

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

S.J., Appellant)	
)	
and)	Docket No. 22-0714
)	Issued: March 31, 2023
U.S. POSTAL SERVICE, PALATINE)	
PROCESSING & DISTRIBUTION CENTER,)	
Palatine, IL, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 April 1, 2022 appellant, through counsel, filed a timely appeal from a January 27, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On May 5, 1994 appellant, then a 38-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries on that date when he was hit by a car while in the performance of duty. OWCP accepted the claim for: contusions of multiple sites not elsewhere classified; neck sprain; superficial injury of the left hip, thigh, leg, and ankle; spondylosis and allied disorders; and brachial neuritis or radiculitis not otherwise specified.

A magnetic resonance imaging (MRI) scan, obtained on November 19, 2014, showed reversal of the normal cervical lordosis, trace retrolisthesis of C2 on C3, C3 on C4, and C5 on C6, grade 1 anterolisthesis of C4 on C5, multilevel degenerative disc disease, hypertrophy and facet arthrosis of the cervical spine causing stenosis.

Electrodiagnostic testing of the upper extremities performed on January 19, 2016 revealed findings consistent with median neuropathies of the wrists bilaterally and chronic radiculitis at C6 and C7 on the right and C6 on the left.

A March 10, 2016 MRI scan of the cervical spine showed moderate-to-severe spinal/foraminal stenosis, extensive loss of the normal cervical lordosis with spondylolisthesis, endplate changes consistent with osteoporotic and degenerative changes, and multilevel spondylosis with facet arthrosis.

On June 4, 2018 Dr. Justin Gent, a Board-certified orthopedic surgeon, found that appellant had full strength and intact sensation of the bilateral upper extremities with limited cervical range of motion. He diagnosed cervical degenerative disc disease.

In a September 10, 2018 impairment evaluation, Dr. Neil Allen, a Board-certified internist and neurologist, discussed appellant's complaints of neck pain radiating into the right shoulder and arm, numbness in the left forearm extending into the fingers, and intermittent right-hand numbness. He found full muscle strength on examination of the upper extremities. Refencing *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), which is a supplemental publication of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ Dr. Allen found a grade modifier for functional history (GMFH) of 2 based on appellant's *QuickDASH* score of 84 and a grade modifier for clinical studies (GMCS) of 4. He determined that appellant had two percent impairment on the right at C5 for a moderate sensory deficit, which he adjusted to three percent after the application of grade modifiers. Dr. Allen further found four percent permanent impairment due to a sensory deficit on the left at C5, which did not change after the application of grade modifiers. He opined that appellant had four percent

³ A.M.A., *Guides* (6th ed. 2009).

permanent impairment of the left upper extremity and three percent permanent impairment of the right upper extremity.

On November 7, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On December 7, 2018 OWCP requested that a district medical adviser (DMA) review Dr. Allen's impairment rating. It indicated that it had accepted appellant's claim for multiple contusions, neck sprain, a superficial injury of the left hip, leg, and ankle, and brachial neuritis or radiculitis. In an accompanying statement of accepted facts (SOAF) of even date, OWCP also indicated that it had accepted spondylosis and allied disorders as employment related.

On December 10, 2018 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, noted that on June 4, 2018 Dr. Gent had found full motor strength and intact sensation, while on September 10, 2018 Dr. Allen had found right and left sensory deficits at C5. He recommended OWCP refer appellant for a second opinion examination.

On March 4, 2021 OWCP referred appellant to Dr. Benjamin S. Gozon, III, a Board-certified physiatrist, for a second opinion examination. It provided Dr. Gozon with a February 26, 2020 SOAF setting forth the accepted conditions as contusions at multiple sites, neck sprain, left, and brachial neuritis/radiculitis not otherwise specified. The SOAF indicated that a physician had found that appellant sustained an aggravation of underlying cervical spondylosis as employment related, but did not include spondylosis as an accepted condition.

In a report dated April 5, 2021, Dr. Gozon reviewed appellant's history of a May 5, 1994 employment injury and his current complaints of intermittent neck pain and numbness in his third to fifth digits with activity. On examination, he found a positive Phalen's test bilaterally. Dr. Gozon diagnosed as employment-related resolved cervical sprain/strain and resolved brachial neuritis. Referencing *The Guides Newsletter*, he found mild sensory involvement in the C5 through T1 dermatomes with 4+/5 manual muscle testing, which he indicated was within normal limits. Dr. Gozon related, "[Appellant] belonged to class I grade A with mild sensory deficit and mild motor deficit along the C5 through T1 represented dermatomes. Therefore, the total impairment rating is 0 [percent] bilaterally." He found that appellant had reached maximum medical improvement (MMI). Dr. Gozon indicated that he had preexisting cervical spondylosis unrelated to the accepted employment injury that had progressed such that he had neck and upper extremity pain and weakness. He opined that appellant's current findings were unrelated to his original injury, but instead due to cervical spondylosis. Dr. Gozon found that he had zero percent permanent impairment of the cervical spine nerves based on the current examination findings.

On May 18, 2021 Dr. Katz opined that appellant had no sensory deficit or motor deficit of the spinal nerves bilaterally and thus no impairment. He determined that appellant had reached MMI on April 5, 2021.

By decision dated July 12, 2021, OWCP denied appellant's schedule award claim as the medical evidence of record was insufficient to establish a permanent impairment to a member or function of the body.

On July 20, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a report dated September 21, 2021, Dr. Carl Graf, a Board-certified orthopedic surgeon, found full strength of the left and right upper extremities and normal sensation bilaterally. He further found a negative Spurling's test and Hoffman's sign bilaterally. Dr. Graff diagnosed cervicgia.

An MRI scan of the cervical spine, obtained on October 7, 2021, revealed findings similar to prior studies with slight interval progression of multilevel degenerative changes, slight progression of mild-to-moderate spinal stenosis at C2-3 and C4-5, and slight progression of bilateral neural foraminal narrowing at C2-3 and of moderate-to-severe bilateral neural foraminal narrowing at C7-T1.

On October 21, 2021 Dr. Graf discussed appellant's findings of continued neck and arm pain, left more than right. He again found full strength and normal sensation of the upper extremities bilaterally and diagnosed cervicgia.

A telephonic hearing was held on November 12, 2021.

By decision dated January 27, 2022, OWCP's hearing representative affirmed the July 12, 2021 decision.

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 way 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 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

⁴ *Supra* note 2.

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 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁷ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

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*.⁸ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (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 in which 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. The appropriate tables for rating spinal nerve extremity impairment are incorporated in OWCP's procedures.¹⁴

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹⁵

ANALYSIS

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

In a December 7, 2018 SOAF, OWCP indicated that it had accepted appellant's claim for multiple contusions, neck sprain, a superficial injury of the left hip, leg, and ankle, brachial neuritis or radiculitis, and spondylosis and allied disorders. On March 4, 2021 it referred appellant to Dr. Gozon for a second opinion examination regarding the extent of his permanent impairment.

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

⁹ *Id.* at 494-531.

¹⁰ *Id.* at 411.

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 C.S.*, Docket No. 19-0851 (issued November 18, 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); *see also M.W.*, Docket No. 20-2052 (issued May 24, 2021); *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

¹⁵ *Id.* at Chapter 2.808.6f. *See also J.T.*, Docket No. 17-1465 (issued September 25, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

OWCP provided Dr. Gozon with a SOAF indicating that it had accepted contusions at multiple sites, neck sprain, left, and brachial neuritis/radiculitis not otherwise specified. It did not include the condition of spondylosis, set forth as accepted by OWCP in its December 7, 2018 SOAF and its July 12, 2021 and January 27, 2022 decisions.

In an April 5, 2021 report, Dr. Gozon diagnosed employment-related cervical sprain/strain and brachial neuritis and opined that the conditions had resolved. He found that appellant had preexisting cervical spondylosis unrelated to the accepted employment injury that caused pain and weakness in his neck and upper extremity. Dr. Gozon found a Class 1, Grade A mild sensory deficit and Class 1, Grade A mild motion deficit along the C5 through T1 dermatomes, which he asserted yielded no impairment.¹⁶

OWCP's procedures and Board precedent dictate that when a DMA, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁷ OWCP procedures specify that the SOAF must include all accepted conditions.¹⁸ OWCP failed to provide Dr. Gozon with a complete and accurate SOAF setting forth all of the accepted conditions; consequently, his report is of little probative value.¹⁹

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.²⁰ Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.²¹ Accordingly, the Board finds that the case must be remanded to OWCP.²²

On remand OWCP shall clarify the accepted conditions and prepare an updated SOAF. It shall then obtain a reasoned opinion from a physician in the appropriate field of medicine regarding the extent of appellant's permanent impairment of the upper extremities. Following this and any such further development as deemed necessary, OWCP shall issue a *de novo* decision.

¹⁶ The Board notes that a Class 1 Grade A sensory mild sensory deficit at C5 through T1 yields no impairment but that a Class 1, Grade A mild motion deficit yields impairment according to Proposed Table 1 of *The Guides Newsletter*.

¹⁷ *Supra* note 6 at Chapter 3.600.3 (October 1990); *see also D.P.*, Docket No. 20-0747 (issued June 2, 2021); *S.D.*, Docket No. 19-1924 (issued November 16, 2020).

¹⁸ *Id.* at Chapter 3.600a(4) (October 1990).

¹⁹ *See J.D.*, Docket No. 18-1355 (issued August 12, 2019); *R.S.*, Docket No. 18-0023 (issued July 26, 2018).

²⁰ *See M.W.*, *supra* note 14; *L.F.*, Docket No. 20-0549 (issued January 27, 2021).

²¹ *See M.E.*, Docket No. 21-1058 (issued March 2, 2022); *N.W.*, Docket No. 21-0653 (issued September 30, 2021).

²² *See M.W.*, *supra* note 14.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2022 decision 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: March 31, 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