United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTE, Sandstone, MN, Employer	)	**Docket No. 23-0482** **Issued: September 5, 2023**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On February 22, 2023 appellant filed a timely appeal from a November 22, 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 6 percent permanent impairment of the right lower extremity and 11 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

[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 decisions are incorporated herein by reference. The relevant facts are as follows.

On August 17, 1995 appellant, then a 46-year-old cook/foreman, filed a traumatic injury claim (Form CA-1) alleging that on December 9, 1994, he sustained an injury to his back as he knelt down to lift steel elevator doors while in the performance of duty. OWCP accepted the claim for L5-S1 herniated disc, fracture nonunion at L3-4, pelvic and bilateral ankle sprains, and psychogenic pain disorder.

By decision dated December 30, 1996, OWCP granted appellant a schedule award for three percent permanent impairment of the right lower extremity. The award ran for 8.64 weeks for the period September 13 to November 12, 1995. On August 18, 1999 OWCP granted appellant a schedule award for 11 percent permanent impairment of the left lower extremity. The award ran for 31.68 weeks for the period July 15, 1999 to February 21, 2000.[3]

Appellant continued to request increased schedule awards. In a November 23, 2007 decision, the Board found that he had not established more than 11 percent permanent impairment of his left lower extremity.[4] By decision dated September 28, 2021, the Board found that appellant had not met his burden of proof to establish greater than 3 percent permanent impairment of the right lower extremity and 11 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

On November 15, 2021 appellant again requested increased schedule awards. He also requested a rating from a physician who understood the sixth edition of the A.M.A., *Guides* (2009) and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*). Appellant explained that none of the physicians had addressed his accepted conditions of L5-S1 herniated disc and nonunion fracture at L3-4.

On August 10, 2022 OWCP referred appellant to Dr. David S. Cockrum, a specialist in preventive occupational and environmental medicine, for a second opinion examination.

In a September 14, 2022 report, Dr. Cockrum reviewed appellant's history of injury and medical treatment, as well as the statement of accepted facts (SOAF). He noted that appellant's diagnosed conditions caused by the work injury were displacement of lumbar intervertebral disc without myelopathy, nonunion of fracture, psychogenic pain disorder, pelvic sprain, and ankle sprain. He also noted that appellant had pseudoarthrosis, lumbar radiculopathy, and compression

[2] Docket No. 20-1666 (issued September 28, 2021); *Order Dismissing Petition for Reconsideration,* Docket No. 06-2009 (issued July 15, 2008); Docket No. 07-1374 (issued November 23, 2007); Docket No. 06-2009 (issued March 15, 2007); Docket No. 02-1628 (issued January 27, 2003).

[3] Appellant retired from the employing establishment on December 3, 1998 and underwent lumbar surgical procedures in 1999, 2000, and 2002.

[4] Docket No. 07-1374 (issued November 23, 2007).

fracture of T12. Dr. Cockrum noted that the A.M.A., *Guides* did not allow the use of the range of motion method for peripheral nerve impairment. He also noted that the A.M.A., *Guides* did not allow an award for impairment of the lumbar spine and that according to *The Guides Newsletter*, he was providing a rating for the lower extremities caused by the spinal injury using Table 2, "Spinal Nerve Impairment: Lower Extremity Impairments." Dr. Cockrum opined that appellant had a left lower extremity impairment of seven percent and a right lower extremity impairment of six percent.

For the left lower extremity Dr. Cockrum explained that appellant had decreased sensation in the lateral thigh attributable to the L3 nerve and decreased sensation in the lower leg attributable to the S1 nerve, and that he would calculate the L3 and S1 impairments separately and then combine them for the left lower extremity rating. For the L3 sensory impairment, he rated the mild sensory deficit as a Class 1 impairment resulting in a median grade C with a default value of one percent. Dr. Cockrum applied the grade modifiers and found a grade modifier for functional history (GMFH) of 2 based upon a moderate problem, and a grade modifier for clinical studies (GMCS) of 2, also based on a moderate problem, resulting in a grade E impairment rating of one percent for the L3 sensory deficit. He noted that the L3 motor deficit rating was 0 and the combined sensory and motor deficit ratings for the L3 nerve remained one percent. Dr. Cockrum then rated the S1 nerve, finding a mild sensory deficit resulted in a Class 1 impairment and a median grade C with a default value of one percent. He noted that the GMFH was 2, and the GMCS was also 2, which resulted in a grade E and one percent impairment for the S1 mild sensory deficit. He then rated the S1 motor impairment, finding that the mild motor deficit resulted in a Class 1 impairment with a median rating of three percent, and that the GMFH of 2, and the GMCS of 2 resulted in a grade E and five percent impairment for the S1 motor deficit. Dr. Cockrum then combined the S1 sensory deficit rating of one percent and the S1 motor deficit rating of five percent and found six percent impairment for nerve root level S1. He then combined the L3 rating of one percent and the S1 rating of six percent and opined that appellant had seven percent left lower extremity permanent impairment.

For the right lower extremity, Dr. Cockrum noted that appellant displayed toe and heel walking weakness and normal sensory examination, although appellant reported intermittent tingling in the right toe. He explained that only the S1 nerve on the right was affected and that he based his right lower extremity rating on combining the sensory and motor deficits for the S1 root level. For the mild sensory deficit, Dr. Cockrum assigned a Class 1 impairment with a default value of C or one percent impairment and GMFH of 2 and GMCS of 2, which resulted in a grade E and one percent impairment rating for the S1 mild sensory deficit. For the S1 mild motor deficit, he assigned a Class 1 impairment with a GMFH of 2 and a GMCS of 2 which resulted in a final mild motor deficit impairment rating of five percent. Dr. Cockrum then combined the S1 mild sensory deficit rating of one percent and mild motor deficit rating of five percent and concluded that appellant had six percent right lower extremity permanent impairment. He also opined that appellant had reached maximum medical improvement (MMI) on May 10, 2017.

OWCP referred appellant's case record and the SOAF to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA), to determine the extent of any employment-related permanent impairment.

In an October 22, 2022 report, Dr. Katz reviewed the SOAF and the medical record, including Dr. Cockrum's report. He concurred with Dr. Cockrum's opinion that appellant had seven percent permanent impairment of the left lower extremity and six percent permanent impairment of the right lower extremity. Dr. Katz referred to the A.M.A., *Guides* and *The Guides Newsletter*, Table 2, "Spinal Nerve Impairment: Lower Extremity Impairments." For the left lower extremity diagnosis of mild sensory deficit at L3, he assigned a class of diagnosis (CDX) of 1, default value one percent, with GMFH of 2, N/A for GMPE, and GMCS of 2, resulting in a net adjustment of +2. This resulted in Class 1 with an adjustment of +2 from the default value C which equaled a Class 1 impairment, grade E, and one percent impairment for the left lower extremity mild sensory deficit at L3. For the left lower extremity diagnosis of mild sensory deficit at S1, Dr. Katz assigned a CDX of 1, default value one percent, with GMFH of 2, N/A for GMPE, and GMCS of 2, resulting in a net adjustment of +2. This resulted in Class1 with an adjustment of +2 from the default value C which equaled a Class 1 impairment, grade E and one percent impairment for the left lower extremity mild sensory deficit at S1. For the left lower extremity diagnosis of mild motor deficit, he assigned a CDX of 1, default value three percent, with GMFH of 2, N/A for GMPE, GMCS of 2, resulting in a net adjustment of +2. This resulted in Class 1 with an adjustment of +2 from the default value C which equaled a Class1 impairment, grade E and five percent impairment for the left lower extremity mild motor deficit. Combining the one percent mild sensory deficit impairment at L3, the one percent mild sensory deficit impairment at S1, and the five percent mild motor impairment, Dr. Katz concluded that appellant had seven percent left lower extremity permanent impairment.

For the right lower extremity diagnosis of mild sensory deficit at S1, he assigned a CDX of 1, with GMFH of 2, N/A for GMPE, and GMCS of 2, resulting in a net adjustment of +2. This resulted in Class 1 with an adjustment of +2 from the default value C which equaled a Class 1 impairment, grade E and one percent impairment for the right lower extremity mild sensory deficit. For the right lower extremity diagnosis of mild motor deficit at S1, Dr. Katz assigned a CDX of 1, with grade GMFH of 2, N/A for GMPE, and GMCS of 2, resulting in a net adjustment of +2. This equaled a Class 1 impairment, grade E and five percent impairment for the right lower extremity mild motor deficit. Combining the one percent for the mild sensory deficit impairment and the five percent for the mild motor deficit impairment, he opined that appellant had six percent permanent impairment of the right lower extremity. Dr. Katz noted that the impairment ratings resulted in a net additional award of 3 percent for the right lower extremity and no net additional award for the left lower extremity, as the current rating of 7 percent did not exceed the prior award of 11 percent for the left lower extremity. He advised that appellant reached MMI on September 7, 2022, the date of Dr. Cockrum's examination.

By decision dated November 22, 2022, OWCP granted appellant a schedule award for an additional three percent permanent impairment of the right lower extremity. It noted that he had

previously received an award of three percent permanent impairment of the right lower extremity. The period of the award ran for 8.64 weeks from September 7 to November 5, 2022.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] and its implementing regulations[6] 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[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): Contemporary Model of Disablement*.[10] Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by GMFH, grade modifier for physical examination (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] However, a schedule award is permissible where the employment-related spinal condition affects the upper

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id. See A.D.*, Docket No. 20-0553 (issued April 19, 2021); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id*. at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[9] *See D.C.*, Docket No. 20-1655 (issued August 9, 2021); *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 521.

[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 A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

and/or lower extremities.[15] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter* (July/August 2009), which is a supplemental publication of the sixth edition of the A.M.A., *Guides*. It was designed for situations where 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 the Federal (FECA) Procedure Manual.[16]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 6 percent permanent impairment of the right lower extremity and 11 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.[17] It is, therefore, unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's August 19, 2020 decision as the Board considered that evidence in its September 28, 2021 decision.[18]

In his September 19, 2022 report, Dr. Cockrum opined that appellant had a left lower extremity impairment of seven percent and a right lower extremity impairment of six percent. For the left lower extremity, he rated both the L3 nerve, based on decreased sensation in the lateral thigh, and the S1 nerve, based on decreased sensation in the lower leg, and he explained that he rated both nerves for sensory and motor deficits. For the L3 nerve, Dr. Cockrum rated the mild sensory deficit as a CDX of 1 with a GMFH of 2 and a GMCS of 2, resulting in a grade E impairment rating of one percent for the L3 sensory deficit, and noted that the L3 motor deficit rating was 0 and the combined sensory and motor deficit rating for the L3 nerve remained one percent. He also rated the S1 nerve, finding a mild sensory deficit and assigned a CDX of 1 with a GMFH of 2 and a GMCS of 2, which resulted in a grade E and one percent for the S1 sensory impairment. For the S1 mild motor deficit, Dr. Cockrum assigned a CDX of 1 with a GMFH of 2 and a GMCS of 2, which resulted in grade E and five percent impairment for the S1 motor deficit, which he combined with the S1 sensory deficit of one percent, for a total of six percent impairment for nerve root level S1. He then combined the L3 rating of one percent and the S1 rating of six percent to conclude that appellant had seven percent left lower extremity permanent impairment. For the right lower extremity, Dr. Cockrum rated both the sensory and motor deficits for the S1 root level, noting that appellant had toe and heel walking weakness and reported intermittent tingling in the right toe. For the S1 sensory deficit, he assigned a CDX of 1 with a GMFH of 2

[15] *Supra* note 10 at Chapter 2.808.5c(3) (March 2017).

[16] *Supra* note 10 at Chapter 3.700, Exhibit 4 (January 2010).

[17] *A.A.*, Docket No. 20-1399 (issued March 10, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

[18] *See R.B.*, Docket No. 22-0954 (issued December 29, 2022); *M.S.*, Docket No. 20-1095 (issued March 29, 2022); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

and a GMCS of 2 which resulted in a grade E and 1 percent impairment rating for the S1 sensory deficit. For the S1 motor deficit, Dr. Cockrum assigned a CDX of 1 with a GMFH of 2 and a GMCS of 2 which resulted in a final motor impairment rating of five percent, and a combined sensory and motor deficit impairment rating of six percent for the right lower extremity.

In his October 22, 2022 report, the DMA concurred with Dr. Cockrum's opinion that appellant had seven percent left lower extremity impairment and a six percent right lower extremity impairment. The DMA explained that the impairment ratings resulted in a net additional award of 3 percent for the right lower extremity and no net additional award for the left lower extremity, as the current rating of 7 percent did not exceed the prior award of 11 percent for the left lower extremity. The Board has reviewed the DMA's rating and finds that he properly applied the net adjustment formula to the findings from Dr. Cockrum's report, pursuant to *The Guides Newsletter*.

The evidence of record does not support that appellant had greater than 6 percent permanent impairment of the right lower extremity and 11 percent permanent impairment of the left lower extremity. The record contains no medical evidence in accordance with *The Guides Newsletter* demonstrating a greater percentage impairment of the right or left lower extremity.[19]

As there is no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter* establishing an additional permanent impairment of a scheduled member or function of the body, 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 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 6 percent permanent impairment of the right lower extremity and 11 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

[19] *See A.S.*, Docket No. 22-0930 (issued January 19, 2023); *E.G.*, Docket No. 19-1081 (issued September 24, 2020); *C.S.*, Docket No. 18-0920 (issued September 23, 2019).

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 5, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board