

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

L.D., Appellant)	
)	
and)	Docket No. 22-0927
)	Issued: July 3, 2023
U.S. POSTAL SERVICE, BIRMINGHAM POST)	
OFFICE, Birmingham, AL, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 28, 2022 appellant filed a timely appeal from an April 7, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 7, 2022 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* 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. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 29 percent permanent impairment of the right lower extremity, and 21 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 25, 1993 appellant, then a 38-year-old mail handler, filed a notice of traumatic injury (Form CA-1) alleging that he sustained a lumbar strain and herniated disc at L5-S1 as a result of bending over to pick up a 30- to 50-pound box at work.⁴ OWCP accepted the claim for lumbar sprain and displacement of lumbar intervertebral disc without myelopathy.

By decision dated April 30, 2009, OWCP granted appellant a schedule award for 21 percent permanent impairment of each lower extremity. The period of the award ran for 120.96 weeks from April 10, 2009 to August 4, 2011. The date of maximum medical improvement (MMI) was listed as April 10, 2009.

On August 19, 2010 appellant requested reconsideration.

By decision dated October 26, 2010, OWCP vacated the April 30, 2009 decision. It found that appellant's request for reconsideration was untimely filed, but granted it as the evidence submitted on reconsideration established clear evidence of error with regard to the date of MMI.

On November 16, 2010 OWCP issued amended schedule awards for 21 percent impairment of each lower extremity. The corrected date of MMI was noted as February 18, 1994. The period of the awards ran for 120.96 weeks from February 18, 1994 to June 13, 1996.

Appellant appealed the November 16, 2010 OWCP decision to the Board. By decision dated January 4, 2012, the Board found that he failed to establish greater than 21 percent permanent impairment of each lower extremity.

On May 18, 2021 appellant filed a claim for an increased schedule award.

In an October 25, 2021, Dr. Ralph D'Auria, Board-certified in physical medicine and rehabilitation, examined appellant and rated his permanent impairment of the right lower extremity at 34 percent. He used the spinal nerve impairment method of calculating impairment according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent*

³ Docket No. 11-620 (issued January 4, 2012); Docket No. 96-275 (issued December 3, 1997).

⁴ Appellant retired on disability from the employing establishment, effective February 18, 1994.

*Impairment (A.M.A., Guides)*⁵ and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition, July/August 2009 (The Guides Newsletter)*. Dr. D'Auria found that appellant had partial permanent impairments of the right lower extremity related to Class 1 lumbar spinal nerve deficits, with a grade modifier for functional history (GMFH) of 2 for pain and symptoms with normal activity; and a grade modifier for clinical studies (GMCS) of 2 due to MRI scan findings consistent with clinical presentation. He rated appellant's impairment as follows: a right L3 moderate sensory deficit at 3 percent lower extremity impairment; a right L4 mild motor deficit at 9 percent impairment; a right L4 moderate sensory deficit at 5 percent impairment; a right L5 mild motor deficit at 9 percent impairment; a right L5 moderate sensory deficit at 5 percent impairment; and a right S1 moderate sensory deficit at 3 percent impairment, for a total right lower extremity impairment rating of 34 percent.

In an addendum report dated January 12, 2022, Dr. D'Auria updated and recalculated appellant's impairment of the right and left lower extremities related to spinal nerve impairment according to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. He stated that appellant's 29 percent permanent impairment of the right lower extremity and 17 percent impairment of the left lower extremity were related to Class 1 lumbar spinal nerve deficits, with a GMFH of 2 due to pain and symptoms with normal activity and a GMCS of 2 as MRI scan findings were consistent with clinical presentation. Dr. D'Auria rated appellant's right lower extremity impairments as follows: a right L3 moderate sensory deficit at three percent impairment; a right L4 mild motor deficit at nine percent impairment; a right L4 moderate sensory deficit at five percent impairment; a right L5 mild motor deficit at nine percent impairment; a right L5 moderate sensory deficit at five percent impairment; and a right S1 moderate sensory deficit at three percent impairment. He rated appellant's left lower extremity impairments as follows: a left L4 mild motor deficit at nine percent impairment, and a left L5 mild motor deficit at nine percent impairment. Dr. D'Auria, using the Combined Values Chart, found that appellant's total right lower extremity permanent was 29 percent, and his total left lower extremity permanent impairment was 17 percent, using the Combined Values Chart. He used the spinal nerve impairment method of calculating impairment according to the A.M.A., *Guides* and *The Guides Newsletter*.

On February 19, 2022 appellant again requested an increased schedule award.

OWCP forwarded Dr. D'Auria's report, along with a statement of accepted facts (SOAF), to a district medical adviser (DMA), Dr. Nathan Hammel, a Board-certified orthopedic surgeon, for review. On March 16, 2022 the DMA replied, but misstated appellant's previously-accepted right lower extremity impairment as 42 percent rather than 21 percent. OWCP requested clarification from the DMA. In an updated March 28, 2022 report, the DMA, referring to *The Guides Newsletter* and the A.M.A., *Guides*, agreed with Dr. D'Auria's calculation of 29 percent permanent impairment of the right lower extremity and 17 percent permanent impairment of the left lower extremity impairment. He noted that the date of MMI was the date of the schedule award examination, January 12, 2022.

⁵ A.M.A., *Guides* (6th ed 2009).

By decision dated April 7, 2022, OWCP granted appellant an additional 8 percent permanent impairment of the right lower extremity for a total of 29 percent permanent impairment of the right lower extremity, and no additional permanent impairment for the left lower extremity. The schedule award ran from January 12 through March 26, 2022.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁶ and its implementing federal regulations,⁷ 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 of 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.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.¹⁰ Furthermore, the back is specifically excluded from the definition of organ under FECA.¹¹ 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 procedures indicate that *The Guides Newsletter* is to be applied.¹² The Board has recognized the adoption of this methodology for rating extremity impairment, 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.¹³

OWCP's procedures provide that, if a claimant's physician provides an impairment rating, the case should be routed to a DMA for an opinion concerning the nature and percentage of

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ *See L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹¹ *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).

¹² *Supra* note 9 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹³ *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 29 percent permanent impairment of the right lower extremity, or more than 21 percent impairment of the left lower extremity, for which he previously received schedule award compensation.

OWCP received an October 25, 2021 report and an addendum report dated January 12, 2022, wherein Dr. D'Auria evaluated appellant's permanent impairment rating of the bilateral lower extremities related to spinal nerve impairment according to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. Dr. D'Auria rated appellant's right lower extremity impairments as follows: a right L3 moderate sensory deficit at three percent impairment; a right L4 mild motor deficit at nine percent impairment; a right L4 moderate sensory deficit at five percent impairment; a right L5 mild motor deficit at nine percent impairment; a right L5 moderate sensory deficit at five percent impairment; and a right S1 moderate sensory deficit at three percent impairment. Utilizing the Combined Values Chart, Dr. D'Auria found appellant's total right lower extremity impairment was 29 percent. He then rated appellant's left lower extremity impairments as follows: a left L4 mild motor deficit at nine percent impairment, and a left L5 mild motor deficit at nine percent impairment. Dr. D'Auria found appellant's total left lower extremity impairment was 17 percent.

OWCP referred the report to the DMA, Dr. Hammel. In a report dated March 28, 2022, the DMA, referring to *The Guides Newsletter* and the A.M.A., *Guides*, agreed with Dr. D'Auria's calculation of 29 percent right lower extremity impairment and 17 percent left lower extremity impairment.

The Board finds that Dr. Hammel properly explained how he arrived at his rating of permanent impairment by reference to *The Guides Newsletter*. The Board also finds that he properly interpreted and applied the standards of the sixth edition of the A.M.A., *Guides* to conclude that appellant had 29 percent permanent impairment of the right lower extremity and 17 percent impairment of the left lower extremity. Dr. Hammel concurred with Dr. D'Auria's calculations as to the percentages of permanent impairment, after use of the Combined Values Chart.¹⁵ Thus, the opinion of Dr. Hammel represents the weight of the medical evidence.

The Board finds that there is no current medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than 29 percent permanent impairment of the right lower extremity and 21 percent permanent impairment of the left lower extremity. Accordingly, appellant has not established entitlement to greater schedule award compensation than that which was previously awarded.¹⁶

¹⁴ See *supra* note 9 at Chapter 2.808.6(e) (March 2017); *Tommy R. Martin*, 56 ECAB 273 (2005).

¹⁵ See *D.M.*, Docket No. 20-1464 (issued July 14, 2021).

¹⁶ See *M.P.*, Docket No. 18-1298 (issued April 12, 2019); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

Appellant may request a schedule award or increased schedule award at any time based on evidence of new exposure, or medical evidence showing a progression of an employment-related condition resulting in impairment or increased permanent impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than 29 percent permanent impairment of the right lower extremity, or more than 21 percent impairment of the left lower extremity, for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 3, 2023
Washington, DC

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

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

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