United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 22-0930**
	)	**Issued: January 19, 2023**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, Corpus Christi, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On May 31, 2022 appellant filed a timely appeal from an April 13, 2022 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 three percent permanent impairment of the left lower extremity for which he previously received a schedule award.

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

On August 26, 2018 appellant, then a 35-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on August 25, 2018 he sustained an injury to his lower back when he attempted to sit in a chair which was lower than expected and lost his balance and fell while in the performance of duty. OWCP accepted the claim for aggravation of radiculopathy of the lumbosacral region.

Appellant had previously filed a Form CA-1 for an injury sustained to his back on July 23, 2017 when he stepped in a hole with his right foot while pursuing subjects while in the performance of duty. OWCP assigned OWCP File No. xxxxxx323. It accepted that claim for radiculopathy of the lumbar region.[2]

Dr. David M. Hirsch, an osteopath and specialist in physical medicine and rehabilitation, treated appellant on October 8 and December 18, 2018 for low back pain radiating down the bilateral lower limbs with an onset date of July 23, 2017. Appellant reported reinjuring his back at work while attempting to sit in a chair, which exacerbated his radicular symptoms. Dr. Hirsch noted moderate-to-severe disc degeneration at L5-S1, mild disc degeneration at L4-5, tear at L4-5, and a disc protrusion and tear at L5-S1. He diagnosed degeneration of lumbar intervertebral disc, herniation of nucleus pulposus of lumbar intervertebral disc, lumbar radiculopathy, chronic low back pain and lumbosacral radiculopathy. On February 12, 2019 Dr. Hirsch advised that conservative treatment failed and recommended surgical intervention.

Appellant came under the treatment of Dr. M. David Dennis, a Board-certified orthopedist, from March 11, 2019 through July 31, 2020 for low back, bilateral buttocks, and bilateral leg pain and lower extremity weakness and numbness. Dr. Dennis noted that appellant had extensive conservative care that included physical therapy and three intra-articular injections with minimal pain relief. He diagnosed lumbar radiculopathy, lumbar disc disorder with myelopathy, lumbar spondylosis with myelopathy, degeneration of lumbar intervertebral disc, and low back pain. On May 10, 2019 Dr. Dennis noted an electromyogram and nerve conduction velocity study was negative for radiculopathy.

A magnetic resonance imaging (MRI) scan of the lumbar spine dated March 25, 2019 revealed L5-S1 paracentral disc protrusion, minimal L2-3 paracentral disc protrusion, and L4-5 posterior annular tear. A July 28, 2020 MRI scan of the lumbar spine revealed small paracentral disc protrusions noted at L2-3, L4-5, and L5-S1, which mildly progressed over the prior study at L4-5.

On February 11, 2021 Dr. Dennis performed a laminectomy at L5-S1, bilateral discectomy at L5-S1, foraminotomies bilaterally at L5-S1 nerve roots, and decompression of the lateral recesses bilaterally and diagnosed lumbar radiculopathy and lumbar disc disorder with myelopathy. He treated appellant on April 29 and July 8, 2021 for chronic back pain status-post discectomy. Dr. Dennis diagnosed lumbar post-laminectomy syndrome and high blood pressure and recommended weight loss. On October 15, 2021 he reevaluated appellant and diagnosed

[2] This claim was administratively combined by OWCP with the current claim before the Board, with the present claim designated as the master file.

permanent L5 and S1 nerve root damage and chronic pain syndrome. Dr. Dennis released appellant to permanent light-duty work. In a work capacity evaluation (Form OWCP-5c), he noted that appellant reached maximum medical improvement (MMI) and provided permanent light-duty work restrictions.

On October 25, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In support of his claim, appellant submitted a report from Dr. Charles W. Kennedy, Jr., a Board-certified orthopedist, dated October 26, 2021, who noted appellant's history of injury and medical treatment. Dr. Kennedy diagnosed L5 radiculopathy. He utilized *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment (The Guides Newsletter*) (July/August 2009), and opined that appellant had two percent permanent impairment of the left lower extremity.

In a development letter dated November 17, 2021, OWCP requested an impairment evaluation addressing whether appellant had reached MMI and an impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] It referenced a November 17, 2021 telephone call with appellant who requested OWCP disregard the October 26, 2021 schedule award report from Dr. Kennedy and afford him the opportunity to submit another report. OWCP advised that, if appellant's physician was unable or unwilling to provide the required report, to notify OWCP in writing and if his case met the essential elements for a schedule award claim, it would schedule an examination with a second opinion specialist. It afforded him 30 days to submit additional medical evidence in support of his schedule award claim.

In support of his request, appellant submitted a December 30, 2021 report from Dr. Yury Sless, a Board-certified orthopedist. Dr. Sless reviewed appellant's history of injury and performed a physical examination. He noted that appellant underwent a laminectomy L5-S1, bilateral discectomy at L5-S1, foraminotomies bilaterally and L5-S1 nerve root, and decompression of the lateral recesses bilaterally on February 11, 2021. Dr. Sless noted findings on physical examination of normal even gait, ambulation without difficulty, a well-healed surgical scar on the lumbar spine, and positive straight leg testing on the left. He noted manual muscle testing of the lower extremities bilaterally at L1, L2, L3, L4, L5, and S1 was 5/5, pinwheel testing of the lower extremities bilaterally revealed L1, L2, L3, L4, L5, and S1 within normal limits with the exception of left L5 and S1 that revealed hypoesthesia. Dr. Sless indicated that appellant reached MMI on December 8, 2021. He noted a pain disability questionnaire was administered and a score of 122 was recorded. Dr. Sless referred to *The Guides Newsletter*, Proposed Table 2, Spinal Nerve Impairment Lower Extremity Impairments. He explained that appellant had a mild sensory deficit at L5, class of diagnosis (CDX), which was a class 1 impairment with a default value of 1 percent. Dr. Sless assigned a grade modifier for functional history (GMFH) of 3, which resulted in a net adjustment of 2 from the default value, and equaled a Class 1, grade E impairment rating of two percent permanent impairment of the left lower extremity. Regarding left S1 mild sensory deficit, he was assigned a Class 1 impairment and assigned a GMFH of 3, therefore, the net adjustment was 2, which equaled Class 1, grade E impairment rating of one percent permanent

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

impairment of the left lower extremity. Dr. Sless concluded that appellant had three percent permanent impairment of the left lower extremity.

On March 25, 2022 OWCP prepared a statement of accepted facts (SOAF) and referred appellant's case record and Dr. Sless' December 30, 2021 report to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA), to determine the extent of any employment-related permanent impairment. It advised him that he should rate appellant's impairment using *The Guides Newsletter*.

In a March 29, 2022 report, Dr. Katz reviewed the SOAF and the medical record, including Dr. Sless' report. He concurred with Dr. Sless' opinion that appellant had three percent permanent impairment of the left lower extremity. Dr. Katz explained that appellant had a mild sensory deficit at L5, CDX, which had a default value of one percent. He assigned a GMFH of 3 and assigned a grade modifier for clinical studies (GMCS) of 1, which resulted in a net adjustment of 2 from the default value, and equaled a Class 1, grade E, impairment rating of two percent permanent impairment of the left lower extremity. Dr. Katz further explained that appellant had a mild sensory deficit at S1, CDX, which had a default value of one percent. He assigned a GMFH of 3 and assigned a GMCS of 1 resulting in a net adjustment of 2 from the default value, which equaled a Class 1, grade E impairment rating of one percent permanent impairment of the left lower extremity. The DMA concluded that appellant had three percent permanent impairment of the left lower extremity. He advised that appellant reached MMI on December 30, 2021 the date of Dr. Sless' examination.

By decision dated April 13, 2022, OWCP granted appellant a schedule award for three percent permanent impairment of the left lower extremity (left leg). The period of the award ran for 8.64 weeks from December 30, 2021 through February 28, 2022.

LEGAL PRECEDENT

The schedule award provisions of FECA,[4] and its implementing federal regulations,[5] 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 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.[6] The Board has approved the use by

[4] *Supra* note 1.

[5] 20 C.F.R. § 10.404.

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

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.[7]

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*.[8] Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by GMFH, grade modifier for physical examination (GMPE), and GMCS.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

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.[12] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[13] 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 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. Proposed Table 2 of *The Guides Newsletter* provides that the maximum permanent impairment for impairment associated with a single nerve is 13 percent. The appropriate tables for rating spinal nerve extremity impairment are incorporated in OWCP's procedures.[14]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than three percent permanent impairment of the left lower extremity for which he previously received a schedule award.

On December 30, 2021 Dr. Sless noted manual muscle testing of the lower extremities bilaterally at L1, L2, L3, L4, L5, and S1 was 5/5 and pinwheel testing of the lower extremities bilaterally revealed L1, L2, L3, L4, L5, and S1 was normal with the exception of left L5 and S1

[7] *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).

[8] A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3a *ICF*.

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

[10] *Id.* 521.

[11] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[12] 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).

[13] *Supra* note 6 at Chapter 2.808.5c(3) (March 2017).

[14] *Supra* note 6 at Chapter 3.700, Exhibit 4 (January 2010).

that revealed hypoesthesia. He noted a Pain Disability Questionnaire was administered and a score of 122 was recorded. Dr. Sless referenced *The Guides Newsletter*, Proposed Table 2, Spinal Nerve Impairment Lower Extremity Impairments and noted that appellant had a mild sensory deficit at left L5, CDX, a class 1 impairment, which yielded a default value of one percent. He assigned a GMFH of 3 and applied the net adjustment formula, which yielded a net adjustment of 2 moving the default value to grade E, for a two percent permanent impairment of the left lower extremity. Regarding left S1 mild sensory deficit, CDX, Dr. Sless explained that it was a class 1 impairment, which yielded a default value of one percent. He assigned GMFH of 3 and applied the net adjustment formula, which resulted in a net adjustment of 2, grade E, impairment rating of one percent. Dr. Sless concluded that appellant had three percent permanent impairment of the left lower extremity.

On March 29, 2022 the DMA concurred with Dr. Sless' finding that appellant had two percent permanent impairment of the left lower extremity due to his L5 sensory loss and one percent permanent impairment of the left lower extremity due to S1 sensory loss. He determined that appellant had three percent permanent impairment of the left lower extremity due to mild sensory deficit at L5 and S1 after applying the net adjustment formula. The DMA noted that appellant had no permanent impairment due to motor loss of the lower extremities as Dr. Sless reported 5/5 strength of each lower extremity and no motor weakness. The Board has reviewed the DMA's rating and finds that he properly applied the net adjustment formula to the findings from Dr. Sless' report, pursuant to *The Guides Newsletter*. The evidence of record does not support that appellant had greater than three percent permanent impairment of the left lower extremity. The record contains no medical evidence in accordance with *The Guides Newsletter* demonstrating a greater percentage impairment of the left lower extremity.[15]

As there is no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter* establishing permanent impairment of a scheduled member or function of the body, the Board finds that appellant has not met his burden of proof.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing 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 three percent permanent impairment of his left lower extremity for which he previously received a schedule award.

[15] *See E.G.*, Docket No. 19-1081 (issued September 24, 2020); *T.K.*, *supra* note 7; *C.S.*, Docket No. 18-0920 (issued September 23, 2019).

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 19, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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