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R.C., Appellant)	
)	
and)	Docket No. 25-0414
)	Issued: May 30, 2025
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. COAST GUARD, New York, NY, Employer)	
)	

Michael D. Overman, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 24, 2025, appellant, through counsel, filed a timely appeal from an October 22, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

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 an 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.*

³ The Board notes that following the October 22, 2024 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 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 on a different issue.⁴ The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 1, 1994, appellant, then a 42-year-old pipefitter, injured his lower back when carrying a fire extinguisher up a ladder while in the performance of duty. OWCP accepted the claim for a closed subluxation of the lumbar vertebra at L3-S1 and lower leg osteoarthritis/radiculitis. It paid appellant wage-loss compensation on the periodic rolls.

On July 27, 2020, OWCP referred appellant to Dr. James Schwartz, a Board-certified orthopedic surgeon, for a second opinion examination on the issue of whether he had continued disability and/or residuals and disability causally related to his accepted September 1, 1994 employment injury.

In a report dated August 22, 2020, Dr. Schwartz indicated that a physical examination yielded "profoundly non-physiologic" findings. He diagnosed a closed lumbar dislocation/subluxation at L3 to L5, lower leg osteoarthritis, radiculitis, and marked non-physiologic pain behavior. Dr. Schwartz advised that performing a physical examination was difficult "due to the screams of pain with simple maneuvers of [appellant's] hip, of his knee, which are actually quite disturbing." He found no orthopedic physiologic diagnosis. Dr. Schwartz opined that appellant likely had progressive degenerative disc disease and was unable to return to his date-of-injury position. He indicated that the accepted conditions "have progressed on to degenerative processes that the claimant is grossly exaggerating..."

In a supplemental report dated October 1, 2020, Dr. Schwartz advised that the accepted conditions had resolved, and that the natural progression of the degenerative processes were not related to the accepted employment injury by either acceleration or precipitation.

On October 3, 2020, appellant elected to receive retirement benefits from the Office of Personnel Management in lieu of FECA wage-loss compensation.

OWCP continued to receive evidence. In a January 13, 2021 impairment evaluation, Dr. Albert Johnson, a Board-certified orthopedic surgeon, applied the provisions of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,⁵ and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*). For the right lower extremity, he found 14 percent permanent impairment of the right lower extremity due to sensory deficits at L5 and S1 and motor strength deficits of the right extensor hallucis longus and right foot plantar flexors. Dr. Johnson

⁴ Docket No. 00-2093 (issued February 8, 2002).

⁵ A.M.A., *Guides* (6th ed. 2009).

further found 18 percent permanent impairment of the left lower extremity due to sensory deficits at L5 and S1 and motor strength deficits of the extensor hallucis longus and plantar flexors of the left foot. He opined that appellant had reached maximum medical improvement (MMI) on January 13, 2021.

On August 13, 2021, appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a November 5, 2021 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed Dr. Johnson's findings. He noted that Dr. Schwartz had opined that appellant's spinal condition had resolved and that his current processes resulted from unrelated degenerative conditions. Dr. Katz also indicated that Dr. Schwartz had found non-physiologic behavior "that may raise doubts as to the reliability of an exam[ination]." He advised that the reports of Dr. Schwartz and Dr. Johnson were in conflict.

Accordingly, OWCP found a conflict in medical opinion between Dr. Schwartz and Dr. Johnson on the issue of whether appellant had an employment-related permanent impairment. On August 10, 2022, it referred appellant to Dr. D. Burke Haskins, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 10, 2022, Dr. Haskins, serving as the impartial medical examiner (IME), discussed appellant's history of injury and continued complaints of intermittent pain in his lumbar spine radiating into the right leg. On examination, he found "severe edema with venous insufficiency changes in both legs from the knees distally." Dr. Haskins further found a positive straight leg test bilaterally and normal strength and motion of the knees, ankles, and great toe and normal sensation. He provided his review of the medical records. Dr. Haskins diagnosed severe peripheral vascular disease and a history of a work-related injury with the accepted conditions of lower leg osteoarthritis, radiculitis, and a closed dislocation/subluxation of the lumbar vertebra from L3 to S1. He found no evidence of radiculopathy and opined that appellant's "severe peripheral vascular disease with edema of both legs account for most of [his] complaints in the lower extremities." Dr. Haskins further noted that a nerve conduction study did not show radiculopathy. Referencing *The Guides Newsletter*, he found no spinal nerve impairment based on the lack of physical findings of "atrophy, muscle loss, wasting, or significant weakness in either lower extremity." Dr. Haskins further found no evidence of a sensory change from a spinal impairment or electrodiagnostic evidence of an impairment. He opined that appellant had reached MMI.

By decision dated January 20, 2023, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body. It concluded, therefore, that the requirements had not been met for entitlement to a schedule award.

On January 31, 2023, appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A hearing was held on July 11, 2023. Counsel requested that the record remain open for 30 days and advised that appellant would be providing updated electrodiagnostic studies. However, no additional evidence was received.

By decision dated August 22, 2023, OWCP's hearing representative affirmed the January 20, 2023 decision.

On November 22, 2023, appellant, through counsel, requested reconsideration. In support thereof, he submitted a September 8, 2023 magnetic resonance imaging (MRI) scan, which revealed multilevel degenerative changes with mild-to-moderate central canal narrowing at L3-4, moderate bilateral neural foraminal narrowing at L4-5, and severe bilateral neural foraminal narrowing at L5-S1. Appellant also submitted an October 4, 2023 electromyogram (EMG), which demonstrated moderate severe sensorimotor axon and demyelinating peripheral neuropathy affecting all tested nerves. The examiner, Dr. Ruth Clark-Brown, a Board-certified neurologist, indicated that a needle examination was not performed due to bilateral leg swelling.

On February 22, 2024, the DMA, Dr. Katz advised that the EMG performed on October 4, 2023 failed to support a determination of a spinal nerve root impairment as it showed "a peripheral neuropathic process which is unrelated to the accepted conditions of this claim."

OWCP subsequently referred the evidence to a new DMA for review. In a report dated April 6, 2024, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA, reviewed the evidence and opined that appellant had no impairment of either the right or left lower extremity due to lumbar radiculopathy, pursuant to Proposed Table 2 of *The Guides Newsletter*.

On May 31, 2024, OWCP requested that the IME, Dr. Haskins, review the September 8, 2023 MRI scan and October 4, 2023 EMG study, and advise as to whether those studies changed the conclusions reached in his October 10, 2022 report. OWCP subsequently received notification of Dr. Haskins' retirement.

On July 18, 2024, OWCP referred appellant to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated August 12, 2024, Dr. Sultan reviewed appellant's history of injury and complaints of low back and bilateral lower extremity pain. On examination, he found a positive straight leg raise on the right, "extensive venous stasis changes involving both lower legs down to the ankles and feet," and impaired sensation of the right lower extremity. Dr. Sultan diagnosed status post acute lower back derangement aggravating multilevel lumbar disease at L1-S2 to L5-S1, and sensory impairment of the right lower extremity from the lateral left calf to the lateral ankle and foot involving the right lumbar L4 and L5 roots. He referenced Table 16-12 on page 535 of the A.M.A., *Guides* and found a Class 1 impairment of the common peroneal nerve resulting in grade E or five percent lower extremity permanent impairment.

On August 23, 2024, Dr. Harris, the DMA, opined that appellant had no impairment of either the right or left lower extremity under *The Guides Newsletter*. He noted that appellant had no "neurologic deficit in the lower extremity consistent with lumbar radiculopathy" and thus a Class 0 impairment under Proposed Table 2 of *The Guides Newsletter*. Dr. Harris determined that Dr. Sultan had calculated appellant's impairment due to a peripheral nerve impairment rather than *The Guides Newsletter* and thus his opinion was not consistent with the A.M.A., *Guides*.

In an addendum dated September 25, 2024, Dr. Sultan disagreed with Dr. Harris' finding that he had not used the A.M.A., *Guides* in reaching his impairment rating. He advised that he had

found an impairment of the common peroneal nerve on the right, which yielded five percent permanent impairment under Table 16-12 on page 535 of the A.M.A., *Guides*.

On October 12, 2024, Dr. Harris again opined that appellant had no permanent impairment of either lower extremity. He reiterated that Dr. Sultan had rated appellant's radiculopathy using the charts for a peripheral nerve impairment rather than *The Guides Newsletter*.

By decision dated October 22, 2024, OWCP denied modification of its August 22, 2023 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,⁶ and its implementing federal regulation,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 way the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 specified edition of the A.M.A., *Guides*, published in 2009.⁸ 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): A Contemporary Model of Disablement*.¹⁰ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), a grade modifier for physical examination (GMPE), and/or a grade modifier for clinical studies (GMCS).¹¹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹² Evaluators are directed to provide reasons for their

⁶ *Supra* note 2.

⁷ 20 C.F.R. § 10.404.

⁸ For OWCP decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁹ *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 411.

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 Furthermore, the back is specifically excluded from the definition of an organ under FECA.¹⁵ 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 provide that the July/August 2009 edition of *The Guides Newsletter* is to be applied.¹⁶

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.¹⁷

Section 8123(a) of FECA provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or an IME) who shall make an examination."¹⁸ This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁹ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME 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.²⁰

ANALYSIS

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

¹³ See *J.S.*, Docket No. 23-0579 (issued January 30, 2024); *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 *D.S.*, Docket No. 24-0870 (issued October 23, 2024); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁵ See *id.* at § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁶ *Supra* note 6 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁷ *Id.* at Chapter 2.808.6(f) (March 2017).

¹⁸ 5 U.S.C. § 8123(a).

¹⁹ 20 C.F.R. § 10.321; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *R.C.*, 58 ECAB 238 (2006).

²⁰ See *W.N.*, Docket No. 21-0123 (issued December 29, 2021); *A.G.*, Docket No. 21-0315 (issued December 29, 2021); *R.R.*, Docket No. 19-0086 (issued February 10, 2021); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

OWCP determined that a conflict existed between Dr. Schwartz, an OWCP referral physician, and Dr. Johnson, appellant's treating physician, on the issue of whether he had an employment-related permanent impairment causally related to the accepted September 1, 1994 employment injury. It properly referred him to Dr. Haskins for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a).²¹

In his October 11, 2022 report, Dr. Haskins, serving as the IME, attributed appellant's complaints to severe peripheral vascular disease. He noted that electrodiagnostic studies failed to reveal radiculopathy. Dr. Haskins opined that appellant had no spinal nerve impairment of the lower extremities under *The Guides Newsletter*. Based on Dr. Haskins' report, OWCP denied appellant's claim for a schedule award. On November 22, 2023, appellant requested reconsideration and subsequently submitted an October 4, 2023 EMG study finding moderate severe sensorimotor axon and demyelinating peripheral neuropathy affecting all tested nerves. OWCP requested that Dr. Haskins review the study; however, he had since retired. It then referred appellant to Dr. Sultan, a second opinion physician, instead of referring appellant to a new IME.

In a situation where OWCP secures an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, it has the responsibility to secure a supplemental report from the IME for the purpose of correcting the defect in the original opinion.²² The Board has held that when an IME's statement of clarification or elaboration is not forthcoming or if the physician is unable to clarify or elaborate on the original report, or if the supplemental report is vague, speculative or lacks rationale, OWCP must refer the employee to a new IME for a rationalized medical opinion on the issue in question.²³

The case shall therefore be remanded to OWCP for referral to a new IME to resolve the conflict in the medical evidence on the issue of whether appellant has an employment-related permanent impairment causally related to the accepted September 1, 1994 employment injury. After this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

²¹ *Supra* notes 18-20.

²² See *P.H.*, Docket No. 24-0897 (issued November 20, 2024); *F.H.*, Docket No. 17-1924 (issued January 25, 2019); *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Talmadge Miller*, 47 ECAB 673 (1996); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

²³ *Id.*; see also *R.T.*, Docket No. 17-0925 (issued December 14, 2017).

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2024 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: May 30, 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