United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 16-0861**
	)	**Issued: September 27, 2016**
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 22, 2016 appellant filed a timely appeal from a February 26, 2016 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, for which he has received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances presented in the prior appeal are incorporated herein by reference. The relevant facts are as follows.

Appellant, a 25-year-old human resources specialist, filed a traumatic injury claim (Form CA-1) on October 22, 1976 alleging that he injured his lower back on October 9, 1976 while lifting a portable ramp. OWCP accepted the claim for lumbar strain, herniated lumbar disc, and lumbosacral degenerative disc disease.

In a report dated May 29, 2007, Dr. Sangarapilla Manoharan, a specialist in emergency medicine, advised 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. He noted that appellant's symptoms were mainly tingling and numbness, as well as weakness in his left leg; he advised that there might be a problem with the nerves that supplied the left lower leg. Dr. Manoharan noted that appellant had surgery at L4-5, L5-S1 in 1976. He recommended referral to a back specialist who could consider whether appellant's left leg symptoms were causally related to his accepted lower back condition.

In June 2013 appellant filed a claim for a schedule award (Form CA-7) based on a partial loss of use of his lower extremities.

In order to determine whether appellant had any permanent impairment stemming from his accepted lumbar strain, herniated lumbar disc and lumbosacral degenerative disc disease conditions, OWCP referred him to Dr. Richard A. Rogachefsky, Board-certified in orthopedic surgery, for a second opinion examination. 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 underwent an L4 laminectomy and L5 discectomy on November 12, 1976. Dr. Rogachefsky noted 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 concluded that his current diagnosis was spinal stenosis syndrome, post-laminectomy, long-term, with two levels of low back lumbar radiculitis.

Dr. Rogachefsky noted that, under Table 16-12, page 534-35 of the A.M.A., *Guides*,[3] appellant had a peripheral nerve impairment of the lower extremity impairment for sciatica, based on a mild motor deficit in the left leg. This yielded seven percent lower extremity impairment under the A.M.A., *Guides*. Dr. Rogachefsky determined that the date of maximum medical improvement (MMI) was February 28, 2014.

[2] Docket No. 14-1395 (issued July 6, 2015).

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

In a March 22, 2014 report, Dr. Arthur A. Harris, a specialist in orthopedic surgery and an OWCP medical adviser, found that appellant had five percent permanent impairment of the left lower extremity under the sixth edition of the A.M.A., *Guides* resulting from his accepted lower back conditions. He reported 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 noted that the sixth edition of the A.M.A., *Guides* did not provide a diagnosis-based impairment or any other method to calculate residual lower extremity impairment for lumbar radiculopathy; the July/August (2009) issue of *The Guides Newsletter* provided a separate approach to rating spinal nerve impairments consistent with sixth edition methodology. He noted that, utilizing this method, appellant had five percent permanent impairment of the left lower extremity for residual problems with mild motor weakness stemming from lumbar radiculopathy. Dr. Harris advised that it not did appear that Dr. Rogachefsky was aware of the approach to rate spinal nerve impairment, citing *The Guides Newsletter*.

By decision dated April 21, 2014, OWCP granted appellant a schedule award for 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.

Appellant appealed to the Board on June 2, 2014. By decision dated July 6, 2015, the Board set aside the April 21, 2014 OWCP decision. The Board found that OWCP improperly relied on the report of its medical adviser, Dr. Harris, which contained findings and conclusions insufficiently thorough and comprehensible upon which to render a judgment and provided an inadequate basis for an impairment rating. The Board noted that Dr. Harris appeared to rate appellant's motor deficits based on lumbar radiculopathy, but failed to identify any positive clinical findings of peripheral nerve impairment; further, he failed to indicate the applicable tables and figures of *The Guides Newsletter* he relied on in calculating his impairment rating.

The Board found that the report of Dr. Rogachefsky, the second opinion examiner, was similarly lacking in probative value, because he failed to specify whether his nine percent lower extremity impairment rating pertained to the left or to the right lower extremity. The Board therefore remanded to OWCP for further development of the medical evidence and to determine whether appellant was entitled to a schedule award for impairment of the left lower extremity based on his accepted conditions. The Board directed OWCP to refer appellant to another second opinion examiner for an updated medical opinion; the examiner was to be instructed to make a specific finding as to whether appellant's current impairment was attributable to the accepted conditions and provide a rationalized opinion based on *The Guides Newsletter*, in making findings and conclusions and in rendering his impairment rating.

OWCP referred the case back to Dr. Rogachefsky. In his October 22, 2015 report, Dr. Rogachefsky related that appellant was seen and evaluated in his office on October 22, 2015. In discussing appellant's impairment rating, he noted that appellant was seen on February 28, 2014, at which time he performed an impairment evaluation using the sixth edition of the A.M.A., *Guides*. Dr. Rogachefsky noted that he had not been instructed to use *The Guides Newsletter* at that time. He then noted that he had recalculated the impairment rating for the spine using *The Guides Newsletter*. Dr. Rogachefsky related that appellant had reached MMI as of February 28, 2014. He determined that appellant's Functional History (GMFH) grade modifier was grade 0, Physical Examination (GMPE) and Clinical Studies (GMCS) grade modifiers were

not applicable, therefore, appellant had two percent permanent impairment of the left lower extremity for mild motor deficit stemming from lumbar radiculopathy under *The Guides Newsletter*.

In a January 11, 2016 report, Dr. Michael M. Katz, OWCP's medical adviser, reviewed Dr. Rogachefsky's October 22, 2015 report. He agreed with Dr. Rogachefsky's two percent impairment rating based on mild motor deficit for lumbar radiculopathy and combined that with an additional one percent impairment for mild sensory loss in the L4 spinal nerve, pursuant to Table 2 of *The Guides Newsletter* to find that appellant had three percent permanent impairment of the left lower extremity.

By decision dated February 26, 2016, OWCP denied appellant's request for an additional schedule award. It found based on the opinion of its medical adviser, Dr. Katz, appellant was not entitled to an additional schedule award for permanent impairment of his left lower extremity, greater than the five percent previously awarded.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[5] 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 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.[6] 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.[7]

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.[8]

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[4] *Supra* note 1.

[5] 20 C.F.R. § 10.404.

[6] Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

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

[8] *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.

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on GMFH and if electrodiagnostic testing were done, GMCS.[9] The net adjustment formula is (GMFH-CDX) + (GMCS-CDX).[10]

ANALYSIS

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

The Board in its July 6, 2015 decision directed OWCP on remand to refer appellant to a second opinion examiner other than Dr. Rogachefsky, whose opinion not only was not rendered in accordance with *The Guides Newsletter,* but was lacking in probative value because he failed to specify whether his nine percent lower extremity impairment rating pertained to the left or to the right lower extremity. OWCP, however, disregarded the Board's explicit instructions in its February 26, 2016 decision and referred the case back to Dr. Rogachefsky, and asked him to provide a new impairment rating pursuant to the July/August (2009) issue of *The Guides Newsletter*.

The Board finds that Dr. Rogachefsky's October 22, 2015 report is of limited probative value. In his October 22, 2015 report, Dr. Rogachefsky rated appellant's permanent impairment under *The Guides Newsletter;* however, it is unclear from his report as to whether he based his impairment rating on the February 28, 2014 examination, or his current examination. In describing his impairment rating, Dr. Rogachefsky noted that he had examined appellant on February 28, 2014 and that he was "recalculating" his impairment rating because he had not previously been advised to use *The Guides Newsletter*. He reiterated that appellant had reached MMI on August 28, 2014, without explaining why appellant had not reached MMI in 2015, since his rating of appellant's permanent impairment decreased from seven percent to two percent. A medical report is of limited probative value if it is unclear whether findings from a previous report or more current medical examination findings of record were utilized to calculate a schedule award.[11]

OWCP's medical adviser, Dr. Katz, reviewed Dr. Rogachefsky's October 22, 2015 report and found two percent impairment left lower extremity. He then combined that rating with an additional one percent impairment rating for mild sensory deficit of the L4 nerve, and found that appellant had a total of three percent permanent impairment rating of the left lower extremity under Table 2 of *The Guides Newsletter*. OWCP relied on Dr. Katz's opinion based upon review of Dr. Rogachefsky's report and denied an award for additional impairment for the left lower extremity in its February 26, 2016 decision, despite the fact that it was unclear as to whether Dr. Rogachefsky based his 2015 impairment rating on new examination findings, and despite the fact that the Board had directed it to refer appellant to a different second opinion examiner in its July 6, 2015 decision.

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

[10] *Id.* at 521.

[11] *See J.R.*, Docket No. 15-1847 (issued March 4, 2016).

The Board, therefore, finds that OWCP erred by disregarding the plain face of the instructions it set forth in its July 6, 2015 decision. Accordingly, the Board will set aside OWCP's February 26, 2016 decision and remand for referral of appellant, the case record and a statement of accepted facts to an appropriate second opinion medical specialist to evaluate appellant's permanent impairment of his left lower extremity.

On remand, OWCP should instruct the new second opinion examiner to make a specific finding as to whether appellant's left lower extremity impairment was attributable to the accepted conditions. The second opinion examiner shall then provide an opinion regarding the degree of permanent impairment of appellant's left lower extremity, based on the July/August 2009 issue of *The Guides Newsletter*, and provide an opinion as to the date of MMI. After such further development of the record as it deems necessary, OWCP shall issue a *de novo* decision.[12]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2016 decision be set aside and remanded in accordance with this decision.

Issued: September 27, 2016
Washington, DC

Christopher J. Godfrey, 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

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