United States Department of Labor
Employees' Compensation Appeals Board

H.T., Appellant **and** **DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, RED RIVER ARMY DEPOT, TX, Employer**	)	**Docket No. 23-0296** **Issued: June 12, 2023**

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 21, 2022 appellant filed a timely appeal from a September 19, 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.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the September 19, 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 one percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.[3] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 30, 2020 appellant, then a 45-year-old forklift operator, filed an occupational disease claim (Form CA-2) alleging that he sustained an aggravation of a low back injury causally related to factors of his federal employment. He stopped work on October 31, 2019. OWCP accepted the claim for lumbar intervertebral disc disorders with radiculopathy and unspecified complications of medical care.[4] On February 6, 2020 appellant underwent a left L4-5 microdiscectomy. OWCP paid him wage-loss compensation from February 6 through March 18, 2020. Appellant returned to his regular employment on March 19, 2020.

On June 23, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In development letters dated October 15 and November 9, 2021, OWCP requested that appellant provide an impairment evaluation from his treating physician utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent 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*). It afforded him 30 days to submit the requested information.

On April 22, 2022 appellant informed OWCP that his treating physician did not perform impairment ratings.

On May 3, 2022 OWCP referred appellant to Dr. Richard B. Sharp, a Board-certified physiatrist, for a second opinion evaluation to determine the extent of any employment-related permanent impairment.

In a report dated May 25, 2022, Dr. Sharp reviewed appellant's history of injury and lumbar surgery. He diagnosed intervertebral disc disorder with lumbar radiculopathy and other complications of surgical and medical care. On examination, Dr. Sharp measured range of motion

[3] Docket No. 21-0313 (issued July 9, 2021).

[4] On April 16, 2020 subsequent to its acceptance of the claim, OWCP determined that appellant's claim was for a traumatic injury (Form CA-1) rather than an occupational disease, noting that he had experienced left leg pain on October 31, 2019. It converted the claim to an traumatic injury claim.

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

of the lumbar spine and found mild tenderness at the left gluteal region with no spasm or atrophy of the lower extremity. He further found reduced sensation to pinprick of the left lateral foot, a negative straight leg-raise bilaterally, full motor strength bilaterally, and no left foot drop. Dr. Sharp related that appellant had a "well-documented left herniated disc [at] L4-5 which should be affecting [the] L5 nerve" but that instead his symptoms appeared to be in the S1 nerve root distribution. He opined that appellant had continued left lumbar radiculopathy that interfered with activities. Referencing Proposed Table 2 of *The Guides Newsletter*, Dr. Sharp found one percent permanent impairment due to a Class 1 mild sensory deficit of the S1 nerve root, which yielded a default impairment rating of one percent. He applied a grade modifier for clinical studies (GMCS) of two based on the diagnostic studies and a grade modifier for functional history (GMFH) of two based on appellant's pain and symptoms that interfered with activity. Dr. Sharp found that a grade modifier for physical examination (GMPE) was not applicable since the neurological examination was used to identify the impairment value. He applied the net adjustment formula which moved the rating two places to the right, for one percent permanent impairment of the lower extremity. Dr. Sharp determined that appellant had reached maximum medical improvement (MMI) on March 18, 2020.

On July 28, 2022 Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon serving as a district medical adviser (DMA), concurred with Dr. Sharp's finding that appellant had one percent permanent impairment of the left lower extremity due to a mild nerve impairment at S1. He determined that appellant had reached MMI on May 23, 2022 as this was "the date with the most comprehensive neurological examination that was used to calculate impairment." Dr. Ugokwe noted that the A.M.A., *Guides* did not provide for a rating using the range of motion as an alternative method for the relevant diagnosis.

By decision dated September 19, 2022, OWCP granted appellant a schedule award for one percent permanent impairment of the left lower extremity. The period of the award ran for 5.76 weeks from May 23 to July 2, 2022.

LEGAL PRECEDENT

The schedule award provision of FECA,[6] and its implementing federal regulation,[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 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

[6] *Supra* note 1.

[7] 20 C.F.R. § 10.404.

A.M.A., *Guides*, published in 2009.[8] 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.[9]

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*: *A Contemporary Model of Disablement*.[10] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by GMFH, GMPE, and GMCS.[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[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]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.[17]

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[8] 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* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[9] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera,* 12 ECAB 348 (1961).

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

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

[12] *Id.* at 411.

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

[14] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see G.H.*, Docket No. 20-1214 (issued December 16, 2022); *N.D.,* 59 ECAB 344 (2008); *Tania R. Keka,* 55 ECAB 354 (2004).

[15] *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani,* 48 ECAB 572 (1997).

[16] *Supra* note 8 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[17] *Supra* note 8 at Chapter 2.808.6(f) (March 2017); *B.B.*, Docket No. 18-0782 (issued January 11, 2019).

ANALYSIS

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

In a report dated May 25, 2022, Dr. Sharp found mild tenderness of the left gluteal region, decreased sensation to pinprick of the left lateral foot without left foot drop, and full strength of the lower extremities with no atrophy or spasm. He noted that appellant had a left herniated disc at L4-5 but that his symptoms appeared to be more from the S1 nerve root. Dr. Sharp identified the CDX as a Class 1 mild sensory deficit of the S1 nerve root, which he found yielded a default impairment of one percent according to Proposed Table 2 of *The Guides Newsletter*. He applied a GMCS of two and a GMFH of two, and noted that a GMPE was not applicable as it was used to identify the CDX. Utilizing the net adjustment formula, Dr. Sharp found a net adjustment of two and one percent permanent impairment of the left lower extremity.[18]

On July 28, 2022 Dr. Ugokwe, the DMA, reviewed and concurred with Dr. Sharp's impairment rating. He noted that range of motion was not available as an alternative rating method. There is no medical evidence of record establishing that appellant has more than one percent permanent impairment of the left lower extremity.

Accordingly, the Board finds that the medical evidence of record is insufficient to establish greater than the one percent permanent impairment of the left lower extremity.[19]

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 greater than one percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

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[18] Utilizing the net adjustment formula discussed above, (GMFH-CDX) + (GMCS-CDX), or (2-1) + (2-1) = 2, yielded an adjustment of two.

[19] *See G.H.*, *supra* note 14; *D.S.*, Docket No. 20-0670 (issued November 2, 2021).

ORDER

IT IS HEREBY ORDERED THAT the September 19, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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