United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 18-0993**
	)	**Issued: July 2, 2019**
DEPARTMENT OF COMMERCE, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, Greer, SC, 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
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 16, 2018 appellant filed a timely appeal from a January 24, 2018 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.[2]

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[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence on appeal. 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 met his burden of proof to establish more than three percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On August 25, 2014 appellant, then a 49-year-old electronics technician, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he sustained a back injury when his government vehicle was hit from behind while traveling to a job site while in the performance of duty. He stopped work. OWCP accepted appellant's claim for lumbar sprain and thoracic or lumbosacral radiculitis. It later expanded his claim to include a broken tooth (No. 29).

In a February 11, 2016 report, Dr. Philip Julius Hodge, a Board-certified neurological surgeon, noted a date of injury of August 25, 2014. Upon examination of appellant's lumbar spine, he reported positive for back pain. Neurological examination was intact. Dr. Hodge reported that according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] appellant had seven percent permanent impairment of the spine. He noted that appellant had reached maximum medical improvement (MMI).

Appellant also received treatment from Dr. David L. Shallcross, Board-certified in physical medicine and rehabilitation, who, in a February 16, 2016 office visit report, noted that examination of appellant's lumbar spine showed diminished range of motion in flexion and extension. Dr. Shallcross indicated that appellant had reached MMI and had 10 percent spinal and 10 percent whole person impairment.

In an August 5, 2016 report, Dr. Charles Christopher Kanos, a Board-certified neurological surgeon, diagnosed lumbar pain with radiation down both legs and lumbar spondylolisthesis. Upon physical examination of appellant's lumbar spine, Dr. Kanos observed tenderness and normal lower extremity strength. He reported: "I agree with the [seven] [percent] impairment to [appellant's] lumbar spine and that he is at MMI."

In letters dated February 8 and 15, 2017, Dr. Kanos opined that appellant had additional diagnosis of grade 1 L5-S1 spondylolisthesis, as seen on a September 8, 2014 lumbar spine MRI scan. He opined that appellant's diagnoses were related to his injury since he did not have symptoms prior to his injury. Dr. Kanos reported that appellant had seven percent permanent impairment to the right lower extremity due to his lumbar radiculopathy.

On March 17, 2017 appellant filed a claim for schedule award (Form CA-7). He noted that Dr. Hodge and Dr. Kanos provided permanent impairment ratings of 7 percent and Dr. Shallcross provided a permanent impairment rating of 10 percent.

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

On April 7, 2017 OWCP routed the case file to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review as to whether appellant sustained permanent impairment as a result of his accepted lumbar injury.

In an April 10, 2017 report and letter, Dr. Kanos explained: "I think [appellant] [has] had MMI and I would relate it to [February 11, 2016], which was Dr. Hodge's initial date." He reported that, based on Chapter 3.700 exhibit 4 of OWCP's Federal (FECA) Procedure Manual, appellant's impairment to the right lower extremity was 10 percent.

In an April 11, 2017 report, Dr. Harris indicated that he reviewed appellant's case, including Dr. Kanos' August 5, 2016 and February 15, 2017 impairment rating reports. He noted his disagreement with Dr. Kanos' rating of seven percent permanent impairment of the lumbar spine and/or lower extremity. Dr. Harris explained that he disagreed with Dr. Kanos' impairment rating because Dr. Kanos did not provide any explanation for his conclusion. He related that he calculated appellant's impairment based on the information in the August 5, 2016 report, which revealed decreased light touch sensation in appellant's right L4, L5, and S1 dermatomes, and did not appear to be severe in nature.

Dr. Harris reported that appellant's accepted conditions were lumbar sprain and thoracic/lumbosacral radiculitis. Utilizing *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (The Guides Newsletter), he opined that appellant had one percent permanent impairment of the lower extremity for residual problems with mild pain/impaired sensation from right L4 lumbar radiculopathy (CDX 1C). Dr. Harris also reported that appellant had one percent impairment of the lower extremity for residual problems with mild pain/impaired sensation from right L5 lumbar radiculopathy (CDX 1C). He also noted one percent impairment of the lower extremity for residual problems with mild pain/impaired sensation from his S1 lumbar radiculopathy (CDX 1C). Dr. Harris calculated that appellant had a total of three percent right lower extremity impairment. He noted a date of MMI of February 15, 2017.

In a letter dated April 25, 2017, OWCP informed Dr. Kanos that it had received his April 10, 2017 letter, which noted that appellant had 10 percent permanent impairment of the right lower extremity. It requested that Dr. Kanos review and comment on the April 11, 2017 DMA impairment rating report. OWCP afforded him 30 days to submit the requested information. No reply was received within 30 days.

By decision dated June 13, 2017, OWCP granted appellant a schedule award for three percent right lower extremity impairment based on Dr. Harris' impairment rating. The period of the award, equivalent to 8.64 weeks, ran from February 15 to April 16, 2017.

On July 10, 2017 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on December 4, 2017.

In a January 10, 2018 report, Dr. Kanos indicated that appellant had 10 percent permanent impairment of the right lower extremity, which was the sole impairment of the right lower extremity resulting from the August 25, 2014 work injury. He also indicated that appellant reached MMI as of February 11, 2016. Dr. Kanos related that appellant's subjective complaints included

constant right low back pain with right leg pain and numbness. He further noted that appellant's objective findings included a lumbar MRI scan, which showed L5-S1 spondylolisthesis with stenosis.

By decision dated January 24, 2018, an OWCP hearing representative affirmed the June 13, 2017 schedule award decision. He found that the weight of the medical evidence rested with the opinion of Dr. Harris, an OWCP medical adviser, who opined in his June 11, 2017 report that appellant had three percent permanent impairment of his right lower extremity due to his work-related lumbar injury. The hearing representative further noted that, although appellant's treating physicians provided several opinions regarding the degree of permanent impairment, none of them provided measurements, citations, and calculations to support the opinions rendered.

LEGAL PRECEDENT

The schedule award provisions 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides,* published in 2009, is used to calculate schedule awards.[7]

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.[8] Furthermore, the back is specifically excluded from the definition of organ under FECA.[9] 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 indicate that *The Guides Newsletter* is to be applied.[10]

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[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.* at 10.404(a); *see also Jacqueline S. Harris,* 54 ECAB 139 (2002).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[9] See 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[10] *Supra* note 8 at Chapter 3.700. *The Guides Newsletter* is included as Exhibit 4.

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than three percent permanent impairment of the right lower extremity impairment, for which he previously received a schedule award.

In support of his claim, appellant submitted several medical reports from his physicians containing opinions on the issue of permanent impairment. In a February 16, 2016 report, Dr. Shallcross opined that appellant had reached MMI and had 10 percent spinal impairment. In a February 11, 2016 report, Dr. Hodge related that according to the sixth edition of the A.M.A., *Guides* appellant had seven percent impairment to the spine. As noted above, however, neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.[11] Because Dr. Shallcross and Dr. Hodge determined appellant's impairment rating as pertaining to his lumbar spine, which is not recognized under FECA, these reports are of no probative value.

Appellant was also treated by Dr. Kanos. In an August 5, 2016 report, Dr. Kanos reported that appellant had reached MMI. In an April 10, 2017 report and letter, he related that based on Chapter 3.700 exhibit 4, appellant's impairment to the right lower extremity was 10 percent. Dr. Kanos, however, did not provide any medical rationale or explain the protocols that he used in making his impairment determination. The Board has held that when the attending physician fails to provide an estimate of impairment confirming to the A.M.A., *Guides* or does not discuss how he arrives at the degree of impairment based on physical findings, his opinion is of diminished probative value in establishing the degree of impairment.[12]

In an April 11, 2017 report, Dr. Harris, the DMA, reviewed appellant's case file, including Dr. Kanos' seven percent impairment rating, and disagreed with his findings. The Board has reviewed the opinion of Dr. Harris and finds that his April 11, 2017 report was sufficiently well-rationalized to establish that appellant had three percent permanent impairment of the right lower extremity. Dr. Harris' opinion was based on a proper factual and medical history, which he reviewed, and on the proper tables and procedures in the A.M.A., *Guides.* He referenced *The Guides Newsletter* and explained that appellant had three percent permanent impairment of the right lower extremity.

The Board finds that OWCP properly relied on the report of Dr. Harris to find that appellant did not establish more than three percent permanent impairment of the right lower extremity due to his accepted lumbar injury.[13] Dr. Harris based his impairment rating on the medical evidence in the record, correctly applied the A.M.A., *Guides* and *The Guides Newsletter*, and provided medical rationale for his impairment rating. As appellant has not provided a rationalized medical opinion to dispute Dr. Harris' impairment rating or create a conflict in medical opinion, the Board

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[11] *Supra* note 7.

[12] *See L.M.,* Docket No. 12-0868 (issued September 4, 2012); *John L. McClanic,* 48 ECAB 552 (1997).

[13] *See D.B.,* Docket No. 17-930 (issued July 11, 2018).

finds that he has not established more than three percent permanent impairment of the right lower extremity due to his accepted lumbar injury.[14]

Appellant may request a schedule award or increased schedule award at any time 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 more than three percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 2, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[14] When the examining physician does not provide an estimate of impairment conforming to the proper edition of the A.M.A., *Guides,* OWCP may rely on the impairment rating provided by the medical adviser. *See P.B.,* Docket No. 17-1046 (issued January 2, 2018).