United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 22-0727**
	)	**Issued: October 19, 2023**
U.S. POSTAL SERVICE, POST OFFICE, Baltimore, MD, Employer	)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On April 7, 2022 appellant filed a timely appeal from a December 3, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] The Board notes that, following the December 3, 2021 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*.

[2] 5 U.S.C. § 8101 *et seq*.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 60 percent permanent impairment of his left lower extremity, and 3 percent permanent impairment of his right 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 decision are incorporated herein by reference. The relevant facts are as follows.

On June 7, 1999 appellant, then a 44-year-old letter carrier filed an occupational disease claim, (Form CA-2) alleging that on March 11, 1999 he developed a right lateral disc herniation at L5-S1 due to factors of his federal employment, including lifting heavy boxes and climbing stairs. OWCP accepted the claim for a herniated lumbar disc.[4] Appellant stopped work on January 13, 1999 and OWCP paid him wage-loss compensation on the supplemental rolls beginning March 12, 1999, and on the periodic rolls beginning November 6, 1999. He underwent an OWCP-authorized lumbar discectomy on July 2, 1999.

Appellant returned to light-duty work on January 22, 2000. OWCP paid wage-loss compensation on the periodic rolls beginning March 11, 2000. On May 9, 2000 appellant underwent an OWCP-authorized right L5-S1 lateral discectomy, right L5 hemilaminectomy, and right L5-S1 foraminotomy. He returned to work on August 22, 2005.

On November 4, 2005 appellant completed a claim for compensation (Form CA-7) requesting a schedule award.

By decision dated June 1, 2007, OWCP granted appellant a schedule award for three percent permanent impairment of each lower extremity due to impairment of the L5 and S1 nerve roots in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] The period of the award was for 17.28 weeks from August 22 through December 20, 2005.

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[3] Docket No. 09-0834 (issued November 24, 2009).

[4] Appellant had previously filed a December 22, 1986 traumatic injury claim (Form CA-1) alleging that he developed low back pain as a result of a December 10, 1986 motor vehicle accident, which occurred while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx754 and accepted it for back sprain. It has not administratively combined OWCP File No. xxxxxx754 with OWCP File No. xxxxxx510. Appellant subsequently filed an occupational disease claim (Form CA-2) on August 14, 2008 alleging that he developed left hip arthritis in the course of his federal employment. He stopped work on June 13, 2008. OWCP assigned OWCP File No. xxxxxx224 and accepted this claim for permanent aggravation of osteoarthritis of the left hip. It paid wage-loss compensation on the supplemental rolls from November 22, 2008 through January 2, 2009. OWCP administratively combined OWCP File No. xxxxxx224 with OWCP File No. xxxxxx510 and designated the latter as the master file.

[5] A.M.A., *Guides* (5th ed. 2001).

After additional development of the medical evidence, by decision dated May 29, 2008, OWCP granted appellant a schedule award for an additional 12 percent permanent impairment of his right lower extremity in accordance with the fifth edition of A.M.A., *Guides*. The award ran for 25.92 weeks from February 8 through August 7, 2008. Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated October 24, 2008, OWCP's hearing representative affirmed the May 29, 2008 decision.

Appellant appealed to the Board. By decision dated November 24, 2009, the Board set aside the October 24, 2008 decision, and remanded the case to OWCP for further development of the extent of the permanent impairment of his lower extremities due to any preexisting conditions and/or consequential conditions, and his accepted back injuries.[6]

On March 2, 2011 appellant underwent an OWCP-authorized left hip total arthroplasty.[7]

On January 18, 2013 OWCP expanded the acceptance of appellant's claim to include intervertebral disc disorder with myelopathy, lumbar region, displacement of lumbar disc without myelopathy, and localized primary osteoarthritis of the left pelvic region and thigh. On October 28, 2015 it further expanded the acceptance of the claim to include other intervertebral disc degeneration, lumbosacral region. Appellant returned to light-duty work on August 7, 2018.

On October 22, 2018 appellant filed a Form CA-7 requesting a schedule award.

On May 28, 2019 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions to Dr. John C. Barry, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the nature and extent of any permanent impairment for schedule award purposes in accordance with the sixth edition of the A.M.A., *Guides*,[8] and *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition*, (July/August 2009) (*The Guides Newsletter*).

In his June 21, 2019 report, Dr. Barry reviewed the SOAF, medical findings, and accepted diagnoses. He performed a physical examination, noting that appellant walked with a shuffling gait flexed forward at the waist at approximately 20 degrees. Dr. Barry determined that appellant had 31 percent permanent impairment of the left hip, utilizing the diagnosis-based impairment (DBI) rating method, due to a total hip replacement in accordance with Table 16-4, (Hip Regional Grid) on page 515 of the A.M.A., *Guides*. He found that appellant had reached maximum medical improvement on June 21, 2019.

On July 10, 2019 OWCP referred the record and SOAF to Dr. Morley Slutsky, Board-certified in occupational medicine serving as a district medical adviser (DMA), to evaluate appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.

[6] *Supra* note 3.

[7] On June 29, 2012 OWCP authorized lumbar fusion surgery at L5-S1. Beginning on March 14, 2014 appellant informed his physician that he was not interested in additional spine surgery.

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

In a report dated August 2, 2019, Dr. Slutsky reviewed the medical record and provided an impairment rating, without reviewing the June 21, 2019 report of Dr. Barry.

On October 21, 2019 OWCP requested a supplemental report from Dr. Slutsky reviewing Dr. Barry's June 21, 2019 report. On November 2, 2019 Dr. Slutsky found that Dr. Barry did not provide three range of motion measurements of the left hip in accordance with the A.M.A., *Guides*, pages 517 and 544. The DMA further found that Dr. Barry did not test for hip stability. Dr. Slutsky requested a supplemental report from Dr. Barry addressing these aspects of appellant's schedule award claim.

On December 18, 2019 OWCP requested a supplemental report from Dr. Barry addressing the issues raised by the DMA. In a report dated December 20, 2019, Dr. Barry provided appellant's left hip range of motion figures, and also found that clinical testing demonstrated no left hip instability. He applied the DBI methodology using Table 15-4 on page 515 of the A.M.A., *Guides* and found that appellant's total right hip replacement had a good result, good position, and good stability, resulting in Class 2 impairment with a default valuate of 25. Dr. Barry determined that the grade modifier for functional history (GMFH) 1 was based on a mild problem with an antalgic gait without the need for assistive device under Table 16-6, (Functional History Adjustment) on page 516. He found a grade modifier for physical examination (GMPE) of 1 based on Table 16-7, (Physical Examination Adjustment) on page 517 and Table 16-24, (Hip Motion Impairments -- Lower Extremity Impairments) on page 549. Dr. Barry determined that the grade modifier for clinical studies (GMCS) was not applicable. He applied the net adjustment formula, set forth on page 521 of the A.M.A., *Guides*, to reach an adjustment of -2 or Grade A, 21 percent permanent impairment of the left lower extremity due to the total hip replacement. In applying *The Guides Newsletter* to appellant's left lower extremity impairment as a result of his accepted lumbar spine conditions, Dr. Barry found that, in accordance with Table 2, L5 radiculopathy was a Class 1 spinal nerve impairment with a mild sensory deficit only. He again found a GMFH of 1 and a GMCS of 1 for a mild problem. Dr. Barry concluded that appellant had a Grade C, three percent permanent impairment of the left lower extremity due to a moderate sensory deficit.

On February 12, 2020 OWCP requested an additional report from the DMA addressing Dr. Barry's December 20, 2019 supplemental report.

In a February 21, 2020 report, Dr. Slutsky disagreed with Dr. Barry's application of the A.M.A., *Guides* using the DBA methodology, and instead found a Class 3 impairment for appellant's total hip replacement, (fair result), in accordance with Table 16-4 on page 515, which yielded 31 percent permanent impairment of the left lower extremity. He also applied *The Guides Newsletter* to reach 1 percent permanent impairment of the left lower extremity due to L5 radiculopathy for a total of 32 percent permanent impairment of the left lower extremity. The DMA further noted that Dr. Barry had not provided lower extremity sensory testing findings.

On February 3, 2021 OWCP informed appellant that a conflict in medical opinion existed between Drs. Slutsky and Barry regarding the extent of his permanent impairment for schedule award purposes and referred him, together with a SOAF, medical record, and series of questions, to Dr. Ian Fries, a Board-certified orthopedic surgeon, to resolve this disagreement and to provide a permanent impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.

In a report dated September 9, 2021, Dr. Fries reviewed the SOAF and the medical history and performed a physical examination. For the left lower extremity, he utilized Table 16-4 on page 515 for the class of diagnosis (CDX) for total hip replacement, which he found was a Class 4 impairment because of moderate-to-severe motion deficits. Dr. Fries assigned a GMFH of 2 based on an asymmetric stance, a GMPE of 2 based on palpatory and observed abnormalities, and a GMCS of 2 based upon the need for a total hip replacement. He applied the net adjustment formula, page 512 of the A.M.A., *Guides* resulting in a net adjustment of -6 or 59 percent impairment of the left lower extremity. For the left lower extremity/lumbar spine, under the DBI method of *The Guides Newsletter*, he found sensory deficits due to left L5-S1 disc herniation, which corresponded with CDX of 1, resulting in a three percent permanent impairment of the left lower extremity. Dr. Fries concluded that appellant had combined 60 percent permanent impairment of the left lower extremity. With regard to appellant's right lower extremity, he found three percent right lower extremity impairment due to similar sensory deficits as a result of L5 disc herniation. Dr. Fries noted that appellant had previously received schedule awards for three percent impairment of each lower extremity due to his accepted lumbar spine conditions.

By decision dated December 3, 2021, OWCP granted appellant a schedule award for an additional 57 percent permanent impairment of the left lower extremity, for a total 60 percent permanent impairment. It found no additional permanent impairment of the right lower extremity. The period of the award ran for 164.16 weeks from January 3, 2020 through December 4, 2021.

LEGAL PRECEDENT

The schedule award provisions of FECA[9] and its implementing regulations[10] 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 adoption.[11] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[12]

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: A Contemporary Model of Disablement*.[13] Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the CDX, which is then adjusted by

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *Id.* at § 10.404 (a); *see also F.A.*, Docket No. 22-0167 (issued December 16, 2022); *J.C.*, Docket No. 21-0288 (issued July 1, 2021); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

[13] A.M.A., *Guides* 3, section 1.3.

GMFH, GMPE, and GMCS.[14] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[15] 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.[16]

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.[17] Furthermore, the back is specifically excluded from the definition of an organ under FECA.[18] 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.[19]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[20]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.[21]

ANALYSIS

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

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[14] *Id*. at 494-531; *see S.W.*, Docket No. 22-0917 (issued October 26, 2022); *R.V.*, Docket No. 20-0005 (issued December 8, 2020); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[15] *Id*. at 521.

[16] *F.A.*, *supra* note 11; *J.C.*, *supra* note 11; *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).

[17] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see F.A.*, *id*.; *J.C.*, *id*.; *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

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

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

[20] 5 U.S.C. § 8123(a); *A.P.*, Docket No. 22-1246 (issued April 25, 2023); *L.L*, Docket No. 15-0672 (issued September 23, 2016); *R.H.*, Docket No. 14-0737 (issued September 4, 2015).

[21] *See supra* note 12 at Chapter 2.808.6f (March 2017).

On May 28, 2019 OWCP referred appellant for a second opinion examination with Dr. Barry to obtain an opinion regarding his lower extremity impairment for schedule award purposes. The DMA, Dr. Slutsky, reviewed his June 21, 2019 report on February 21, 2020 and disagreed with his impairment rating, noting that Dr. Barry had not provided sensory testing findings.

OWCP then determined that there was a conflict of medical opinion between second opinion physician Dr. Barry and DMA Dr. Slutsky, which required an IME and referred appellant to Dr. Fries. However, under section 8123(a) of FECA (5 U.S.C. § 8123(a)), a conflict of medical opinion arises only between an attending physician and an OWCP referral physician.[22] As there was no conflict in accordance with section 8123(a) of FECA, Dr. Fries' September 9, 2021 report must be considered as a second-opinion report.[23]

As noted above, 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.[24] OWCP's procedures further provide that, after a second opinion is received, the case should be referred to the DMA for review.[25] In the instant case, however, OWCP failed to route the case record, including Dr. Fries' September 9, 2021 second-opinion report, to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*.[26] Accordingly, the case must be remanded for referral to a DMA.[27]

On remand, OWCP shall further develop the medical evidence of record by obtaining an opinion from a DMA regarding the nature and extent of appellant's bilateral lower extremity permanent impairment for his accepted March 11, 1999 and August 14, 2008 employment injuries. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding appellant's increased schedule award claim.

CONCLUSION

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

[22] 20 C.F.R. § 10.321; *L.L.*, Docket No. 20-0468 (issued June 15, 2022); *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *R.C.*, 58 ECAB 238 (2006).

[23] *See D.S.*, Docket No. 21-1129 (issued April 19, 2022); *G.C.*, Docket No. 15-0370 (issued December 2, 2015); *Helga Risor (Windell A. Risor)*, 41 ECAB 939 (1990).

[24] *Supra* note 12 at Chapter 2.808.6e (March 2017); *W.M.*, Docket No. 21-0728 (issued December 2, 2022).

[25] *Id*.

[26] *See W.M.*, *supra* note 24; *L.S.*, Docket No. 19-0092 (issued June 12, 2019).

[27] *See Order Remanding Case, D.K.*, Docket No. 21-0885 (issued January 14, 2022); *L.R.*, Docket No. 20-0493 (issued September 20, 2021).

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2021 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: October 19, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy 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