

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 17, 2014 appellant, then a 55-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 16, 2014 he injured his lower back when bending to lift letter trays from an all-purpose container while in the performance of duty. He stopped work on the date of injury and returned to full-duty work on July 24, 2014. By decision dated June 30, 2014, OWCP accepted the claim for thoracic or lumbosacral radiculitis or neuritis and lumbar intervertebral disc displacement without myelopathy. It paid appellant wage-loss compensation on the supplemental rolls for intermittent periods of disability commencing May 3, 2014.

In a January 30, 2018 report, Dr. Nicholas P. Diamond, an osteopathic physician Board-certified in physical medicine and rehabilitation, noted appellant's history of injury and medical treatment. He provided a permanent impairment rating under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ and Proposed Table 2 of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment* using the sixth edition (July/August 2009) (*The Guides Newsletter*). Dr. Diamond determined that appellant's sensory and motor deficits associated with bilateral L4 and S1 nerve distribution warranted a finding that appellant had seven percent permanent impairment of each lower extremity, and that he had reached maximum medical improvement (MMI) as of the date of the examination.

On March 19, 2018 Dr. Steven J. Valentino, an osteopathic Board-certified orthopedic surgeon, examined appellant for low back pain. On examination he noted palpation of the lumbar spine and lower back revealed significant spasm and facet synovitis and effusion. Dr. Valentino also related that "otherwise, neurologic examination reveals intact deep tendon reflexes are intact, motor and sensory examinations are normal." He diagnosed lumbar ligaments sprain, lumbar intervertebral disc displacement without myelopathy, and lumbar facet joint syndrome.

On April 20, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On May 2, 2018 OWCP forwarded the case record, including Dr. Diamond's January 30, 2018 report and a statement of accepted facts (SOAF), to Dr. Michael M. Katz, a Board-certified

³ Docket No. 21-0821 (issued April 15, 2022).

⁴ A.M.A., *Guides* (6th ed. 2009).

orthopedic surgeon serving as an OWCP district medical adviser (DMA). It requested that Dr. Katz review the report and provide an opinion regarding appellant's permanent impairment.

In a report dated May 8, 2018, Dr. Katz related that Dr. Diamond's January 30, 2018 report supported a finding that appellant had seven percent permanent impairment of each lower extremity. However, he recommended a second opinion evaluation as there was significant conflict between the findings of Dr. Valentino with respect to motor and sensory findings and Dr. Diamond, in his March 19, 2018 report, which could not be resolved on the basis of a review of the medical record. Dr. Katz indicated that MMI was undetermined, pending a second opinion evaluation.

On December 18, 2018 OWCP referred appellant, along with a SOAF, the medical record, and a series of questions to Dr. Stanley Askin for a second opinion examination, a Board-certified orthopedic surgeon, and requested that he provide an assessment of appellant's work-related condition and any resulting permanent impairment.

In a report dated January 11, 2019, Dr. Askin related that appellant had no anatomic change due to the March 16, 2014 employment injury, but rather that he had degenerative changes which were grossly misattributed as consequential to this injury. He found no neurological impairment of the upper or lower extremities, bilateral lower extremity sensation preserved to light touch, 90 degrees bilateral straight leg raising, normal manual testing of the quadriceps, ankle and toe motors, and hip abductors, adductors, flexors, extensors. Dr. Askin concluded that appellant had no neurologic impairment and concurred with Dr. Valentino's assessment.

In a February 1, 2019 report, Dr. Katz, OWCP's DMA, indicated that he had reviewed Dr. Askin's January 11, 2019 report. He concurred with Dr. Askin's assessment that appellant's lack of neurologic deficits in the bilateral lower extremities demonstrated that appellant had no permanent impairment pursuant to the A.M.A., *Guides* and *The Guides Newsletter*.

On March 14, 2019 Dr. Diamond reviewed the reports of Drs. Askin and Katz, and disagreed with their conclusions that appellant had no lower extremity sensory deficit. He asserted that Dr. Askin failed to properly evaluate appellant's sensory abnormalities as he did not use the Semmes-Weinstein Monofilament testing and that according to the A.M.A., *Guides* using monofilament is the optimum choice for objective touch examination. Dr. Diamond reiterated his opinion that appellant had seven percent right lower extremity permanent impairment and seven percent left lower extremity permanent impairment pursuant to *The Guides Newsletter*.

On April 3, 2019 OWCP sought clarification from Dr. Katz regarding his February 1, 2019 report and provided Dr. Diamond's March 14, 2019 report for his review. In an April 5, 2019 addendum report, the DMA reviewed the record along with Dr. Diamond's March 14, 2019 report. He related that the A.M.A., *Guides* did not require Semmes-Weinstein monofilament testing to establish or refute sensory deficits. The DMA advised that Dr. Askin's bilateral lower extremity motor and sensory findings were consistent with Dr. Valentino's March 14, 2018 examination findings. Thus, based on the examination findings of Dr. Askin and Dr. Valentino, his opinion that appellant had zero percent lower extremity permanent impairment remained unchanged.

OWCP subsequently referred appellant, along with an updated SOAF, the medical record, and a series of questions to Dr. Thomas O'Dowd, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the medical opinion evidence regarding appellant's permanent impairment due to the accepted employment injury. The May 8, 2019 SOAF noted that the claim had been accepted for thoracic or lumbosacral neuritis or radiculitis and lumbar intervertebral disc displacement without myelopathy.

In a report dated September 27, 2019, Dr. O'Dowd, serving as the impartial medical examiner (IME), opined that appellant sustained a lumbar strain/sprain and probable thoracic strain/sprain due to the accepted March 16, 2014 employment injury. He noted, however, that he had not been provided with all of the magnetic resonance imaging (MRI) scans performed over the years. Dr. O'Dowd also noted that he had not been provided with Dr. Askin's report, therefore he could not determine whether a conflict existed in the medical opinion evidence and could not provide a permanent impairment rating.

OWCP subsequently provided Dr. O'Dowd with additional x-ray and MRI scans, as well as a copy of Dr. Askin's report, and requested that he provide an addendum report resolving the conflict in the medical opinion evidence

In an addendum report dated April 20, 2020, Dr. O'Dowd opined that appellant sustained a lumbar sprain/strain due to the accepted employment injury, which the SOAF referred to as thoracic or lumbosacral neuritis or radiculitis, and lumbar intervertebral disc displacement without myelopathy. Based on his physical examination, he found that appellant had no neurologic changes. A review of MRI scans demonstrated slow chronic changes, no acute injury, and no evidence of a herniation. Dr. O'Dowd explained that this was supported by the lack of evidence of a significant injury in a 2019 MRI scan. He advised that if appellant had a neurologic defect, a rating of seven percent permanent impairment of each lower extremity was not unreasonable. However, Dr. O'Dowd found no neurologic deficits or any permanent injury due to the accepted March 16, 2014 employment injury. Thus, he concluded that appellant did not have a permanent impairment of the bilateral lower extremities pursuant to the A.M.A., *Guides*.

By decision dated May 20, 2020, OWCP denied appellant's schedule award claim.

On May 27, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on September 3, 2020.

Dr. Diamond, in an August 14, 2020 report, reviewed Dr. O'Dowd's report and reiterated that Dr. Dowd had misapplied the A.M.A., *Guides*, as the only way to detect mild sensory deficits is using the Semmes Weinstein Monofilament method. Dr. Diamond again concluded that appellant had seven percent left lower extremity permanent impairment, and seven percent right lower extremity permanent impairment.

By decision dated November 10, 2020, OWCP's hearing representative affirmed the denial of appellant's claim for a schedule award.

On May 7, 2021 appellant, through counsel, appealed to the Board. By decision dated April 15, 2022, the Board set aside OWCP's November 10, 2020 decision and remanded the case

for further development.⁵ The Board found that no true conflict in the medical opinion existed at the time of referral as Dr. Askin's opinion was not based on the SOAF. Thus, the Board found that Dr. O'Dowd's opinion could not be afforded the special weight of an IME and had to be considered for its own intrinsic value. The Board concluded that Dr. O'Dowd's opinion was also inconsistent with the SOAF and was therefore of no probative value. The Board remanded the case for OWCP to refer appellant to a new second opinion physician for an evaluation to determine the extent of any permanent impairment.

On June 9, 2022 OWCP referred appellant, along with a SOAF, the medical record, and a series of questions to Dr. Willie E. Thompson, a Board-certified orthopedic surgeon, for a second opinion evaluation and a permanent impairment rating.

In a report dated July 18, 2022, Dr. Thompson recounted a review of appellant's medical record, the SOAF, and appellant's physical examination findings. He reported that appellant had normal motion and neurologic function, intact and equal bilateral deep tendon reflexes, and no evidence of structural abnormality. Dr. Thompson concluded that appellant had zero percent permanent impairment of the lower extremities, under the A.M.A., *Guides* as he had no sensory or motor deficit. Thus, he concluded that appellant had a zero percent permanent impairment of the right lower extremity and a zero percent permanent impairment of the left lower extremity. Dr. Thompson indicated that July 18, 2022 was the date of appellant's MMI.

In a report dated August 3, 2022, Dr. Katz, OWCP's DMA, indicated that he had reviewed Dr. Thompson's July 18, 2022 second opinion report. He concurred with Dr. Thompson's assessment that appellant's lack of sensory and motor deficits in both lower extremities demonstrated no ratable permanent impairment pursuant to *The Guides Newsletter*.

By *de novo* decision dated August 12, 2022, OWCP denied appellant's schedule award claim.

On August 30, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a decision dated November 22, 2022, OWCP's hearing representative found a conflict in the medical opinion evidence between Dr. Diamond, appellant's treating physician, and Drs. Thompson and Katz, OWCP's second opinion physician and DMA as to whether appellant had any permanent impairment of the lower extremities due to the accepted employment injury. It remanded the case to OWCP for resolution of the conflict.

On March 1, 2023 OWCP referred appellant for an impartial medical examination with Dr. Andrew Collier, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence regarding permanent impairment due to the accepted employment injury.

In a report dated April 5, 2023, Dr. Collier recounted appellant's medical history and reported the findings of his physical examination. He related that appellant had a normal neurological examination. Dr. Collier noted the claim had been accepted for thoracic or

⁵ *Supra* note 3.

lumbosacral neuritis or radiculitis and lumbar intervertebral disc displacement without myelopathy. Based on his review of the medical record and examination findings, he diagnosed acute lumbosacral spine strain and sprain, aggravation of underlying lumbar degenerative disc disease, and no evidence that he sustained herniated discs. Dr. Collier opined that while appellant initially had some minor radiculitis, that the condition had completely resolved and appellant only had chronic underlying degenerative disease of the back. On physical examination, he reported mechanical symptoms, with no deep tendon, sensory, or motor reflex changes and negative tension signs. Dr. Collier concluded that appellant had no permanent impairment under the sixth edition of the A.M.A., *Guides* due to his normal physical examination.

By *de novo* decision dated April 20, 2023, OWCP denied appellant's schedule award claim.

On April 25, 2023 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on September 28, 2023.

By decision dated June 16, 2023, OWCP expanded the acceptance of the claim to include the conditions of lumbar region radiculopathy and other lumbar region intervertebral disc displacement.

On December 14, 2023 OWCP's hearing representative set aside the April 20, 2023 decision and remanded the case to OWCP for further development of the evidence.

On January 4, 2024 OWCP requested clarification from Dr. Collier. In a January 11, 2024 addendum report, Dr. Collier noted he reviewed an April 13, 2010 electromyogram (EMG) and nerve conduction velocity (NCV) study, which diagnosed left L5 radiculopathy and right L3-4 radiculopathy. Therefore, appellant did have evidence in 2010, prior to his employment injury in 2014, of radiculopathy in both lower extremities. He advised after reviewing the new records, that his opinion remained unchanged. Dr. Collier explained that appellant had no neurological findings or any evidence of radiculopathy at the time of his examination. He related that, while appellant did have symptoms radiating to both lower extremities prior to his injury and afterward, his symptoms had all dissipated and resolved. Dr. Collier again concluded that appellant had no permanent impairment of the lower extremities due to his lumbar spine injury. In support of this conclusion, he explained appellant had no numbness, weakness, or neurological findings of the lower extremities.

By *de novo* decision dated February 27, 2024, OWCP denied appellant's claim for a schedule award.

On March 7, 2024 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on June 4, 2024.

By decision dated July 9, 2024, an OWCP hearing representative affirmed the denial of appellant's claim for a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ and its implementing regulations⁷ 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*, published in 2009, 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 However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹¹ The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. 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.¹² In addressing upper or lower extremity impairment due to peripheral or spinal nerve root involvement, the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* require identifying the impairment class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH) and/or a grade modifier for clinical studies (GMCS). The effective net adjustment formula is (GMFH - CDX) + (GMCS - CDX).¹³

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

⁶ *Supra* note 2.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a); *see C.C.*, Docket No. 24-0951 (issued November 12, 2024); *R.M.*, Docket No. 20-1278 (issued May 4, 2022); *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); *id.* at Part 3 -- Medical, *Schedule Awards*, 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 C.C.*, *supra* note 8; *A.G.*, Docket No. 18-0815 (issued January 24, 2019).

¹¹ *Supra* note 9 at Chapter 2.808.5c(3) (February 2022).

¹² *Id.* at Chapter 3.700, Exhibit 4 (January 2010); *see L.H.*, Docket No. 20-1550 (issued April 13, 2021); *N.G.*, Docket No. 20-0557 (issued January 5, 2021).

¹³ *C.C.*, *supra* note 8; *G.W.*, Docket No. 22-0301 (issued July 25, 2022); *see also The Guides Newsletter*; A.M.A., *Guides* 430.

shall appoint a third physician who shall make an examination.¹⁴ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁵ Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹⁶

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

After significant development of the medical evidence, in a decision dated November 22, 2022, OWCP's hearing representative found a conflict in the medical opinion evidence continued to exist between appellant's treating physician, Dr. Diamond, who found seven percent permanent impairment of each lower extremity, and Dr. Thompson, an OWCP second opinion physician, and Dr. Katz, a DMA, who found that appellant had zero percent permanent impairment of the lower extremities as he had no motor or sensory deficits. It properly referred the case to Dr. Collier, pursuant to 5 U.S.C. § 8123(a), for an impartial medical examination to resolve the conflict in the medical opinion evidence.¹⁷

In his April 5, 2023 report, Dr. Collier concluded that appellant did not have any permanent impairment of a scheduled member or function of the body under the sixth edition of the A.M.A., *Guides*. He reported the findings of appellant's physical examination and found that appellant had a normal neurological examination. Dr. Collier explained that, while appellant initially had some minor radiculitis, that the condition had completely resolved, and appellant only had chronic underlying degenerative disease of the back. On physical examination, he reported mechanical symptoms, with no deep tendon, sensory, or motor reflex changes and negative tension signs. In a January 11, 2024 addendum, Dr. Collier noted that he had reviewed appellant's April 13, 2010 EMG and NCV study which had findings of left L5 radiculopathy and right L3-4 radiculopathy. While appellant did have evidence in 2010, prior to his employment injury in 2014, of radiculopathy in both lower extremities, at the time of his current examination appellant had no neurological findings or any evidence of radiculopathy. Dr. Collier again concluded that appellant had no permanent impairment of the lower extremities due to his lumbar spine injury, based on his finding that appellant had no numbness, weakness, or neurological findings of the lower extremities.

¹⁴ 5 U.S.C. § 8123(a). See *L.W.*, Docket No. 22-1207 (issued April 10, 2023); *M.E.*, Docket No. 21-0281 (issued June 10, 2022); *R.C.*, Docket No. 18-0463 (issued February 7, 2020); see also *G.B.*, Docket No. 16-0996 (issued September 14, 2016).

¹⁵ See *L.W.*, *id.*; *M.E.*, *id.*; *M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

¹⁶ *L.W.*, *id.*; *M.E.*, *id.*; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁷ *L.W.*, *id.*; *H.M.*, Docket No. 21-0046 (issued June 1, 2021); *W.C.*, Docket No. 19-1740 (issued June 4, 2020).

The Board finds that Dr. Collier's opinion has reliability, probative value, and convincing quality.¹⁸ Dr. Collier provided a thorough factual and medical history, and he accurately summarized the relevant medical evidence. As his report is detailed, well rationalized, and based on a proper factual background, his opinion is sufficient to represent the special weight of the medical evidence.

As the medical evidence of record is insufficient to establish 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 permanent impairment of a scheduled member or function of the body, warranting a schedule award.

¹⁸ See *L.L.*, Docket No. 24-0887 (issued November 21, 2024); *P.G.*, Docket No. 24-0437 (issued June 26, 2024); *S.V.*, Docket No. 23-0474 (issued August 1, 2023).

ORDER

IT IS HEREBY ORDERED THAT the July 9, 2024 decision of the Office of Workers' Compensation Programs affirmed.

Issued: February 10, 2025
Washington, DC

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

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

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