United States Department of Labor
Employees' Compensation Appeals Board

K.M., Appellant	)	
and	)	**Docket No. 23-1103**
	)	**Issued: February 6, 2024**
U.S. POSTAL SERVICE, CHAGRIN FALLS POST OFFICE, Chagrin Falls, OH, Employer	)	

Appearances:
Alan J. Shapiro, *Esq.*, for the appellant[1]
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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On August 18, 2023 appellant filed a timely appeal from a July 28, 2023 merit decision of the Office of Workers' Compensation Programs. 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] 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 his lower extremities, warranting a schedule award.

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 March 27, 2014 appellant, then a 50-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he felt a pull and a pinch in his lower back when he lifted a bucket of mail on September 24, 2013 while in the performance of duty. On November 29, 2016 OWCP accepted his claim for exacerbation of lumbosacral disc herniation. It paid appellant appropriate wage-loss compensation.

In a report dated May 1, 2017, Dr. Kumar Reddy, a Board-certified orthopedic surgeon, diagnosed lumbar herniated disc at L5-S1. He reviewed appellant's diagnostic studies of record and related his physical examination findings. Dr. Reddy related that neurologic examination of appellant's lower extremities revealed no neurologic deficit. Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] and *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), he found that appellant had a mild impairment of the L5/S1 nerve root resulting in two percent permanent impairment of the left lower extremity with no neurological deficits.

On February 16, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a report dated May 9, 2018, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed the statement of accepted facts (SOAF) and medical record, including Dr. Reddy's May 1, 2017 report. He found that appellant reached maximum medical improvement on that date. Dr. Harris disagreed with Dr. Reddy's May 1, 2017 permanent impairment rating, as Dr. Reddy had reported no neurological deficits. Referring to Table 16-11 and Table 16-12 of the A.M.A., *Guides*, he opined that appellant had zero percent permanent impairment of the bilateral lower extremities.

By decision dated September 24, 2018, OWCP denied appellant's claim for a schedule award, finding that he had no permanent impairment of the lower extremities.

In a report dated August 29, 2018, Dr. Stewart Kaufman, a Board-certified orthopedic surgeon, examined appellant to determine his percentage of permanent impairment. Referring to

[3] Docket No. 15-0820 (issued July 17, 2015).

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

the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, he found that appellant had 19 percent impairment of the lower extremity due to L5 radiculopathy, with a severe sensory deficit of 6 percent and a moderate motor deficit of 13 percent. Dr. Kaufman did not specify whether the rating applied to one or both lower extremities.

On October 1, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on January 22, 2019.

By decision dated March 20, 2019, the hearing representative set aside the September 24, 2018 decision and remanded the case for further medical development.

In an addendum report dated May 3, 2019, Dr. Kaufman noted that he had evaluated appellant's left lower extremity permanent impairment. He stated that his assessment of appellant's motor impairment was based on appellant's complaints and electromyogram/nerve conduction velocity (EMG/NCV) testing from 2014 and 2016. Dr. Kaufman also noted that it was disconcerting that current magnetic resonance imaging (MRI) scans or EMG/NCV tests were not available.

On June 25, 2019 Dr. Harris reviewed the medical record, including Dr. Kaufman's August 29, 2018 and May 3, 2019 reports. He found that appellant had zero percent permanent impairment of the right lower extremity and six percent permanent impairment of the left lower extremity based on sensory impairment.

OWCP found that the reports from Drs. Kaufman and Harris had created a conflict of medical opinion, and referred appellant to Dr. Michael J. Katz, a Board-certified orthopedic surgeon, to resolve the conflict. In an impartial medical examination report dated October 2, 2019, Dr. Katz diagnosed lumbosacral radiculopathy and a herniated disc. He recommended an MRI scan of appellant's lumbar spine and an updated EMG/NCV.[5]

OWCP was subsequently informed that Dr. Katz was unavailable to provide a final report. It arranged for appellant to undergo another impartial medical examination with Dr. Ian B. Fries, a Board-certified orthopedic surgeon.

In a report dated June 7, 2021, Dr. Fries, serving as the impartial medical examiner (IME), reviewed the SOAF and medical record, and related appellant's physical examination findings. Referring to the A.M.A., *Guides* and *The Guides Newsletter*, he found that all findings were mild and the EMG/NCV studies were inconsistent. As to the MRI scan of the lumbar spine at L5-S1, Dr. Fries noted that a small central protrusion slightly indented the epidural fat, but there was no spinal canal or foraminal narrowing. He concluded that the MRI scan was consistent with age-related degeneration. Dr. Fries concluded that the medical evidence did not establish radiculopathy in the right or left lower extremities, and that physical examination did not show sensory, reflex, or motor deficits. He opined that several of appellant's physical examination findings were clearly

[5] The updated EMG/NCV was obtained on May 15, 2020 and the lumbar MRI scan was obtained on May 19, 2020.

nonphysiologic. As such, Dr. Fries concluded that appellant had no permanent impairment of the lower extremities.

By decision dated September 24, 2021, OWCP denied appellant's schedule award claim.

On October 5, 2021 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 6, 2021, the hearing representative noted that a preliminary review had been completed and that the case was not in posture for decision. The representative set aside the September 24, 2021 decision and remanded the case for further medical development.

In a supplemental report dated February 14, 2022, Dr. Fries clarified that he did not question the accepted condition, but that he believed that the condition due to the accepted injury was temporary. He noted that he found no bilateral neurological symptoms of the lower extremities and no sensory, motor, or reflex deficits, and no atrophy. Dr. Fries further noted that in Dr. Reddy's report of May 1, 2017 he found no neurological deficits. He explained that the MRI scan did not explain appellant's symptoms and that there were no findings on physical examination of radiculopathy.

By decision dated April 4, 2022, OWCP again denied appellant's schedule award claim.

On April 19, 2022 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on August 18, 2022.

By decision dated October 31, 2022, the hearing representative determined that the addendum report and initial evaluation from Dr. Fries was inadequate to resolve the conflict of medical opinion. It found that it was necessary to have the medical records reviewed by a DMA not previously associated with the case for an opinion as to whether Dr. Fries correctly applied the sixth edition A.M.A., *Guides* and *The Guides Newsletter*. The hearing representative set aside the April 4, 2022 decision and remanded the case for further medical review.

In a report dated November 12, 2022, Dr. Michael M. Katz, a Board-certified orthopedic surgeon, in his capacity as an OWCP DMA, reviewed the June 7, 2021 report and February 14, 2022 supplemental report of Dr. Fries. He noted that Dr. Fries had stated that a permanent partial impairment rating using the diagnostic-based impairment (DBI) method could not be calculated because appellant did not have any neurologic findings in his lower extremities. Further, DMA Dr. Katz noted that Dr. Fries had determined that permanent residuals of appellant's temporary condition were not convincingly reflected in his clinical course, current complaints, physical examination findings, imaging, and electrodiagnostic studies. He opined that Dr. Fries had reviewed and documented the pertinent history and diagnostic reports and performed a focused physical examination addressing the accepted conditions under appellant's claim, and also correctly applied the A.M.A., *Guides* and *The Guides Newsletter* in finding that appellant had no ratable permanent impairment of the lower extremities.

By decision dated December 8, 2022, OWCP again denied appellant's schedule award claim.

On December 14, 2022 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on June 12, 2023.

In a report dated March 31, 2023, Dr. Sami E. Moufawad, Board-certified in physical medicine and rehabilitation, reviewed the medical record and concluded that he could not provide any recommendations as to the clinical picture and could not determine whether appellant had any sensory or motor deficits of the lower limbs. Referring to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, Dr. Moufawad noted that EMG/NCV testing was done for confirmation and did not always correlate with clinical findings.

By decision dated July 28, 2023, the hearing representative affirmed OWCP's December 8, 2022 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[6] and its implementing regulations[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 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.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9]

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.[10] Furthermore, the back is specifically excluded from the definition of organ under FECA.[11] 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

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id*. at 10.404(a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

[10] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see B.M.*, Docket No. 19-1069 (issued November 21, 2019); *B.W*., Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[11] *See id*. at § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.[12]

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[13] This is called an IME and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[14] When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence, and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[16] If the referral physician fails to respond or does not provide an adequate response, OWCP should refer appellant for a new impartial medical examination.[17]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his lower extremities, warranting a schedule award.

OWCP found a conflict in the medical opinion evidence between Drs. Kaufman and Harris and properly referred the case to Dr. Fries, pursuant to 5 U.S.C. § 8123(a), for an impartial medical examination in order to resolve the conflict in the medical opinion.

In his June 7, 2021 report, Dr. Fries, the IME, reviewed the SOAF and medical record and performed a physical examination. Referring to the A.M.A., *Guides* and *The Guides Newsletter*, he found that appellant's EMG/NCV studies were inconsistent and MRI scans were consistent with age-related degeneration. Dr. Fries stated that the medical evidence did not establish radiculopathy in the right or left lower extremities, and that physical examination did not show sensory, reflex, or motor deficits. As such, he concluded that appellant had no permanent impairment of the lower extremities, pursuant to *The Guides Newsletter*. In his February 14, 2022 supplemental report, Dr. Fries clarified that he did not question the accepted condition, but that he believed that the

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[12] *Supra* note 9 at Chapter 3.700. *The Guides Newsletter* is included as Exhibit 4.

[13] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[14] 20 C.F.R. § 10.321.

[15] *B.M.*, *supra* note 10; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[16] *W.H.*, Docket No. 16-0806 (issued December 15, 2016); *supra* note 9 at Chapter 2.810.11(e) (September 2010).

[17] *Id.*; *see also R.W.*, Docket No. 18-1457 (issued February 1, 2019).

condition due to the accepted injury was temporary. He noted that he found no bilateral neurological symptoms of the lower extremities and no sensory, motor, or reflex deficits, and no atrophy. Dr. Fries further noted that in Dr. Reddy's report of May 1, 2017 he found no neurological deficits. He explained that the findings on MRI scan did not explain appellant's symptoms and that there were no findings on physical examination of radiculopathy. On November 12, 2022 DMA Dr. Katz reviewed the June 7, 2021 and February 14, 2022 reports of Dr. Fries. He noted that Dr. Fries had stated that a permanent partial impairment rating using the DBI method could not be calculated because appellant did not have any findings in his lower extremities. Further, DMA Dr. Katz noted that Dr. Fries had determined that permanent residuals of appellant's temporary condition were not convincingly reflected in his clinical course, current complaints, physical examination findings, imaging, and electrodiagnostic studies. He opined that Dr. Fries had reviewed and documented the pertinent history and diagnostic reports and performed a focused physical examination addressing the accepted conditions under appellant's claim, and also correctly applied the A.M.A., *Guides* and *The Guides Newsletter* in finding that there was no ratable impairment due to sensory or motor deficit of the lower extremities.

The Board finds that OWCP properly accorded the special weight of the evidence to the well-reasoned reports of Dr. Fries, as supplemented by DMA Dr. Katz. Dr. Fries accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions as to permanent impairment which comport with his physical findings.[18] He explained his impairment rating and cited to the appropriate tables and pages of the A.M.A., *Guides* and *The Guides Newsletter*. As his report is detailed, well-rationalized, and based on the proper factual background the opinion of Dr. Fries is entitled to the special weight accorded to an IME.[19]

As the medical evidence of record is insufficient to establish permanent impairment of the lower extremities, 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 permanent impairment of his lower extremities, warranting a schedule award.

[18] *See M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

[19] *See P.P.*, Docket No. 22-1228 (issued February 5, 2021).

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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