United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 14-1395**
	)	**Issued: July 6, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Downey, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 2, 2014 appellant filed a timely appeal from an April 21, 2014 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 more than five percent permanent impairment of his left lower extremity.

FACTUAL HISTORY

Appellant, a 25-year-old human resources specialist, injured his lower back on October 9, 1976 while lifting a portable ramp, as he was loading and unloading a truck. He filed a claim for benefits on October 22, 1976 and OWCP accepted lumbar strain, herniated lumbar disc and

[1] 5 U.S.C. § 8101 *et seq.*

lumbosacral degenerative disc disease. Appellant underwent an L4 laminectomy and L5 discectomy on November 12, 1976. He was placed on the periodic rolls until he returned to work on February 15, 1978. Appellant later received a wage-earning capacity decision based on his position at that time. He continued to receive compensation for partial disability.

Appellant continued to complete EN1032 forms and received medical treatment until 2007 when he was advised that his position was being targeted by the National Reassessment Process and that he needed to provide an updated medical report listing all current restrictions.

In a report dated May 29, 2007, Dr. Sangarapilla Manoharan, a specialist in emergency medicine, stated that appellant had left lower leg symptoms consisting of numbness and tingling in his left lower extremity, as well as weakness in his left leg. Appellant believed that his left leg symptoms were related to his lower back condition. Dr. Manoharan advised that this might be a problem with the nerves that supply the left lower leg, which actually originate in the low back. He noted that appellant had surgery at L4-5, L5-S1 in 1976. Dr. Manoharan asserted that, although he believed appellant's left lower leg symptoms were related to his lower back condition, he would recommend referral to a back specialist who could consider whether his left leg symptoms were causally related to his accepted lower back condition. He provided work restrictions.

On October 29, 2013 appellant filed a claim for a schedule award based on a partial loss of use of his lower extremities.

OWCP referred appellant to Dr. Richard A. Rogachefsky, Board-certified in orthopedic surgery, for a second opinion examination as to whether appellant had any impairment from the accepted conditions. In a February 28, 2014 report, Dr. Rogachefsky found that appellant had nine percent lower extremity impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition). He advised that appellant had undergone an L4 laminectomy and L5 discectomy on November 12, 1976. Dr. Rogachefsky stated that appellant's status was post decompression laminectomy, discectomy, and neural foraminotomy; he had developed facet syndrome at the left L4-5 level, probably segmental instability and recurrent disc herniation, with some residual motor weakness and sensory deficit in the left lower extremity involving the L4, L5, and S1 nerve root, probably by perineural scarring. He stated that his current diagnosis was spinal stenosis syndrome, postlaminectomy, long-term, with two levels of low back lumbar radiculitis.

Dr. Rogachefsky stated that, under Table 16-12, page 534-35 of the A.M.A., *Guides*,[2] appellant had a peripheral nerve impairment of the lower extremity impairment for sciatica, based on a mild motor deficit in the left leg. He graded this as a class 1, mild problem with a middle default value of nine percent lower extremity impairment. Citing Table 16-6, page 516 of the A.M.A., *Guides*,[3] the table used for rating grade modifiers for functional history impairments for the lower extremities, Dr. Rogachefsky found that appellant had a grade modifier of zero because he did not have an antalgic limp. The physical examination grade

[2] A.M.A., *Guides* 534-35.

[3] *Id.* at 516.

modifier at Table 16-7, page 517 of the A.M.A., *Guides*[4] was not relevant as this was used in determining class assignment. The clinical studies grade modifier at Table 16-8, page 519 of the A.M.A., *Guides*[5] was also not relevant as there were no electrodiagnostic studies available. Accordingly, Dr. Rogachefsky found that appellant's net adjusted impairment consisted of one shift to the left because a class 1 minus a grade zero modifier would yield an adjusted grade modifier of minus one, which would be one shift to the left from the middle default value; this resulted in a seven percent lower extremity rating under the A.M.A., *Guides*. He determined that the date of maximum medical improvement (MMI) was February 28, 2014.

In a March 22, 2014 report, Dr. Arthur A. Harris, a specialist in orthopedic surgery and an OWCP medical adviser, found that appellant had a five percent impairment of the left lower extremity under the sixth edition of the A.M.A., *Guides* stemming from his accepted lower back conditions. He stated that appellant had undergone an L4-5 laminectomy with left L5-S1 disc excision on November 12, 1976 and chronic left lumbar radiculopathy. Dr. Harris advised that the sixth edition of the A.M.A., *Guides* does not provide a diagnosis-based impairment or any other method to calculate residual lower extremity impairment for lumbar radiculopathy. He stated, however, that the July/August issue of *The Guides Newsletter* provided a separate approach to rating spinal nerve impairments consistent with the sixth edition methodology. Dr. Harris asserted that, utilizing this method, appellant had a five percent impairment of the left lower extremity for residual problems with mild motor weakness stemming from lumbar radiculopathy, using class 1. He stated:

> "Appellant has five percent of the left lower extremity resulting from the accepted work injury of October 9, 1976. The date of MMI was February 28, 2014, when [he] was seen by Dr. R. Rogachefsky."

Dr. Harris stated that it not did appear that Dr. Rogachefsky was aware of the approach to rate spinal nerve impairment, utilizing *The Guides Newsletter* as he set forth above.

By decision dated April 21, 2014, OWCP granted appellant a schedule award for a five percent permanent impairment of the left lower extremity for the period March 4 to June 9, 2014, for a total of 14.4 weeks of compensation.

LEGAL PRECEDENT

The schedule award provision 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. 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, good administrative practice

[4] *Id.* at 517.

[5] *Id.* at 519.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th edition).

necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[8] The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[9]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* "Rating Spinal Nerve Extremity Impairment using the sixth edition" (July/August 2009) is to be applied.[10]

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment Class of Diagnosis condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH) and if electrodiagnostic testing were done, Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[12]

ANALYSIS

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

In the present case, OWCP found that appellant was entitled to a schedule award for a five percent left lower extremity impairment based on the opinion of Dr. Harris, OWCP's medical adviser. The Board finds, however, that OWCP improperly relied on its medical adviser's opinion. Dr. Harris failed to identify any positive clinical findings of peripheral nerve impairment. In addition, he failed to indicate the applicable tables and figures of the July/August issue of *The Guides Newsletter* or the A.M.A., *Guides* upon which he relied in calculating his impairment rating. Regarding radiculopathy, Dr. Harris' conclusion that "appellant had a five percent impairment of the left lower extremity for residual problems with mild motor weakness stemming from lumbar radiculopathy" is not a sufficient basis for an impairment rating. Due to this lack of clarity, the Board is unable to render an informed judgment as to whether Dr. Harris' impairment rating was in conformance with the accepted condition and the standards enunciated in the July/August issue of *The Guides Newsletter* or the A.M.A., *Guides*.

The Board further finds that Dr. Rogachefsky's report is similarly lacking in probative value. Dr. Rogachefsky did not indicate that he was rating appellant's left leg impairment

[8] *Id.*

[9] *Veronica Williams*, 56 ECAB 367, 370 (2005).

[10] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[11] A.M.A., *Guides* 533

[12] *Id.* at 521.

pursuant to the accepted condition or the protocols of *The Guides Newsletter*. The Board notes that while Dr. Rogachefsky indicated that mild motor deficit of the sciatic nerve would have a default grade of 9, pursuant to *The Guides Newsletter* the default grade would be 8. As such, the evidence does not substantiate that Dr. Rogachefsky's evaluation was performed pursuant to *The Guides Newsletter*. OWCP properly determined that Dr. Rogachefsky's report did not provide a basis for a schedule award under FECA.[13] While the claimant has the burden to establish entitlement to additional compensation, once OWCP undertakes the development of the evidence, it has an obligation to provide a valid opinion.[14]

Accordingly, the Board will set aside OWCP's April 21, 2014 decision and remand to OWCP for further development of the medical evidence and to determine whether appellant has established greater impairment of the left lower extremity based on the accepted condition. On remand, OWCP should refer him to another second opinion physician. It should request that the second opinion physician provide a well-rationalized, updated medical opinion, which specifically makes a finding as to whether the accepted conditions from 1976 are responsible for the current impairment and provide a rationalized opinion, based on the July/August issue of *The Guides Newsletter* and/or the A.M.A., *Guides* in making findings and conclusions and in rendering an impairment rating. After such development as it deems necessary, OWCP shall issue a *de novo* decision.[15]

CONCLUSION

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

[13] The Board notes that a description of appellant's impairment must be obtained from appellant's physician, which must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. *See Peter C. Belkind*, 56 ECAB 580, 585 (2005).

[14] *Horace L. Fuller*, 53 ECAB 775 (2002).

[15] The Board notes that appellant has contested the date of MMI. This issue should also be addressed on remand by the second opinion physician.

ORDER

IT IS HEREBY ORDERED THAT that the April 21, 2014 decision of the Office of the Workers' Compensation Programs be set aside and remanded in accordance with this decision.

Issued: July 6, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board