United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 24-0056**
	)	**Issued: March 4, 2024**
U.S. POSTAL SERVICE, POST OFFICE, Hinsdale, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 11, 2023 appellant filed a timely appeal from a September 7, 2023 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.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the September 7, 2023 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 her burden of proof to establish more than nine percent permanent impairment of the left lower extremity and zero percent permanent impairment of the right lower extremity for which she previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board regarding appellant's schedule award claims.[3] The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On December 1, 2009 appellant, then a 53-year-old sales and service distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on November 30, 2009 she sustained lower back and left shoulder injuries when placing 50-pound boxes into a cart while in the performance of duty. OWCP accepted the claim for lumbar sprain and left shoulder and rotator cuff sprain. Appellant underwent OWCP-authorized left shoulder rotator cuff repair, acromioplasty, and distal clavicle resection on April 14, 2010.[4] She retired effective April 21, 2011.

On June 26, 2012 appellant filed a claim for compensation (Form CA-7) for a schedule award due to her accepted November 30, 2009 left shoulder and lumbar conditions.

By decision dated January 2, 2014, OWCP granted appellant a schedule award for 10 percent permanent impairment of her left upper extremity based upon her distal clavicle resection. By decision dated June 19, 2015, it granted her a schedule award for an additional three percent permanent impairment of the left upper extremity. Appellant continued to seek an increased schedule award. By decision dated April 6, 2017, OWCP denied modification. By decision dated August 25, 2017, it denied appellant's request for reconsideration of the merits of her claim, finding that the evidence submitted was either repetitious or irrelevant.

Following an appeal to the Board, by decision dated October 16, 2018, the Board set aside OWCP's April 6 and August 25, 2017 decisions.[5] In pertinent part, the Board found that OWCP failed to develop the evidence regarding whether appellant had established permanent impairment of her lower extremities as a result of her accepted lumbar conditions and remanded the case for

[3] Docket No. 22-1068 (issued June 13, 2023); Docket No. 20-1187 (issued November 18, 2021); Docket No. 17-1949 (issued October 16, 2018).

[4] OWCP previously accepted that appellant sustained a sprain of lumbosacral (joint) (ligament), displacement of lumbar intervertebral disc at L4-5 without myelopathy; and thoracic or lumbosacral left-sided neuritis or radiculitis due to a September 3, 1991 employment injury, under OWCP File No. xxxxxx544. It also previously accepted that she sustained bilateral carpal tunnel syndrome due to a September 2, 1991 employment injury, under OWCP File No. xxxxxx845. In October 1995, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity, under OWCP File No. xxxxxx845. OWCP File No. xxxxxx704, the current file, and OWCP File Nos. xxxxxx544 and xxxxxx845 have been administratively combined by OWCP, with OWCP File No. xxxxxx704 serving as the master file.

[5] Docket No. 17-1949 (issued October 16, 2018).

OWCP to obtain a second opinion impairment evaluation to determine the extent of her lower extremity impairment, if any, under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[6]

Appellant's treating physician, Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon, submitted progress reports regarding her conditions. In a February 28, 2019 report, he reported that a February 6, 2019 magnetic resonance imaging (MRI) scan demonstrated significant multi-level degenerative changes in the lumbar spine, most notably at L4-5.

On remand, OWCP referred appellant to Dr. Kanayo K. Odeluga, a Board-certified occupational medicine physician, for a second opinion permanent impairment evaluation of both upper and lower extremities due to her accepted work-related injuries.

In a March 26, 2019 report, Dr. Odeluga, under Proposed Table 2 of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) *(The Guides Newsletter),* concluded that appellant had combined sensory and motor deficits of the left lower extremity of 16 percent.

On June 25, 2019 OWCP requested that Dr. Odeluga provide a supplemental report to include impairment ratings for appellant's right upper and right lower extremities. It noted that she may be reexamined if necessary.

In his August 20, 2019 report, Dr. Odeluga indicated his examination findings and impairment calculations for both the upper and lower extremities. He indicated, based on his evaluation, that there was no observed impairment of the right lower extremity originating in the back or spine. Dr. Odeluga found no sign of right lumbar radiculopathy despite appellant's complaint of radicular pain into her right buttock and groin. He noted that, although the 2016 electromyography and nerve conduction velocity (EMG/NCV) study was suggestive of L4-5 and L5-S1 active radiculopathy with sensory nerve action potential abnormalities on the right side involving both peroneal and sural nerve sensory fibers, there was no physical evidence of nerve injury on examination such as decreased sensation, reflexes or muscle power.

Dr. Chmell continued to submit progress reports. No right-sided radiculopathy was reported. In an October 21, 2019 letter, Dr. Chmell took issue with Dr. Odeluga's March 26, 2019 impairment ratings.

On January 9, 2020 OWCP referred the medical record, including Dr. Odeluga's reports, to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA). In a January 15, 2020 report, Dr. Harris provided findings with regard to appellant's right and left upper extremities. For the lower extremities, he indicated that she did

[6] A.M.A., *Guides* (6th ed. 2009). The Board also remanded the case for OWCP to issue a *de novo* decision following development of a consistent method for calculating permanent impairment of the upper extremities, finding that OWCP had inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* regarding the proper use of either the diagnosis-based impairment or range of motion methodologies in assessing the extent of permanent impairment.

not have any neurologic deficit in either the left or right lower extremity consistent with lumbar radiculopathy. As such, he opined there was no increased impairment.

By decision dated February 20, 2020, OWCP denied appellant's claim for an increased schedule award. It relied on the medical opinion of its DMA, Dr. Harris, to establish that there was no additional permanent impairment that would justify an increased schedule award.

On May 12, 2020 appellant filed an appeal to the Board. By decision dated November 18, 2021, the Board affirmed in part and set aside in part OWCP's February 20, 2020 decision.[7] The Board found that appellant had not met her burden of proof to establish more than 13 percent permanent impairment of her left upper extremity and 10 percent permanent impairment of her right upper extremity, for which she previously received schedule award compensation. The Board further found that she had not met her burden of proof to establish permanent impairment of her right lower extremity due to her accepted lumbar conditions. The Board also found that the case was not in posture for decision regarding the permanent impairment of appellant's left lower extremity due to her accepted lumbar conditions. The Board explained that there was no indication that the DMA had reviewed Dr. Odeluga's March 26, 2019 left lower extremity impairment rating. The Board remanded the case for OWCP's DMA, Dr. Harris, to review Dr. Odeluga's March 26, 2019 left lower extremity impairment rating pursuant to its procedures.

Dr. Chmell continued to submit progress reports. In a January 6, 2022 report, he set forth examination findings which included marked tenderness of the left sciatic nerve and positive straight leg raising on the left and right side with diminished strength and sensation at both ankles and feet. In relevant part, Dr. Chmell diagnosed lumbar sprain and L4-5 disc herniation with left L5 radiculopathy.

In a January 13, 2022 report, Dr. Chmell disagreed with the DMA's permanent impairment findings regarding appellant's lower extremities as she had diagnostic evidence of bilateral lower extremity neurologic involvement. This included the 2016 EMG/NCV study, which indicated bilateral L4-5 and L5-S1 radiculopathy, and the recent September 22, 2021 lumbar spine MRI scan, which demonstrated greater nerve root impingement on right side than left. Dr. Chmell indicated that appellant's bilateral lower extremity radiculopathy has deteriorated with time, which is often the case with a permanent low back injury affecting the lower extremity nerves. He therefore recommended that she undergo a repeat evaluation as to the permanent neurologic impairment in her lower extremities as a result of her accepted work-related low back injury. A copy of the September 22, 2021 lumbar spine MRI scan was submitted along with copies of May 27, 2015 and November 7, 2017 lumbar spine MRI scans.

In a January 21, 2022 report, Dr. Scott E. Glaser, a Board-certified anesthesiologist and pain medicine specialist, noted that a work event was the precipitating factor of appellant's bilateral lower back pain and bilateral buttock and leg/feet pain. He diagnosed lumbar radiculopathy "as deteriorated," noting examination findings of limited rotation and extension which produced bilateral lumbar spine pain and bilateral straight leg raising which elicited calf

[7] Docket No. 20-1187 (issued November 18, 2021).

pain. Dr. Glaser provided a bilateral L3-4 and L4-5 transforaminal epidural steroid injection on February 18, 2022.

On March 16, 2022 OWCP requested an addendum report from the DMA, Dr. Harris, regarding whether appellant had a left lower extremity permanent impairment based upon her accepted lumbar spine condition as outlined in Dr. Odeluga's March 26, 2019 report.

In a March 17, 2022 report, Dr. Harris indicated that, while Dr. Odeluga found that appellant had impairment to her left L4, L5, and S1 dermatomes, his examination only demonstrated diminished sensation in the L5 dermatome. Utilizing *The Guides Newsletter*, he rated her bilateral lower extremity permanent impairments. For the right lower extremity, Dr. Harris found that appellant did not have any neurologic deficit in the lower extremity consistent with lumbar radiculopathy. For the left lower extremity, he opined that she had nine percent total permanent impairment due to the L5 lumbar radiculopathy. This was comprised of six percent impairment for impaired sensation and three percent impairment for mild motor weakness due to left L5 lumbar radiculopathy.

By decision dated April 13, 2022, OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity. The period of the award ran for 25.92 weeks from March 26 to September 13, 2019. OWCP further found that appellant had zero percent permanent impairment of the right lower extremity.

On July 5, 2022 appellant filed an appeal to the Board. By decision dated June 13, 2023, the Board set aside OWCP's April 13, 2022 decision.[8] The Board noted that OWCP had issued its April 13, 2022 schedule award decision without DMA's consideration of the additional medical evidence from Dr. Chmell and Dr. Glaser, which was received prior to Dr. Harris' March 17, 2022 report, and which reflected evidence of recent sensory or motor loss which could possibly affect the current schedule award to the left and right lower extremities. The Board remanded the case to OWCP for referral of the case record to DMA, Dr. Harris for further review. After such other further development as may be deemed necessary, OWCP was to issue a *de novo* decision on appellant's claim for a bilateral lower extremity schedule award.

On July 21, 2023 OWCP requested an addendum report from the DMA, Dr. Harris, regarding whether appellant had a left lower extremity permanent impairment based upon her accepted lumbar spine condition as outlined in Dr. Odeluga's March 26 and August 20, 2019 reports. It also requested that the DMA refer to the Board's decision of June 13, 2023.

In a July 25, 2023 report, Dr. Harris, the DMA, noted that the medical record, in pertinent part, established the diagnoses of lumbar disc bulging L4-5 with protrusion L2-3, and lumbar radiculopathy. He reviewed Dr. Odeluga's March 26, 2019 report along with the evidence of record and indicated that appellant reached maximum medical improvement on March 26, 2019 the date of Dr. Odeluga's examination. Dr. Harris noted that, while Dr. Odeluga found that appellant had impairment to her left L4, L5, and S1 sensory and L5 motor radiculopathy, the reports of March 26 and August 20, 2019 did not document any sensory deficits in the L4 and S1 dermatomes, and she was not entitled to any impairment based on the methodology to rate spinal

[8] Docket No. 22-1068 (issued June 13, 2023).

nerve impairments discussed in *The Guides Newsletter* July/August 2009 for L4 or S1 lumbar radiculopathy. Utilizing *The Guides Newsletter*, he rated appellant's bilateral lower extremity permanent impairments. For the right lower extremity, Dr. Harris found that she did not have any neurologic deficit in the lower extremity consistent with lumbar radiculopathy, resulting in zero percent impairment. For the left lower extremity, he opined that appellant had eight percent permanent impairment due to the L5 lumbar radiculopathy. Dr. Harris concluded that the medical evidence did not demonstrate a permanent, measurable, scheduled impairment greater than that already awarded.

By decision dated September 7, 2023, OWCP denied appellant's claim for an increased schedule award regarding the left lower extremity. It further denied her schedule award claim for the right lower extremity as she had zero percent permanent impairment.

LEGAL PRECEDENT

The schedule award provisions of FECA,[9] and its implementing federal 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. 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[11] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[12]

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.[13] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[14] 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 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

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *Id.* at § 10.404(a).

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

[13] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see T.W.*, Docket No. 20-0119 (issued January 12, 2021); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[14] *Supra* note 12 at Chapter 2.808.5c(3) (March 2017).

rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[15]

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 permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[16]

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for it to consider the evidence appellant submitted prior to the issuance of OWCP's April 13, 2022 merit decision because the Board considered that evidence in its June 13, 2023 decision. Findings made in the prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[17]

On prior appeal, the Board remanded the case to OWCP so that its DMA, Dr. Harris, could review the case record, including evidence of record received prior to his March 17, 2022 report, which reflected a recent sensory or motor loss which could affect the current schedule award to the left and right lower extremities.

In its July 21, 2023 letter to its DMA, OWCP noted the Board's decision, but instructed that Dr. Harris to provide an addendum report for only a left lower extremity permanent impairment based upon appellant's accepted lumbar spine condition. In his July 25, 2023 report, Dr. Harris, the DMA, focused solely on Dr. Odeluga's March 26 and August 20, 2019 impairment reports. There is no mention of the medical evidence received in 2022, which reflected evidence of sensory or motor loss in both extremities, or its possible effect on the current schedule award to the left and right lower extremities.

The Board notes that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[18] Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case. Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[19] It issued its September 7, 2023 schedule award decision with inadequate instructions to Dr. Harris and, as such, he Dr. Harris did not

[15] *Id*. at Chapter 3.700, Exhibit 4 (January 2010); *see N.G.*, Docket No. 20-0557 (issued January 5, 2021).

[16] *Id*. at Chapter 2.808.6f (March 2017).

[17] *See D.M.*, Docket No. 21-1209 (issued March 24, 2022); *T.R.*, Docket No. 20-0588 (issued June 25, 2021); *A.G.*, Docket No. 18-0329 (issued July 26, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

[18] *See T.C.*, Docket No. 19-0771 (issued March 17, 2021); *E.W.*, Docket No. 17-0707 (issued September 18, 2017).

[19] *See T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

consider the additional medical evidence received from Dr. Chmell and Dr. Glaser which was of record prior to his March 17, 2022 and July 25, 2023 impairment reports. Therefore, the case must again be remanded to OWCP for further development.[20]

The Board will therefore set aside OWCP's September 7, 2023 decision and remand the case to OWCP for referral of the case record to Dr. Harris for further review. After such other further development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for a bilateral lower extremity schedule award.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 7, 2023 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 4, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[20] *X.Y.*, Docket No. 19-1290 (issued January 24, 2020); *K.G.*, Docket No. 17-0821 (issued May 9, 2018).