United States Department of Labor
Employees' Compensation Appeals Board

T.T., Appellant	)	
and	)	**Docket No. 23-0116**
	)	**Issued: June 28, 2023**
U.S. POSTAL SERVICE, INDIANAPOLIS PROCESSING & DISTRIBUTION CENTER, Indianapolis, IN, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 1, 2022 appellant filed a timely appeal from September 22, 2022 merit decisions 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 her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances as set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On January 8, 2019 appellant, then a 50-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on December 14, 2018 she sprained her thoracic and lumbar spine when she lifted trays out of the all-purpose container while in the performance of duty. She stopped work and returned to modified duty on December 21, 2018. OWCP accepted appellant's claim for lumbar sprain, sprain of sacroiliac joint, lumbar intervertebral disc disorder with myelopathy, and lumbosacral intervertebral disc disorder with radiculopathy. On March 11, 2019 appellant again stopped work. OWCP paid her wage-loss compensation on the supplemental rolls, effective March 11, 2019.[3]

On March 17, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a development letter dated March 17, 2020, OWCP requested that appellant provide a medical report from her treating physician, which included an impairment rating utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*). It afforded her 30 days to submit the requested information.

Appellant submitted reports dated October 17, 2017 through March 12, 2020 by Dr. Shiroo Parshad, a Board-certified oncologist, who treated appellant for chronic portal vein thrombosis. In reports dated February 3 and March 12, 2020, Dr. Parshad indicated that she had treated appellant for a history of vein thrombosis. She noted that appellant also complained of severe back pain and opined that appellant's liver was not the cause of the back pain. Dr. Parshad reviewed appellant's history of injury and conducted an examination. She diagnosed chronic portal vein thrombosis, thrombocytopenia, cirrhosis of the liver, and back injury.

In a report dated October 28, 2019, Dr. Sunita N. Premkumar, a Board-certified family practitioner, examined appellant's back and noted pain and spasm. She diagnosed esophageal varices without bleeding, major depressive disorder, abdominal bloating, other ascites, hepatic

[2] Docket No. 20-0687 (issued December 11, 2020); *Order Dismissing Appeal*, Docket No. 20-0864 (issued December 17, 2020).

[3] By decision dated March 6, 2020, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective March 6, 2020. Appellant filed an appeal to the Board, to which the Clerk of the Appellate Boards assigned Docket No. 20-0864. By *Order Dismissing Appeal* dated December 17, 2020, the Board found that the March 6, 2020 OWCP decision was null and void, as the Board had assumed jurisdiction under Docket No. 20-0687 over a related issue of expansion and dismissed her appeal assigned Docket No. 20-0864. *Order Dismissing Appeal*, Docket No. 20-0864 (issued December 17, 2020).

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

cirrhosis, chronic obstructive pulmonary disease, essential hypertension, and post-traumatic stress disorder.

By decision dated April 29, 2020, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

On May 13, 2020 appellant requested reconsideration.

A March 13, 2020 lumbar spine magnetic resonance imaging (MRI) scan demonstrated multilevel canal stenosis, primarily secondary to epidural lipomatosis and congenitally narrow lumbar canal, and relatively mild degenerative changes of the lumbar spine.

Appellant submitted a May 11, 2020 disability assessment summary report and functional capacity evaluation report, which indicated that she could perform light-duty work.

In a spine and pelvis impairment evaluation record dated May 27, 2020, Collin Gallagher, a certified athletic trainer, utilized the diagnosis-based impairment (DBI) rating method and noted a class of diagnosis (CDX) of lumbar sprain. He indicated a grade modifier for physical examination (GMPE) of 1 and reported that grade modifiers for functional history (GMFH) and clinical studies (GMCS) were not applicable. Mr. Gallagher determined that appellant had two percent permanent impairment of the whole person.

By decision dated August 5, 2020, OWCP denied modification of its prior decision.

On September 22, 2020 appellant requested reconsideration.

In reports dated September 16, 2020, Dr. Phillip Kingma, a Board-certified pain management specialist, evaluated appellant for a low back strain and noted the December 14, 2018 employment injury. He indicated that diagnostic imaging showed degenerative changes and vascular congestion that was more likely related to her previous portal vein thrombosis. Dr. Kingma indicated that appellant did not report significant neurogenic symptoms and could tolerate standing and walking for at least one hour. He reported that she had reached maximum medical improvement (MMI) from her injury on that date. Dr. Kingma indicated that appellant's initial low back injury had resolved and that her residual symptoms were more likely due to her underlying degenerative changes.

Appellant submitted an October 23, 2015 report by Dr. Gregory Merrell, a Board-certified orthopedic hand surgeon, who noted diagnoses of pain in forearm and knee stiffness. Dr. Merrell indicated that she complained of constant soreness across her right wrist and problems with her right grip losing control when gripping large bundles of mail. He utilized the DBI-rating method and determined that appellant had nine percent permanent impairment of the left upper extremity, which converted to five percent permanent impairment of the whole person.

OWCP referred the claim to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to provide an impairment rating in conformity with the A.M.A., *Guides* and *The Guides Newsletter*. In an October 31, 2020 report, Dr. Harris reviewed appellant's history of injury and noted her accepted conditions of lumbar

sprain, lumbar disc disorder, and lumbar radiculopathy. He explained that she did not have any neurologic deficit causing sensory or motor loss, therefore, she had Class 0 placement under Table 2 of *The Guides Newsletter*, resulting in zero percent permanent impairment of the lower extremity. Dr. Harris reported a MMI date of September 8, 2020.

By decision dated November 20, 2020, OWCP denied modification of its prior decision based on the October 28, 2020 DMA report.[5]

On April 30, 2021 appellant requested reconsideration and submitted an April 22, 2021 report by Dr. Ted Matthews, a chiropractor. By decision dated May 17, 2021, OWCP denied her request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a).

On July 16, 2021 appellant again requested reconsideration.

In a progress note dated May 12, 2021, Dr. Premkumar indicated that appellant was evaluated for complaints of chronic back pain. She reported diagnoses of chronic back pain, greater than three months duration, chronic lumbar radiculopathy, major depressive disorder, resolved esophageal varices without bleeding, resolved budd-chiari syndrome, and improved thrombocytopenia.

In a July 1, 2021 electromyography (EMG) and nerve conduction velocity (NCV) study report, Dr. Kristi Koch George, a Board-certified neurologist, noted an abnormal EMG/NCV study of the lower extremities. She indicated that findings were consistent with a moderate, chronic right L4 and L5 radiculopathy.

On July 29, 2021 OWCP requested that Dr. Harris review the additional medical reports and provide a supplemental report regarding whether appellant sustained a ratable impairment in the lower extremities pursuant to the A.M.A., *Guides* and *The Guides Newsletter*. In an August 2, 2021 supplemental report, Dr. Harris indicated that he had reviewed the additional medical records and noted that July 1, 2020 EMG/NCV study was consistent with right L4-5 radiculopathy. He reported that a review of the medical records showed no significant change in appellant's condition as compared to the September 8, 2020, the date of MMI. Utilizing the DBI-rating method, Dr. Harris referenced Table 2 of *The Guides Newsletter* and determined that she had no ratable impairment of the bilateral lower extremities because she did not have any neurologic deficits in the lower extremities consistent with lumbar radiculopathy. He explained that the range of motion rating methodology was not applicable as it was not permitted as an alternative rating method for appellant's condition under the A.M.A., *Guides*.

By decision dated August 23, 2021, OWCP denied modification of its prior decision based on Dr. Harris' August 2, 2021 report.

[5] By decision dated December 11, 2020, the Board affirmed the January 16, 2020 OWCP decision finding that appellant had not met her burden of proof to establish that the acceptance of her claim should be expanded to include an additional lumbar condition causally related to her accepted December 14, 2018 employment injury. Docket No. 20-0687 (issued December 11, 2020).

On June 2, 2022 appellant requested reconsideration and submitted progress notes and physical therapy reports dated August 6, 2021 through May 25, 2022. By decision dated July 8, 2022, OWCP denied her request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

On August 1, 2022 appellant requested reconsideration.

Appellant submitted a March 17, 2022 lumbar spine MRI scan, which revealed multilevel canal stenosis and relatively mild degenerative changes of the lumbar spine.

In a discharge summary report dated June 16, 2022, Dr. Philip C. Sailer, a Board-certified orthopedic surgeon, noted diagnoses of neurogenic claudication, lumbar pain, lumbar radiculopathy, and lumbar stenosis.

In a progress note dated July 7, 2022, Dr. Sailer noted appellant's complaints of continued low back pain radiating to her groin and legs. He conducted an examination and diagnosed lumbar stenosis with neurogenic claudication.

In a supplemental report dated August 10, 2022, Dr. Harris indicated that he reviewed the additional medical records and noted diagnosed conditions of lumbar multilevel degenerative changes and bulging and lumbar radiculopathy. He indicated that the medical records did not provide any objective evidence that appellant had any impairment in either lower extremity. Dr. Harris explained that she did not have any neurologic deficit causing sensory or motor loss, therefore, she had Class 0 placement under Table 2 of *The Guides Newsletter*, resulting in zero percent bilateral lower extremity permanent impairment.

By decision dated September 22, 2022, OWCP denied modification of its prior decision.

By separate decision also dated September 22, 2022, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body due to her accepted December 14, 2018 employment injury.

LEGAL PRECEDENT

The schedule award provisions of FECA[6] and its implementing 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. FECA, however, does not specify the manner in which the percentage of loss of a member 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 and the Board has concurred in such

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

adoption.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[9]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement*.[10] Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the CDX, which is then adjusted by a GMFH, GMPE, and GMCS.[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.[13]

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.[14] Furthermore, the back is specifically excluded from the definition of an organ under FECA.[15] 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 July/August 2009 edition of *The Guides Newsletter* is to be applied.[16]

ANALYSIS

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

In support of her claim for a schedule award, appellant submitted several reports, including a July 1, 2021 EMG/NCV study report, which revealed an abnormal study of the lower extremities that was consistent with a moderate, chronic right L4 and L5 radiculopathy.

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[8] *Id*. at § 10.404 (a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

[10] A.M.A., *Guides*, page 3, section 1.3.

[11] *Id*. at 493-556.

[12] *Id*. at 521.

[13] *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[14] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[15] *See id*. at § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

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

OWCP properly routed appellant's claim to a DMA, Dr. Harris. In reports dated August 2, 2021 and August 10, 2022, Dr. Harris noted diagnosed conditions of lumbar multilevel degenerative changes and bulging and lumbar radiculopathy. He explained that appellant did not have any neurologic deficit causing sensory or motor loss, therefore, she had Class 0 placement under Table 2 of *The Guides Newsletter*, resulting in zero percent permanent impairment of the bilateral lower extremity. The Board finds, however, that Dr. Harris provided a contradictory and inconsistent opinion regarding he permanent impairment. Although Dr. Harris noted the July 1, 2021 abnormal EMG/NCV study, he assigned a Class 0 for no neurologic deficits. According to Table 2 of *The Guides Newsletter*, moderate deficits in the lumbar spine result in a Class 1 placement, instead of Class 0. The Board finds that Dr. Harris did not adequately explain why he assigned a Class 0 for no neurologic deficits when the July 1, 2021 EMG/NCV study report showed findings consistent with moderate right L4 and L5 radiculopathy. Therefore, the Board finds that his reports require clarification.[17]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[18] 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.[19] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve all of the relevant issues in the case.[20]

The Board, therefore, finds that the case must be remanded for OWCP to seek clarification or to obtain a supplemental report from Dr. Harris concerning the nature and percentage of impairment of appellant's bilateral lower extremities in accordance with the A.M.A., *Guides* and *The Guides Newsletter*.[21] On remand, OWCP should request that he address her abnormal diagnostic findings of moderate L4 and L5 radiculopathy and support his conclusion with medical rationale. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[17] *See J.M.*, Docket No. 21-1428 (issued April 11, 2022); *W.W.*, Docket No. 18-0093 (issued October 9, 2018).

[18] *See R.R.*, Docket No. 18-0914 (issued February 24, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

[19] *C.T.*, Docket No. 20-0043 (issued April 20, 2021); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[20] *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

[21] *See E.G.*, Docket No. 21-0113 (issued October 7, 2022).

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2022 merit decisions of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 28, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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