United States Department of Labor
Employees' Compensation Appeals Board

P.B., Appellant	)	
and	)	**Docket No. 16-0237**
	)	**Issued: March 23, 2016**
DEPARTMENT OF THE NAVY, NAVAL TRAINING CENTER, Great Lakes, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 23, 2015 appellant, through counsel, filed a timely appeal from an October 22, 2015 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 met his burden of proof to establish that he sustained permanent impairment of either lower extremity, warranting a schedule award.

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 24, 2004 appellant, then a 61-year-old security guard, filed a traumatic injury claim (Form CA-1) under File No. xxxxxx938 alleging that he injured his left shoulder and the left side of his back and neck when he slipped and fell on ice at work on that day. On April 3, 2006 OWCP accepted his claim for lumbar sprain/strain and sprain/strain in an unspecified area of the left arm.

On May 27, 2005 appellant filed another Form CA-1 under File No. xxxxxx394, alleging that he hurt his lower back while getting into a van at work on that day. The driver of the van drove off before he could get in the van. On October 26, 2005 OWCP accepted appellant's claim for lumbar sprain/strain, lumbosacral sprain/strain, and aggravation of lumbar spondylosis with myelopathy. On February 2, 2007 it accepted his claim under File No. xxxxxx938 for aggravation of left carpal tunnel syndrome and authorized left carpal tunnel release performed on February 16, 2007.

On March 28, 2011 appellant filed a claim for a schedule award (Form CA-7) in both claims. He submitted an August 12, 2011 medical report from Dr. William N. Grant, an attending Board-certified internist, who found that appellant, had 22 percent impairment of the left upper extremity and 25 percent impairment of each lower extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On December 18, 2011 and February 20, 2012 Dr. David H. Garelick, an OWCP medical adviser who is a Board-certified orthopedic surgeon, reviewed the medical record, including Dr. Grant's findings and determined that appellant had one percent impairment of the left arm and two percent impairment of each leg under the sixth edition of the A.M.A., *Guides*. He determined that Dr. Grant's evaluation was of limited value as he did not cite objective medical evidence and was not an orthopedist. Dr. Garelick concluded that appellant reached maximum medical improvement on December 10, 2008 the date of an examination performed by Dr. Thomas F. Gleason, a Board-certified orthopedic surgeon.[2]

In a May 8, 2012 decision, OWCP granted appellant a schedule award for one percent impairment of the left upper extremity, based on its medical adviser's opinion as the weight of the evidence. It paid him compensation for 3.12 weeks from December 10 to 31, 2008.

By letter dated May 14, 2012, appellant, through counsel, requested a telephone hearing with an OWCP hearing representative.

In a June 22, 2012 decision, an OWCP hearing representative set aside the May 8, 2012 decision and remanded the case to OWCP. She directed OWCP to combine appellant's claims under File Nos. xxxxxx938 and xxxxxx394, prepare a new statement of accepted facts

[2] In a December 10, 2008 report, Dr. Gleason diagnosed neck pain with cervical spondylosis, questionable lumbar radicular syndrome post prior surgeries in 1980 and 1983 with report of more recent onset of radiculopathy related to the accepted December 24, 2004 employment injury and more recent increased symptoms with electromyogram/nerve conduction studies that suggested bilateral S1 radiculopathy, more on the right, and degenerative disc disease, and recent postoperative changes that were exacerbated and stable. He concluded that appellant had reached maximum medical improvement on the date of his examination, December 10, 2008.

addressing the mechanism of injury for the accepted work injuries and noting appellant's complete medical history, and to refer him for a second opinion examination on whether his current medical conditions and any permanent impairment under the sixth edition of the A.M.A., *Guides* were causally related to his accepted December 24, 2004 and May 27, 2005 employment injuries.

On remand, OWCP doubled File Nos. xxxxxx938 and xxxxxx394, with File No. xxxxxx938 as the master file.

By letter dated July 19, 2012, OWCP notified appellant that he was scheduled for an August 21, 2012 appointment for a second opinion with Dr. Allan Brecher, a Board-certified orthopedic surgeon.

In an August 21, 2012 report, Dr. Brecher reviewed the statement of accepted of facts and medical record and provided appellant's medical and social background. A review of appellant's systems revealed fatigue, eye and hearing problems, nose bleeds, heart trouble, shortness of breath, wheezing, frequent diarrhea and urination, abdominal pain, and musculoskeletal problems including, joint and back pain, weakness, and difficulty with walking. Neurologically, he had light-headedness, dizziness, numbness, and tingling sensations, problems with paralysis, possible memory loss, confusion, and depression. On examination, findings included a healed anterior cervical scar and a healed back scar. Appellant's toe touch was two feet from the floor. He had a normal gait, and heel and toe walking. Appellant's quadriceps and hamstrings were each five minus out of five. The extensor halluces longus was normal. Sensibility was intact. Appellant had normal hip, knee, and ankle motion. Dr. Brecher assessed diabetes, a history of cervical and lumbar spondylosis, and fusions in both regions. Appellant's current symptoms suggested claudication. Dr. Brecher noted the December 2004 and May 27, 2005 work injuries. The latter work injury resulted in appellant's lumbosacral sprain and aggravation of lumbar spondylosis. Dr. Brecher noted that appellant returned to full-duty work on April 19, 2005.

In response to OWCP questions, Dr. Brecher stated that appellant had sprains of the lumbar spine with underlying spondylosis and a shoulder sprain. Appellant underwent a left rotator cuff repair and now that shoulder was the better shoulder. He had minimal weakness, but he had claudication. Dr. Brecher believed that this was a progression of his underlying degenerative spine disease which was not related to the accepted December 24, 2004 and May 27, 2005 lumbar and cervical sprains and shoulder sprain. He advised that appellant's continuing problem was not related to the accepted conditions. Appellant actually had more problems with his right shoulder which was not an injured member. Regarding appellant's work-related permanent or partial impairment, Dr. Brecher advised that his sprains were not high velocity injuries. He noted that, after the first injury, appellant was returned to full-duty work the next year. Appellant's second injury was only an injury to his back that was a temporary aggravation of his underlying spondylosis. Dr. Brecher believed that appellant had continued progression of his spondylosis which caused claudication-like symptoms unrelated to his work injuries. He advised that appellant's residual weakness was not related to the work injuries. Dr. Brecher concluded that appellant had two percent impairment of the arm due to tendinitis and weakness and five percent permanent impairment of both legs and arms due to weakness under the sixth edition of the A.M.A., *Guides*.

In an October 15, 2012 decision, OWCP denied appellant's claim for a schedule award. It found that the weight of the evidence rested with Dr. Brecher's opinion that appellant's current conditions and resulting impairment were not related to his accepted December 24, 2004 and May 27, 2005 employment injuries.

By letter dated October 19, 2012, appellant, through counsel, requested a telephone hearing with an OWCP hearing representative.

In a January 9, 2013 decision, an OWCP hearing representative set aside the October 15, 2012 decision and remanded the case to OWCP to obtain a supplemental report from Dr. Brecher, who was to provide rationale to support his opinion that the aggravation of appellant's lumbar spondylosis was temporary, and address whether appellant's tendinitis and weakness in his left shoulder were due to his accepted December 24, 2004 work injuries and whether he had any residuals or impairment related to his accepted conditions under the sixth edition of the A.M.A., *Guides*.

Following OWCP's request, on October 16, 2013, Dr. Brecher explained why the aggravation of appellant's lumbar spondylosis was temporary. He noted that appellant had a history of multiple lumbar surgeries and chronic failed back syndrome, but after the aggravation appellant returned to full-duty work on April 19, 2005. This reflected that appellant's lumbosacral sprain and aggravation of lumbar spondylosis had returned to baseline. Dr. Brecher noted that this did not mean that appellant was without pain. Appellant had chronic pain and underwent multiple back surgeries. Dr. Brecher advised that the temporary aggravation resolved when appellant returned to work. He further advised that appellant's tendinitis and weakness of the left shoulder resulted from his December 24, 2004 employment-related fall. Dr. Brecher found no impairment for appellant's employment-related left carpal tunnel syndrome and left small trigger finger under the sixth edition of the A.M.A., *Guides* as his physical examination findings did not reveal any signs of these conditions.

On December 31, 2013 OWCP accepted appellant's claim for temporary aggravation of lumbar spondylosis that resolved as of April 19, 2005 and left small trigger finger.

On January 5, 2014 Dr. Christopher Gross, an OWCP medical adviser who is Board-certified in psychiatry and neurology, reviewed the medical record, including the reports of Drs. Brecher and Garelick, and Dr. Sanjai K. Shukla, an OWCP medical adviser and a Board-certified orthopedic surgeon.[3] He utilized the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* July/August 2009 to rate appellant's impairment. Dr. Gross noted Dr. Brecher's October 16, 2013 findings and determined that resolved pathologies were class 0 diagnoses with no impairment. He determined that appellant reached maximum medical improvement on December 10, 2008 the date of Dr. Gleason's evaluation. Regarding the bilateral lower extremities, Dr. Gross related that neither Dr. Brecher nor Dr. Shukla used the preferred *The Guides Newsletter* July/August 2009 for disabilities relating to the spine. Dr. Shukla noted S1 sensory loss while Dr. Brecher's most recent examination noted full sensation, but mild (5-/5) quadriceps weakness. Dr. Gross found that appellant had a grade 1

[3] In a December 18, 2011 report, Dr. Shukla found that appellant had two percent impairment of each lower extremity. He also found that appellant reached maximum medical improvement on December 10, 2008, the date of Dr. Gleason's examination.

diagnosis for right L4 radiculopathy with mild motor loss (*The Guides Newsletter* July/August 2009, Table 2). Based on Table 16-6, page 516, he had a mild functional problem without an antalgic gait which represented a grade l modifier. Physical examination was not relevant as the neurologic findings were used to define impairment ranges. Clinical studies were also not relevant. Dr. Gross determined that appellant had a net adjustment of zero. He had five percent bilateral leg permanent impairment. Dr. Gross noted, however, Dr. Brecher's finding that appellant had residual weakness not related to his injuries and that his lumbosacral pain and aggravation of lumbar spondylosis had returned to baseline. Therefore, he determined that since appellant's weakness was attributed to preexisting conditions, appellant had no bilateral lower extremity impairment for his accepted conditions. This differed from Dr. Shukla's rating since new medical evidence demonstrated that there were no sensory deficits. Dr. Gross concluded that appellant reached maximum medical improvement on August 21, 2012, the date of Dr. Brecher's last examination.[4]

In a February 12, 2014 decision, OWCP denied appellant's claim for a schedule award. It found that the weight of the evidence rested with Dr. Brecher's opinion.

By letter dated February 19, 2014, appellant, through counsel, requested a telephone hearing with an OWCP hearing representative.

In an October 9, 2014 decision, an OWCP hearing representative set aside the February 12, 2014 decision and remanded the case to OWCP. She directed OWCP to clarify whether appellant's claim had been accepted for lumbar spondylosis or an aggravation of lumbar spondylosis as Dr. Brecher had advised that the aggravation of the lumbar spondylosis had resolved, but found that there was impairment related to the underlying condition.

By decision dated February 2, 2015, OWCP denied appellant's schedule award claim for the lower extremities. It found that his claim under File No. xxxxxx938 was accepted for temporary aggravation of lumbar spondylosis that had resolved as of April 19, 2005. OWCP noted that it had not accepted appellant's claim for an underlying spondylosis condition and, therefore, there was no need for its medical adviser to review his schedule award claim.

In a February 11, 2015 letter, appellant, through counsel, requested a telephone hearing with an OWCP hearing representative. A telephone hearing was held on August 5, 2015.

In an October 22, 2015 decision, an OWCP hearing representative affirmed the February 2, 2015 decision. She found that Dr. Brecher's opinion established that appellant sustained a work-related temporary aggravation of his underlying spondylosis condition and that he did not sustain any permanent impairment entitling him to a schedule award for his lower extremities. The hearing representative noted that appellant's underlying lumbar condition had not been accepted by OWCP.

[4] It appears that Dr. Gross inadvertently listed the date of maximum medical improvement as August 21, 2013 rather than August 21, 2012 as he accurately described Dr. Brecher's August 21, 2012 examination findings.

LEGAL PRECEDENT

The schedule award provision of FECA,[5] and its implementing federal regulations,[6] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions and organs of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[7] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[8] Effective May 1, 2009, FECA adopted the sixth edition of the A.M.A., *Guides*[9] as the appropriate edition for all awards issued after that date.[10]

The sixth edition requires identifying the impairment class for the diagnosed condition Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12]

No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the regulations.[13] Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,[14] no claimant is entitled to such an award.[15] However, in 1966, amendments to FECA modified the schedule award provision to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provision of FECA includes the extremities, a

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Ausbon N. Johnson*, 50 ECAB 304 (1999).

[8] *Supra* note 7; *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

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

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *see also*, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013).

[11] A.M.A., *Guides* 494-531.

[12] *Id.* at 521.

[13] *Henry B. Floyd, III*, 52 ECAB 220 (2001).

[14] FECA specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

[15] *Thomas Martinez*, 54 ECAB 623 (2003).

claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[16]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[17]

ANALYSIS

OWCP accepted that appellant sustained lumbar sprain/strain, sprain/strain in an unspecified area of the left arm, aggravation of lumbar spondylosis with myelopathy, aggravation of left carpal tunnel syndrome, and left small trigger finger. It paid him a schedule award for one percent permanent impairment of the left upper extremity, which was set aside by an OWCP hearing representative. Subsequently, OWCP denied appellant's claim for a schedule award for both lower extremities. The Board finds that he has not met his burden of proof to establish permanent impairment to either lower extremity due to his accepted conditions.[18]

The Board finds that the well-rationalized opinion of Dr. Brecher, an OWCP referral physician, constitutes the weight of the medical evidence regarding the extent of impairment to appellant's bilateral lower extremities. It does not establish that appellant is entitled to schedule award compensation for either lower extremity. In an August 21, 2012 report, Dr. Brecher provided normal findings on examination of the lower extremities. While he advised that appellant had a continued progression of his underlying lumbar spondylosis which caused claudication-like symptoms and resulted in five percent impairment of each leg under the sixth edition of the A.M.A., *Guides*, Dr. Brecher opined that these conditions were not related to the accepted employment-related injuries.[19] In his supplemental report dated October 16, 2013, Dr. Brecher clarified that appellant's temporary aggravation of lumbar spondylosis had resolved as of April 19, 2005, the date he returned to full-duty work. He explained that this reflected that appellant's accepted lumbosacral sprain and aggravation of lumbar spondylosis had returned to baseline.

On January 5, 2014 Dr. Gross, an OWCP medical adviser, reviewed Dr. Brecher's reports.[20] He determined that appellant reached maximum medical improvement on August 21, 2012 the date of Dr. Brecher's examination. The medical adviser found that appellant had no impairment to the lower extremities under the sixth edition of the A.M.A.,

[16] *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

[17] *See supra* note 10 at Chapter 2.808.6(f) (February 2013). *See C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

[18] An employee seeking a schedule award has the burden of proof to establish permanent impairment. *See Denise D. Cason*, 48 ECAB 530 (1997).

[19] *See Veronica Williams*, 56 ECAB 367 (2005) (a schedule award can be paid only for a condition related to an employment injury; 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).

[20] *See supra* note 17.

Guides resulting from either employment injury. He explained that Dr. Brecher attributed appellant's residual weakness to a preexisting condition and not to the accepted employment injuries and found that appellant's employment-related aggravation of lumbar spondylosis had returned to baseline. Dr. Gross further explained that the new medical evidence demonstrated that appellant had no sensory deficits.

The Board finds that appellant has not shown that he is entitled to schedule award compensation for his lower extremities and, thus, he has not met his burden of proof.

On appeal, counsel contends that OWCP's decision is contrary to fact and law. For reasons stated above, the Board finds that the weight of the medical evidence does not establish that appellant sustained permanent impairment to either lower extremity, warranting a schedule award.

Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2016
Washington, DC

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

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

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