. Segil's September 15, 2021 report to DMA Dr. Katz. In a February 15, 2022 report, Dr. Katz noted that he had recommended a second opinion as he did not find Dr. Ellis' bilateral lower extremity impairment evaluation to be probative. He reviewed Dr. Segil's report, noting that he had not found reproducible myotomal motor/dermatomal sensory deficits in either of appellant's lower extremities. Dr. Katz explained that Dr. Segil's examination findings concurred with the examination findings found by Dr. Wang in his October 29, 2020 report. He found no ratable permanent impairment of the lower extremities due to the accepted lumbar spine conditions. Dr. Katz opined that the weight of the medical evidence rested with Dr. Segil's impairment opinion rather than that of Dr. Ellis. Under *The Guides Newsletter* proposed Table 2, Spinal Nerve Impairment: Lower Extremity Impairment, the DMA found no motor or sensory deficit of the bilateral lower extremities from the peripheral nerves at L3, L4, L5, and S1. Dr. Katz concluded that each lower extremity had 0 percent permanent impairment. The DMA further opined that the A.M.A., *Guides* did not allow for an alternative ROM impairment calculation for the accepted conditions.

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[4] By decision dated March 1, 2021, OWCP granted appellant a schedule award for 20 percent permanent impairment of the left upper extremity and a 21 percent permanent impairment of the right upper extremity.

By decision dated March 16, 2022, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of her lower extremities, warranting a schedule award.

## ***LEGAL PRECEDENT***

The schedule award provisions of FECA[5] and its implementing federal regulations,[6] 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 loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

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.[9] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[10]

The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment using *The Guides Newsletter*, which is a supplemental publication of the sixth edition of the A.M.A., *Guides*. 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.[11]

Section 8123(a) of FECA provides in pertinent part that 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.[12]

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[5] *Supra* note 2.

[6] 20 C.F.R. § 10.404.

[7] *Id. See also P.L.*, Docket No. 21-0821 (issued April 15, 2022); *D.D.*, Docket No. 20-0897 (issued August 11, 2021); *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

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

[9] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see D.D.*, *supra* note 7; *A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[10] *Supra* note 8 at Chapter 2.808.5(c)(3) (March 2017).

[11] *Id.* at Chapter 3.700, Exhibit 4 (January 2010).

[12] 5 U.S.C. § 8123(a).

## ***ANALYSIS***

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

In his August 22, 2019 report, Dr. Ellis reported that appellant's neurological examination of the lower extremities revealed decreased sensation to light touch, pin prick, monofilament testing, and 2-point discrimination. He also noted lumbar paraspinous muscle tightness and tenderness, iliolumbar muscle tenderness, positive bilateral straight leg raising and Bragard's sign, negative Romberg, and bilateral foot dorsiflexion and plantar flexion weakness. Dr. Ellis based his impairment rating of nine percent permanent impairment of each lower extremity on these positive findings.

In contrast, Dr. Segil reported that appellant had variable areas of increased and decreased sensation, which he found nonreproducible, and no wasting or weakness. He opined that she had no impairment for the lower extremities under *The Guides Newsletter*.

Dr. Katz thereafter opined that the weight of the medical evidence rested with the impairment report of Dr. Segil, whose examination findings concurred with those of Dr. Wang, over the impairment opinion and examination findings of Dr. Ellis. He concluded that appellant had no permanent impairment of either lower extremity pursuant to *The Guides Newsletter*.

The Board finds that a conflict exists in the medical opinion evidence between Dr. Ellis and Drs. Segil and Katz as to whether appellant has sensory or motor deficits of the lower extremities due to peripheral nerve impairment arising from appellant's accepted lumbar conditions, warranting a schedule award.[13]

Consequently, the case must be remanded for further development. On remand, OWCP shall refer appellant, along with the case file and a SOAF, to a specialist in the appropriate field of medicine for an impartial medical evaluation to resolve the existing conflict in the medical opinion evidence regarding the extent of appellant's bilateral lower extremity permanent impairment, if any. After this and other such further development as deemed necessary, it shall issue a *de novo* decision.

## ***CONCLUSION***

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

[13] *Id.*; *see V.S.*, Docket No. 21-1300 (issued April 25, 2022); *L.P.*, Docket No. 21-0409 (issued November 5, 2021).

***ORDER***

**IT IS HEREBY ORDERED THAT** the March 16, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: September 22, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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