

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

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<b>L.L., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-0625</b>
	)	<b>Issued: January 17, 2023</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Fresno, CA, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*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 9, 2021 appellant filed a timely appeal from October 19, 2020 and February 3, 2021 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the February 3, 2021 decision, appellant submitted additional evidence to OWCP and on appeal to the Board. However, the Board's *Rules of Procedures* 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.

## ISSUE

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

## FACTUAL HISTORY

On September 30, 2005 appellant, then a 42-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she developed a lumbar sprain due to factors of her federal employment. She note that she first became aware of her condition and realized its relation to her federal employment on April 25, 2005. OWCP accepted the claim for a sprain/strain of the lumbar region. It paid appellant wage-loss compensation.<sup>3</sup>

On September 28, 2009 appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine, which revealed advanced facet arthropathy with joint effusion at L4-5.

An electromyogram and nerve conduction velocity (EMG/NCV) study performed on January 6, 2014 revealed active right radiculopathy at L5 and mild-to-moderate sensorimotor demyelinating peripheral polyneuropathy.

In a report dated July 19, 2019, Dr. Harwinder Singh, a Board-certified physiatrist, noted findings on examination of the low back of deepening of lumbar lordotic curvature, limited range of motion with flexion 50 percent of normal, extension 10 to 20 percent of normal, localized tenderness in the bilateral S1 joints, and negative straight leg test bilaterally. He diagnosed chronic lower back pain due to degenerative arthritis and difficulty walking. Dr. Singh noted that OWCP requested permanent impairment based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides)*;<sup>4</sup> however, he indicated that this edition was highly complicated and that the industry standard was the fifth edition of the A.M.A., *Guides*.<sup>5</sup> Dr. Singh noted noticeable muscle spasms, guarding, and decreased range of motion with nonverifiable radicular complaints for five percent whole person impairment.

Dr. Singh provided a corrected supplemental report dated August 22, 2019 and provided an updated impairment rating pursuant to the fifth edition of the A.M.A., *Guides*. He opined that

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<sup>3</sup> OWCP assigned the present claim OWCP File No. xxxxxx946. Appellant also has a claim accepted under OWCP File No. xxxxxx668 for bilateral shoulder impingement syndrome. By decision dated December 30, 2016, under OWCP File No xxxxxx668, OWCP granted her a total of three percent permanent impairment of the right upper extremity and one percent permanent impairment of the left upper extremity. The period of the award ran from June 16 through August 20, 2016. By decision dated April 27, 2018, OWCP granted appellant an additional three percent permanent impairment of the right upper extremity for a total of six percent permanent impairment right upper extremity impairment and an additional five percent permanent impairment of the left upper extremity for a total of six percent permanent impairment of the left upper extremity. The period of the award ran from September 13, 2017 through August 28, 2018. Appellant's claims in OWCP File Nos. xxxxxx946 and xxxxxx668 have been administratively combined, with the latter serving as the master file.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>5</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

pursuant to the diagnosis-related estimate method appellant was lumbar spine category III and had 18 percent whole person impairment.

On September 4, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On September 20, 2019 OWCP requested that Dr. Singh determine the extent of any employment-related permanent impairment. It indicated that he used the fifth edition of the A.M.A., *Guides* in his July 19, 2019 report, which was inappropriate and noted that the sixth edition of the A.M.A., *Guides* was the most recent version that must be used to rate appellant's impairment. Appellant's claim was accepted for sprain of the back lumbar region and, therefore, advised him that he should rate her impairment using *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment* (July/August 2009) (*The Guides Newsletter*), a supplemental publication of the A.M.A., *Guides*.<sup>6</sup>

In a September 27, 2019 response to OWCP's development letter, Dr. Singh recommended that OWCP refer appellant to another physician to complete the permanent impairment using the sixth edition of the A.M.A., *Guides*.

On January 29, 2020 OWCP referred appellant to Dr. Matthew Chan, Board-certified in occupational medicine, for a second opinion examination to determine the extent of any employment-related permanent impairment. It advised him that he should rate her impairment using *The Guides Newsletter*.<sup>7</sup>

In a February 21, 2020 report, Dr. Chan diagnosed chronic lumbar strain injury with MRI scan evidence of disc herniations and EMG/NCV studies consistent with right L5 radiculopathy. He noted that symptomatically appellant did not have significant radiculitis or sciatica, no motor or reflex deficits in the lower extremities, bilateral lower extremity weakness in both thighs and calf muscles, and intermittent numbness in the bottom of the left foot. Dr. Chan indicated that her subjective findings did not match the objective findings. He opined that there was no impairment in the upper extremities related to the lumbar spine. With regard to the lower extremities, appellant reported numbness and Dr. Chan detected decreased sensation in the bottom of the left foot along the distribution of the medial plantar nerve, which has an L5 contribution. Dr. Chan utilized the A.M.A., *Guides* to find that, under Table 16-12 (Peripheral Nerve Impairment), pages 534-36, the class of diagnosis (CDX) for her medial plantar nerve resulted in a class 1, mild problem, with a default impairment of one. He noted a grade modifier for functional history (GMFH) of zero, a grade modifier for physical examination (GMPE) was not used pursuant to the A.M.A., *Guides*, and a grade modifier for clinical studies (GMCS) was 1 based on the MRI scan and EMG/NCV studies. Utilizing the net adjustment formula,  $(GMFH - CDX) + (GMCS - CDX) = (1 - 1) + (1 - 1) = 0$ , Dr. Chan calculated a one percent permanent impairment of the left lower extremity. He noted maximum medical improvement occurred on February 21, 2020.

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<sup>6</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>7</sup> *Id.*

On April 7, 2020 OWCP referred appellant's case record and Dr. Chan's February 21, 2020 report to Dr. Amanda C. Trimpey, Board-certified in occupational medicine serving as the district medical adviser (DMA), to determine the extent of any employment-related permanent impairment. It advised her that she should rate appellant's impairment using *The Guides Newsletter*.

In an April 16, 2020 report, the DMA noted Dr. Chan's assessment was chronic lumbar strain injury with EMG/NCV findings consistent with L5 radiculopathy. Dr. Chan noted no motor loss in the lower extremities, but found isolated sensory loss on the bottom of the left foot. He concluded that appellant's physical examination did not match her EMG/NCV findings. Dr. Chan provided an impairment rating based on clinical findings and physical examination stating that her symptoms and findings were not related to her back, but were related to left foot numbness. The DMA concurred in this finding. She utilized the A.M.A., *Guides* and referred to Table 16-3, medial plantar nerve, page 537. The DMA noted sensory deficit was mild. Using Table 16-12, pages 536, for the medial plantar nerve, mild sensory loss placed appellant in class 1 impairment with a default value of one. The DMA noted a GMFH of zero, GMPE was not used, and GMCS was 1 based on the MRI scan and EMG/NCV findings. Using the net adjustment formula the total adjustment was +1 for one percent permanent impairment of the left lower extremity.

By decision dated May 6, 2020, OWCP granted appellant a schedule award for one percent permanent impairment of the left lower extremity. The period of the award ran from February 21 through March 12, 2020.

On May 12, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 12, 2020.

Appellant submitted progress reports dated March 30 through July 15, 2020, wherein Dr. Singh noted diagnoses and opined that she remained totally disabled from work.

By decision dated October 19, 2020, OWCP's hearing representative affirmed the May 6, 2020 decision.

Appellant subsequently submitted progress notes dated February 25, 2009 through January 11, 2021, wherein Dr. Singh treated her for chronic low back pain and bilateral knee pain.

On November 20, 2020 appellant requested reconsideration.

By decision dated February 3, 2021, OWCP denied modification of the October 19, 2020 decision.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>8</sup> and its implementing federal regulations,<sup>9</sup> set forth the number of weeks of compensation payable to employees sustaining permanent

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<sup>8</sup> *Supra* note 1.

<sup>9</sup> 20 C.F.R. § 10.404.

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.<sup>10</sup> 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.<sup>11</sup>

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*.<sup>12</sup> 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.<sup>13</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>14</sup> Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>15</sup>

Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.<sup>16</sup> Furthermore, the back is specifically excluded from the definition of organ under FECA.<sup>17</sup> The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.<sup>18</sup> The Board has recognized the adoption of this methodology for rating extremity impairment,

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<sup>10</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.*, at Chapter 3.700, Exhibit 1 (January 2010).

<sup>11</sup> *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).

<sup>12</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), p.3, section 1.3a.

<sup>13</sup> *Id.* at 494-531.

<sup>14</sup> *Id.* 521.

<sup>15</sup> *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>16</sup> *K.Y.*, Docket No. 18-0730 (issued August 21, 2019); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>17</sup> *See* 5 U.S.C. § 8101(19); *see also G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

<sup>18</sup> *Supra* note 10 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.<sup>19</sup>

### ANALYSIS

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

OWCP accepted appellant's claim for a sprain/strain of the lumbar region. Appellant filed a claim for a schedule award and submitted reports from Dr. Singh, her treating physician, dated July 19 and August 22, 2019. Dr. Singh rated her using the fifth edition of the A.M.A., *Guides* and indicated that he could not provide an impairment rating using the sixth edition of the A.M.A., *Guides*. OWCP subsequently referred appellant to Dr. Chan for a second opinion examination to determine the extent of any employment-related permanent impairment. In a February 21, 2020 report, Dr. Chan utilized the A.M.A., *Guides* and referred to Table 16-12, Peripheral Nerve Impairment, and determined that appellant was a class 1 mild problem with a default impairment of one percent of the medial plantar nerve. He applied the net adjustment formula and found one percent permanent impairment of the left lower extremity.

OWCP subsequently routed appellant's claim to a DMA for review. In an April 16, 2020 report, the DMA referenced Table 16-12 (Peripheral Nerve Impairment), medial plantar nerve, and determined that appellant was a class 1 impairment with a default value of one. Using the net adjustment formula she calculated one percent permanent impairment of the left lower extremity.

However, both Dr. Chan and the DMA failed to utilize *The Guides Newsletter* in rendering evaluation of appellant's permanent impairment due to her accepted lumbar injury.<sup>20</sup> 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*.<sup>21</sup> Dr. Chan and the DMA did not apply the specific methodology for rating spinal nerve impairments affecting the upper or lower extremities in accordance with the A.M.A., *Guides*.<sup>22</sup> Rather, Dr. Chan and the DMA determined that appellant had one percent permanent impairment of the left lower extremity according to Table 16-12 of the A.M.A., *Guides*. They failed to discuss the standards of *The Guides Newsletter*, the above-described FECA-approved

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<sup>19</sup> *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

<sup>20</sup> *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).

<sup>21</sup> *Supra* note 12; *see T.K.*, Docket No. 19-1222 (issued December 2, 2019); *see also C.K.*, Docket No. 16-1294 (issued January 13, 2017).

<sup>22</sup> *See L.L.*, Docket No. 19-0214 (issued May 23, 2019); *see also G.S.*, Docket No. 13-1649 (issued December 24, 2013).

methodology, which provides for a permanent impairment rating based on peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries.<sup>23</sup>

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.<sup>24</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>25</sup> Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.<sup>26</sup>

The case will, therefore, be remanded to OWCP for clarification or a supplemental report from Dr. Chan regarding whether appellant sustained permanent impairment as a result of her accepted lumbar strain injury in accordance with *The Guides Newsletter*.<sup>27</sup> After this and other such further development of the case record as deemed necessary, OWCP shall issue a *de novo* decision.<sup>28</sup>

### CONCLUSION

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

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<sup>23</sup> See *id.*, at § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997); *supra* note 10 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>24</sup> *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

<sup>25</sup> *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>26</sup> *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

<sup>27</sup> *Supra* note 10 at Chapter 2.808.6(f) (March 2017).

<sup>28</sup> See *E.T.*, *Order Remanding Case*, Docket No. 18-0262 (issued November 22, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 19, 2020 and February 3, 2021 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: January 17, 2023  
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