

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

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D.A., Appellant )

and )

U.S. POSTAL SERVICE, EDISON POST )  
OFFICE, Edison, NJ, Employer )  
\_\_\_\_\_ )

**Docket No. 23-0695  
Issued: October 18, 2023**

*Appearances:*

*Russell Uliase, Esq.*, for the appellant<sup>1</sup>  
*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 April 18, 2023 appellant, through counsel, filed a timely appeal from an October 25, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the October 25, 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 zero percent permanent impairment of the right lower extremity and nine percent permanent impairment of the left lower extremity for which he previously received a schedule award.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> 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 March 31, 2010 appellant then a 53-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his back on March 29, 2010 while moving trays from the ground onto a skid while in the performance of duty. OWCP accepted the claim for thoracic or lumbosacral neuritis or radiculitis, and displacement of the lumbar intervertebral disc without myelopathy. Appellant stopped work following the injury and has not returned.

On August 21, 2013 appellant filed a claim for a schedule award (Form CA-7).

In a January 13, 2014 report, Dr. Arthur Becan, an orthopedic surgeon, performed an impairment evaluation and found that, under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>5</sup> appellant had 42 percent left lower extremity permanent impairment and 15 percent right lower extremity permanent impairment.

Following development of the schedule award claim,<sup>6</sup> by decision dated September 11, 2014, OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity and zero percent permanent impairment of the right lower extremity.

On September 16, 2014 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on February 26, 2015.

By decision dated June 3, 2015, OWCP's hearing representative set aside OWCP's September 11, 2014 decision and remanded the case for referral of appellant to Dr Dinenberg for a second opinion regarding permanent impairment of the lower extremities.

In August 27 and September 7, 2015 reports, Dr. Dinenberg opined that appellant had five percent permanent impairment of the left lower extremity due to L5 motor nerve impairment under *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition*

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<sup>4</sup> Docket No. 19-0314 (issued May 5, 2022).

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>6</sup> This development included referral to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion. In a March 11, 2014 report, Dr. Dinenberg found lumbosacral radiculopathy and preexisting cerebrovascular accident with chronic weakness of the left lower extremity. He recommended further electrodiagnostic studies, including a repeat magnetic resonance imaging scan.

(July/August 2009) (*The Guides Newsletter*), and zero percent permanent impairment of the right lower extremity. He noted that his examination findings of the lower extremities were supported by the 2014 diagnostic testing which demonstrated a left-sided radiculopathy related to the L5 nerve only. Dr. Dinenberg found no sensory findings on examination and, thus, a left-sided impairment was rated on the L5 motor nerve only.

In a January 13, 2016 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA), opined that appellant reached maximum medical improvement (MMI) on August 27, 2016 and that the medical evidence did not support an increased schedule award.

By decision dated July 20, 2016, OWCP issued a *de novo* decision granting nine percent permanent impairment of left lower extremity and zero percent permanent impairment of the right lower extremity. It noted that appellant was not entitled to impairment greater than that previously awarded on September 11, 2014.

On November 15, 2017 appellant, through counsel, requested reconsideration.

By decision dated January 30, 2018, OWCP denied modification of its July 20, 2016 decision.

On March 6, 2018 appellant, through counsel, requested reconsideration. He submitted a copy of a September 22, 2017 electromyogram and nerve conduction velocity (EMG/NCV) study, which indicated findings of bilateral L4 and L5 radiculopathy.

In a June 1, 2018 report, Dr. Morley Slutsky, Board-certified in occupational medicine and serving as a DMA, reviewed the most recent statement of accepted facts dated July 1, 2015, which noted the acceptance of a lumbosacral radiculopathy, and appellant's medical record, including the September 22, 2017 EMG/NCV study. He opined that MMI was reached on August 27, 2018.<sup>7</sup> The DMA concluded that appellant had normal lower extremity sensation. Utilizing the findings in Dr. Dinenberg's August 27, 2015 impairment evaluation and *The Guides Newsletter*, he opined that there was no basis for a right lower extremity permanent impairment schedule award as there were no right lower extremity sensory or motor deficits related to the lumbar spine. For the left lower extremity, the DMA found that appellant had zero percent impairment due to normal lower extremity sensation and five percent left lower extremity impairment based on the mild left L5 weakness Dr. Dinenberg had reported and confirmed by the September 22, 2017 EMG/NCV study. He noted that, as appellant had previously received a schedule award for nine percent left lower extremity permanent impairment for the same nerve root, there was no greater permanent impairment for schedule award purposes.

By decision dated July 2, 2018, OWCP denied modification of its January 30, 2018 decision. The weight of the medical evidence rested with DMA Dr. Slutsky's June 1, 2018 opinion.

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<sup>7</sup> This appears to be a typographical error and should read as August 27, 2015 based on the DMA's review of Dr. Dinenberg's August 27, 2015 report.

On November 28, 2018 appellant, through counsel, appealed to the Board.<sup>8</sup> In a September 18, 2019 order, the Board set aside and remanded the case, finding that OWCP had not requested clarification from the DMA regarding the September 22, 2017 EMG/NCV study, which revealed the existence of bilateral L4 and L5 radiculopathies. The Board noted that DMA Dr. Slutsky, in his June 1, 2018 report, confirmed the existence of a left L5 radiculopathy, but failed to mention the bilateral radiculopathies of L4 and the right-sided radiculopathy of L5 and whether such conditions were preexisting or subsequently-acquired conditions with respect to the March 29, 2010 employment incident. The Board also noted that Dr. Slutsky's impairment evaluation was based on Dr. Dinenberg's August 27, 2015 impairment evaluation, which predated the September 22, 2017 EMG/NCV study.

In a November 9, 2019 report, Dr. Slutsky noted that the September 22, 2017 EMG study noted neurogenic findings related to L4 dermatomes.

By decision dated February 26, 2020, OWCP denied appellant's claim for an additional schedule award. It accorded the weight of the medical evidence to Dr. Slutsky's November 9, 2019 report.

On March 5, 2020 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated June 3, 2020, OWCP's hearing representative found that the case was not in posture for a hearing as Dr. Slutsky did not sufficiently address the September 22, 2017 EMG/NCV study.

In a September 25, 2020 report, Dr. Slutsky recommended referral of appellant to a Board-certified orthopedic surgeon for a second opinion on whether there was clear evidence of a right lower extremity radiculopathy due to a progression of the underlying degenerative disc disease.

In an April 2, 2021 report, Dr. Jon D. Donshik, a Board-certified orthopedic surgeon serving as a second opinion examiner, indicated that appellant's examination did not demonstrate any neurologic deficit in the lower extremities consistent with lumbar radiculopathy. He opined that, under Table 2 of *The Guides Newsletter*, appellant had zero percent permanent impairment of his right leg and zero percent permanent impairment of the left leg, as he had no sensory or motor deficit in either lower extremity.

In a July 8, 2021 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA, concurred with Dr. Donshik's impairment ratings. He found that appellant reached MMI on April 2, 2021 when seen by Dr. Donshik and noted that the A.M.A., *Guides* precluded impairment ratings based on range of motion (ROM) methodology for a lumbar radiculopathy diagnosis.

On February 16, 2022 OWCP requested that Dr. Harris clarify whether he agreed with the impairment evaluations of Dr. Becan, Dr. Dinenberg, or Dr. Donshik. It also requested that he

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<sup>8</sup> *Supra* note 4.

discuss the September 22, 2017 EMG/NCV study test and explain how the test was used in the impairment evaluations.

In February 18 and March 21, 2022 reports, DMA Dr. Harris reviewed the entire case file including the January 14, 2013 report of Dr. Becan, the March 11, 2014 and August 27 and September 7, 2015 reports of Dr. Dinenberg, and the April 2, 2021 report of Dr. Donshik. He noted that the three impairment reports varied in their objective findings and that appellant's most recent impairment evaluation, that of Dr. Donshik dated April 2, 2021, was chosen as the appellant's condition can vary from time to time. Dr. Harris reiterated that the A.M.A., *Guides* did not allow for ROM impairment and that appellant had zero percent permanent impairment based on the diagnosis-based impairment (DBI) methodology described in *The Guides Newsletter* July/August 2009 study. He indicated that Dr. Donshik's evaluation did not reveal any neurologic deficit in the lower extremities consistent with lumbar radiculopathy. Thus, appellant had severity of 0 for sensory and motor deficits under Table 16-11, page 533, Class 0 impairment under Table 2 of *The Guides Newsletter* which resulted in zero percent left and right leg permanent impairment ratings. Dr. Harris also explained that, while appellant had a positive September 22, 2017 electrodiagnostic study consistent with radiculitis, the studies were not applicable as grade modifiers as he had zero percent permanent impairment. He indicated that electrodiagnostic studies were used as grade modifiers once appellant is found to have impairment from sensory or motor deficit from radiculopathy. However, appellant did not have any sensory or motor deficit from radiculopathy and positive studies, absent any neurological deficit consistent with lumbar radiculopathy, does not by itself result in impairment in the lower extremities.

By decision dated May 16, 2022, OWCP denied appellant's claim for an increased schedule award. It accorded the weight of the medical evidence to the reports of Dr. Donshik and DMA Dr. Harris.

On May 24, 2022 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on August 12, 2022.

By decision dated October 25, 2022, an OWCP hearing representative affirmed OWCP's May 16, 2022 decision.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>9</sup> and its implementing regulations<sup>10</sup> 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. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, good administrative practice necessitates 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 sixth

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<sup>9</sup> 5 U.S.C. § 8107.

<sup>10</sup> 20 C.F.R. § 10.404.

edition of the A.M.A., *Guides*, published in 2009.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> Furthermore, the spine is specifically excluded from the definition of organ under FECA.<sup>14</sup> 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's procedures indicate that *The Guides Newsletter* is to be applied.<sup>15</sup> 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.<sup>16</sup>

A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment causally related to an employment injury.<sup>17</sup> The medical evidence must include a detailed description of the permanent impairment.<sup>18</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a 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.<sup>19</sup>

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<sup>11</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Chapter 3.700, Exhibit 1 (January 2010).

<sup>12</sup> *A.P.*, Docket No. 22-1246 (issued April 25, 2023); *D.M.*, Docket No. 21-1209 (issued March 24, 2022); *L.E.*, Docket No. 20-1505 (issued June 7, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>13</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.H.*, Docket No. 19-1788 (issued March 17, 2020); *Jay K. Tomokiyo*, 51 ECAB 361 (2000); *C.S.*, Docket No. 19-0851 (issued November 18, 2019).

<sup>14</sup> *See id.* at § 8107(c); *see G.S.*, Docket No. 18-0827 (issued May 1, 2019).

<sup>15</sup> *Supra* note 11 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included in Exhibit 4.

<sup>16</sup> *W.G.*, Docket No. 21-0675 (issued December 28, 2021); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *A.H.*, *supra* note 13.

<sup>17</sup> *See T.W.*, Docket No. 20-1547 (issued October 4, 2021).

<sup>18</sup> *See K.F.*, Docket No. 18-1517 (issued October 9, 2019).

<sup>19</sup> *Supra* note 11 at Chapter 2.808.6f (March 2017); *see K.R.*, Docket No. 21-0247 (issued February 25, 2022); *D.J.*, Docket No. 19-0352 (issued July 24, 2020).

## ANALYSIS

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

Following development of the claim for an increased schedule award, appellant underwent a permanent impairment examination with Dr. Donshik, a second opinion physician. In an April 2, 2021 report, Dr. Donshik indicated that the examination did not demonstrate any neurologic deficit in the lower extremities consistent with lumbar radiculopathy, as he had no sensory or motor deficits. Thus, he opined, based on Table 2 of *The Guides Newsletter*, that appellant had zero percent permanent impairment of his right leg and zero percent permanent impairment of the left leg.

Referencing *The Guides Newsletter*, DMA Dr. Harris, concurred with Dr. Donshik's calculations of zero permanent impairment of the bilateral lower extremities based on the DBI methodology described in *The Guides Newsletter* as there was no neurologic deficit in the bilateral lower extremities consistent with lumbar radiculopathy. Thus, appellant had severity of 0 for sensory and motor deficits under Table 16-11, page 533 and Class 0 impairment under Table 2 of *The Guides Newsletter*, which resulted in zero percent left and right leg permanent impairment determinations. He indicated that the A.M.A., *Guides* precluded impairment ratings based on ROM methodology for a lumbar radiculopathy diagnosis. In February 18 and March 21, 2022 reports, Dr. Harris also explained that Dr. Donshik's April 2, 2021 impairment evaluation was chosen to rate appellant's impairment as it was the most recent evaluation. He also explained that appellant's positive September 22, 2017 electrodiagnostic study was not applicable as such studies were used as grade modifiers only after appellant is found to have impairment from sensory or motor deficit from radiculopathy. However, appellant did not have any sensory or motor deficit from radiculopathy and any positive studies, absent any neurological deficit consistent with lumbar radiculopathy, would not result in ratable permanent impairment under *The Guides Newsletter*.

The Board finds that the DMA, Dr. Harris, properly applied the standards of *The Guides Newsletter* to the physical examination findings of Dr. Donshik to determine that appellant did not have permanent impairment of a scheduled member or function of the body. He accurately summarized the relevant medical evidence including findings on examination, and reached conclusions that comported with these findings.<sup>20</sup> *The Guides Newsletter* rates permanent impairment from lumbar radiculopathy based upon sensory or motor loss of the upper and lower extremities.<sup>21</sup> As the medical evidence did not substantiate that appellant had sensory or motor loss of either lower extremity, Dr. Donshik and Dr. Harris properly determined that appellant did not have permanent impairment of the bilateral lower extremities based on the DBI methodology described in *The Guides Newsletter*.<sup>22</sup> Dr. Harris also properly noted that the A.M.A., *Guides* did

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<sup>20</sup> See C.W., Docket No. 19-1590 (issued September 24, 2020); M.S., Docket No. 19-1011 (issued October 29, 2019); W.H., Docket No. 19-0102 (issued June 21, 2019); J.M., Docket No. 18-1387 (issued February 1, 2019).

<sup>21</sup> See B.W., Docket No. 22-0522 (issued March 10, 2023); M.H., Docket No. 21-1250 (issued February 17, 2023); E.F., Docket No. 18-1723 (issued May 1, 2019).

<sup>22</sup> T.M., Docket No. 16-0429 (issued August 11, 2016).

not allow for an impairment rating based on ROM for the relevant diagnoses.<sup>23</sup> Dr. Harris also provided a well-rationalized explanation as to why the earlier impairment reports of appellant's treating physician Dr. Becan and second opinion physician Dr. Dinenberg were not considered.<sup>24</sup>

There is no current medical evidence of record utilizing *The Guides Newsletter* which demonstrates greater than zero percent permanent impairment of the right lower extremity or the nine percent permanent impairment of the left lower extremity previously awarded. Accordingly, the Board finds that appellant has not met his burden of proof.

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 permanent impairment or increased permanent impairment.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 25, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 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

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<sup>23</sup> *R.L.*, Docket No. 19-1793 (issued August 7, 2020).

<sup>24</sup> *See G.H.*, Docket No. 19-1800 (issued September 4, 2020); *M.L.*, Docket No. 18-0547 (issued November 7, 2018); *T.M.*, *supra* note 22.