United States Department of Labor
Employees' Compensation Appeals Board

H.C., Appellant	)	
and	)	**Docket No. 16-0937**
	)	**Issued: October 13, 2016**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, SANTA FE NATIONAL FOREST, Cuba, NM, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant[1]
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 April 4, 2016 appellant, through counsel, filed a timely appeal of March 14 and 16, 2016 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

[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 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish more than three percent permanent impairment of each of his lower extremities for which he received a schedule award.

On appeal counsel argues that OWCP improperly relied on its procedure manual provisions regarding the July/August 2009, *The Guides Newsletter*[3] rather than the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4]

FACTUAL HISTORY

On May 20, 2009 appellant, then a 49-year-old forestry technician, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower back on May 14, 2009 when cutting out a trail with a pick in the performance of his job duties. He underwent a magnetic resonance imaging (MRI) scan of the lumbar spine on July 7, 2009, which demonstrated broad-based disc bulging at L4-5 with degenerative disc disease and desiccation of the discs at L4-5 and L5-S1. This scan also demonstrated facet hypertrophy at L4-5 and pressure on the exiting nerve root with mild-to-moderate stenosis.

By decision dated July 29, 2009, OWCP accepted appellant's claim for lumbar sprain. On June 22, 2010 it accepted temporary aggravation of degeneration of lumbar intervertebral disc.

Appellant underwent a computerized tomography (CT) scan of his lumbar spine on August 12, 2010, which demonstrated diffused disc degeneration at L3-4, L4-5, and L5-S1. His CT scan also demonstrated a diffuse posterior annular-type disc protrusion at L4-5.

OWCP referred appellant for a second opinion evaluation on March 31, 2011. In a report dated July 27, 2011 Dr. Thomas G. Grace, a Board-certified orthopedic surgeon, examined appellant for OWCP and reviewed the statement of accepted facts as well as his medical history. He found that appellant demonstrated difficulty with prolonged sitting of more than 15 minutes and had decreased range of motion of the lumbar spine. Dr. Grace found no fixed paraspinal muscle spasms and no neurosensory deficit. He noted that appellant reported a nonradicular distribution intermittently in the left leg. Dr. Grace found that appellant's right thigh was two centimeters smaller than his left. He diagnosed diffused degenerative joint disease L3-4, L4-5, and L5-S1 with a disc protrusion at L4-5, facet arthropathy at L4-5 with central spinal stenosis, and chronic pain syndrome. Dr. Grace opined that appellant's employment injury resulted in a permanent aggravation of appellant's underlying spine conditions and that appellant had reached maximum medical improvement on February 25, 2011.

[3] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (Exhibits 1, 4) (January 2010).

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

On October 28, 2011 appellant underwent left L4, L5, S1, S2, and S3 medial/lateral branch radiofrequency rhizotomies. He underwent an additional MRI scan on December 12, 2011 which demonstrated degenerative disc disease of mild severity at L3-4, L4-5, and L5-S1, mild L4-5 central canal stenosis, mild right L4-5 foraminal stenosis, and mild-to-moderate left L5-S1 foraminal stenosis.

On July 20, 2012 OWCP referred appellant for an additional second opinion evaluation with Dr. James H. Lubowitz, a Board-certified orthopedic surgeon. On August 8, 2012 Dr. Lubowitz opined that appellant had sustained a permanent aggravation of his degenerative disc disease. He found that appellant had reached maximum medical improvement as of the time of his report.

OWCP accepted appellant's claim for permanent aggravation of degeneration of lumbar discs at L3-4 and L5-S1 on May 14, 2013.

Appellant's attending physician, Dr. Thomas Whalen, a Board-certified internist, evaluated him for schedule award purposes on February 28, 2014. He described appellant's history of injury and noted that appellant experienced chronic persistent low back pain with intermittent radiating pain into the legs. Dr. Whalen found that appellant had decreased light touch in the bilateral L5 distribution. He reviewed appellant's 2009 MRI scan and found L3-4 disc herniation, L4-5 right central disc herniation producing right foraminal stenosis, and L5-S1 central disc herniation causing left foraminal stenosis. Dr. Whalen applied the A.M.A., *Guides* and found that based on the lumbar spine regional grid[5] appellant's multiple level disc herniations constituted 15 percent permanent impairment of the whole person.

On April 7, 2014 appellant filed a claim for compensation (Form CA-7) and requested a schedule award.

An OWCP medical adviser reviewed the medical evidence in support of appellant's schedule award claim on April 25, 2014. He found that appellant had no objective sensory or motor deficits in the lower extremities and was not eligible for a schedule award. OWCP's medical adviser noted that appellant had normal lower extremity strength and nondermal nonphysiological sensory findings unrelated to the lumbar spine in the lower extremities. He further noted that Dr. Whalen utilized impairment rating of the spine which was not permitted under FECA. OWCP's medical adviser also found that Dr. Whalen reported L5 sensory loss bilaterally, which was not consistent with the remainder of the medical evidence.

On September 1, 2014 OWCP referred appellant for a second opinion evaluation with Dr. Grace to determine his permanent impairment for schedule award purposes. Dr. Grace completed a report on September 17, 2014. He again noted that appellant had difficulty sitting for more than 15 minutes and had a loss of range of motion of the low back, but found that he did not demonstrate paraspinal muscle spasm. Dr. Grace found inconsistent break away weakness of the knee flexors and extensors. He found symmetrical thigh and calf measurements. Dr. Grace noted that appellant reported burning sensations involving both feet and decreased sensibility to light touch. He opined that this correlated with the sural nerve, superficial peroneal, and deep

[5] *Id*. at 570, Table 17-4.

peroneal nerve distribution of the left foot. Dr. Grace opined that appellant had decrease in light touch involving the L4-5 or fifth lumbar nerve root involving the superficial and deep peroneal nerves as well as the medial plantar nerve of the right foot. He found no evidence of symptom magnification, somatization, or malingering.

Dr. Grace found documented changes on appellant's December 12, 2011 MRI scan including evidence of central canal stenosis at L4-5, right foraminal stenosis L4-5 and left foraminal stenosis at L5-S1. He noted that Dr. Whalen's examination showed L5 nerve root involvement. Appellant's current examination was consistent with MRI scan findings of significant lumbar disc disease at multiple levels of L3-4 through L5-S1 and neurosensory changes. Dr. Grace determined that appellant had no consistent neuromotor deficit other than breakaway weakness. He used Table 16-12[6] of the A.M.A., *Guides* to evaluate appellant's sensory impairment of the medial plantar nerve and the common peroneal nerve of the right foot. Dr. Grace found clinical studies grade modifier 1, based on MRI scan studies confirming the diagnosis with pathology. Dr. Grace found that appellant's functional history grade modifier was disregarded as it was grade 3 or two levels higher than his diagnosis. He further noted that the physical examination grade modifier was not applicable as this was how the diagnosis was determined. Applying the remaining formula (GMCS - CDX), Dr. Grace concluded that appellant's net adjustment was zero, and that he had three percent permanent impairment of the right leg due to the mild sensory impairment of the common peroneal nerve. He applied the same findings to reach one percent permanent impairment of the right leg due to the medial plantar nerve after application of the appropriate formula, for a total four percent permanent impairment of the right lower extremity.

With regard to appellant's left foot, Dr. Grace determined that appellant had neurosensory deficit of the sural nerve, (S1 nerve root) and the superficial peroneal nerve L5 (L5 root). He again utilized Table 16-12[7] to reach three percent permanent impairment due to the sural nerve and three percent permanent impairment due to the superficial peroneal nerve or six percent permanent impairment of the left lower extremity after application of the above formula of the A.M.A., *Guides*. Dr. Grace also determined that the date of maximum medical improvement should be August 8, 2012 as there were changes from appellant's 2009 to 2011 MRI scans.

An OWCP medical adviser reviewed Dr. Grace's report on October 24, 2014 and found that appellant had three percent permanent impairment of both lower extremities due to lumbar nerve root impairment not peripheral nerve deficits. He found that Dr. Grace should not have utilized the peripheral nerve tables. The medical adviser noted that both Drs. Whalen and Grace determined that appellant had mild bilateral L5 sensory loss, but that there were no consistent S1 dermatomal deficits. He concluded that appellant reached maximum medical improvement on September 17, 2014. The medical adviser found that appellant had a moderate sensory loss based on Table 16-11[8] as demonstrated by impaired light touch. A moderate sensory deficit of

[6] *Id*. at 535, Table 16-12.

[7] *Id.*

[8] *Id*. at 533, Table 16-11.

the L5 nerve root has a default value of three in accordance with Proposed Table 2 of the July/August 2009 *The Guides Newsletter*. OWCP's medical adviser found that appellant's functional history grade modifier was 1, based on Table 16-6[9] as he continued to experience lower extremity symptoms, but did not demonstrate an antalgic gait. He determined that the grade modifier for physical examination was not relevant[10] as contrary to Dr. Grace's conclusions, he believed that appellant's MRI scan findings of mild neuroforaminal narrowing was not significant as there was no demonstrable impact on the nerves rated. Applying the formula of the A.M.A., *Guides*, OWCP medical adviser found that appellant had class 1 grade C or three percent permanent impairment of each of his lower extremities.

OWCP requested a supplemental report from Dr. Grace on February 11, 2015 addressing whether appellant had peripheral nerve impairments rather than lumbar nerve root impairments. It referred Dr. Grace to the July/August 2009 *The Guides Newsletter*.

By decision dated March 24, 2015, OWCP granted appellant a schedule award for three percent permanent impairment of the right lower extremity.

Dr. Grace completed supplemental reports on April 7 and September 19, 2015. He opined that the date of maximum medical improvement should be August 8, 2012. Dr. Grace reviewed the medical reports and found that he, Dr. Whalen, and Dr. Lubowitz had documented neurosensory changes in the L5 distribution. He noted that he also found S1 nerve root deficit, which was also consistent with appellant's MRI scan findings. Dr. Grace conceded that if OWCP did not agree with his findings regarding the S1 nerve root, then there would be no medial plantar nerve impairment of one percent in the right leg and no sural nerve impairment in the left leg of three percent. He opined that the proposed tables referenced in *The Guides Newsletter* were not adapted in the sixth edition. Dr. Grace alleged that based on these tables appellant's impairment rating would be two percent for each lower extremity.

In a request for reconsideration dated November 24, 2015, counsel noted that Dr. Grace believed that appellant was entitled to compensation for four percent permanent impairment of the right lower extremity and six percent permanent impairment of the left lower extremity. He alleged that there was a conflict of medical evidence requiring referral to an impartial medical examiner. Counsel further noted that OWCP had not issued a schedule award for the left lower extremity in accordance with the findings of OWCP's medical adviser.

Counsel submitted an addendum to his request for reconsideration on January 22, 2016 and argued that Dr. Grace properly found that July/August 2009, *The Guides Newsletter* was a proposal not adopted by the American Medical Association, and that the methodology of the sixth edition of the A.M.A., *Guides* should be used in calculating appellant's lower extremity impairment due to his accepted spine conditions.

In a decision dated March 14, 2016, OWCP reviewed the merits of appellant's claim and modified its March 24, 2015 decision finding that while he had no more than three percent

[9] *Id*. at 516, Table 16-6.

[10] *Id*. at 517, Table 16-7.

permanent impairment of his right lower extremity, he was entitled to a schedule award for three percent permanent impairment of his left lower extremity.

By decision dated March 16, 2016, OWCP granted appellant a schedule award for three percent permanent impairment of his left lower extremity.

LEGAL PRECEDENT

The schedule award provision of FECA[11] and its implementing regulations[12] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such 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*.[13] No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.[14] Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of whole person or the back or spine,[15] no claimant is entitled to such an award.[16]

Amendments to FECA, however, modified the schedule award provisions 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 provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.[17]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

[13] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *supra* note 3 at Chapter 3.700, Exhibit 1 (January 2010).

[14] *W.D.*, Docket No. 10-274 (issued September 3, 2010); *William Edwin Muir*, 27 ECAB 579 (1976).

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

[16] *W.D., supra* note 14. *Timothy J. McGuire*, 34 ECAB 189 (1982).

[17] *W.D., id. Rozella L. Skinner*, 37 ECAB 398 (1986).

sixth edition methodology.[18] OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures which memorializes proposed tables outlined in a July/August 2009, *The Guides Newsletter*.[19]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than three percent permanent impairment of each of his lower extremities for which he received schedule awards.

OWCP granted appellant schedule awards for three percent permanent impairment of each of his lower extremities based on the second opinion evaluation of Dr. Grace and review of the medical evidence and application of the A.M.A., *Guides* by an OWCP medical adviser. Dr. Grace did not comply with the requirements of FECA procedure manual as adopted by OWCP and approved by the Board since July 2010 to utilize the July/August 2009 *The Guides Newsletter* which contains tables for evaluating lower extremity impairments arising from spinal nerve root injuries. Counsel's arguments that application of these tables is inappropriate is contrary to Board precedent. The Board is not persuaded that this established method is inappropriate or inapplicable in this case.

The medical adviser found that appellant was entitled to three percent permanent impairment of each of appellant's lower extremities due to documented sensory impairment of the L5 nerve root. He determined that appellant had moderate sensory impairment with grade modifier 1 or functional history, and class 1 diagnosis for a net adjustment of zero. In accordance with Proposed Table 2 of the July/August 2009 *The Guides Newsletter*, the default value for moderate sensory deficit of the L5 nerve root is three. OWCP's medical adviser provided an explanation of how he reached his impairment rating and the basis for his disagreement with Dr. Grace's method and conclusions.[20] He evaluated the appropriate grade modifiers and utilized the appropriate formula in reaching the impairment ratings. The Board finds that his report is entitled to the weight of the medical evidence and establishes that appellant has no more than three percent permanent impairment of each of his lower extremities for which he has received schedule awards.

The Board finds that OWCP's medical adviser applied the appropriate tables and grading schemes of the A.M.A., *Guides* in determining that appellant had three percent permanent impairment of each of his lower extremities due to sensory deficits from the L5 nerve root.

There is no other current probative medical evidence of record in conformance with the sixth edition of the A.M.A., *Guides* establishing that appellant had more than three percent

[18] *Supra* note 13 at Chapter 2.808.5c(3) (February 2013); *supra* note 3 at Chapter 3.700 Exhibit 4 (January 2010).

[19] *Supra* note 3.

[20] The Board notes that as both Dr. Grace and the medical adviser are OWCP physicians, there can be no conflict of medical opinion requiring referral to an impartial medical examiner. 5 U.S.C. § 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

permanent impairment of each of his lower extremities. Appellant was seen on February 28, 2014 by his attending physician, Dr. Whalen for a permanent impairment award evaluation. Utilizing Chapter 17-4, Dr. Whalen assessed appellant's injury using the lumbar spine regional grid yielding 15 percent whole person impairment.

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[21] In 1960, amendments to FECA modified the schedule award provisions 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. Therefore, as the schedule award provisions of FECA include the extremities, a 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.[22]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.[23] 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.[24] FECA approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[25] As such, Dr. Whalen's report is of diminished probative value.

Appellant may request a schedule award or increased 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 no more than three percent permanent impairment of each of his lower extremities for which he has received schedule awards.

[21] *Pamela J. Darling*, 49 ECAB 286 (1998).

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

[23] *Supra* note 3 at Chapter 3.700, Exhibit 4 (January 2010).

[24] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also id*., at Chapter 3.700, Exhibit 1, note 6 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[25] *Supra* note 13 at Chapter 2.808.5(c)(3) (February 2013).

ORDER

IT IS HEREBY ORDERED THAT the March 16 and 14, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 13, 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