

**United States Department of Labor
Employees' Compensation Appeals Board**

<p>L.R., Appellant</p> <p>and</p> <p>DEPARTMENT OF THE ARMY, FORT JACKSON, SC, Employer</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 19-0521 Issued: July 29, 2019</p>
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Appearances:

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 9, 2019 appellant, through counsel, filed a timely appeal from a November 30, 2018 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this 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 a permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On October 19, 2010 appellant, then a 53-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that while in the performance of duty on October 15, 2010 he injured his left lower back and right elbow when his foot got hung up on a door liner causing him to fall. OWCP accepted the claim for a lumbar sprain. Appellant stopped work on October 15, 2010 and resumed his regular employment on November 18, 2010.

Appellant received treatment in 2015 for bilateral hip pain. On May 28, 2015 Dr. Shervin V. Oskouei, a Board-certified orthopedic surgeon, diagnosed severe bilateral degenerative joint disease of the hips, worse on the left. He recommended a left hip arthroplasty.

In a permanent impairment worksheet dated June 10, 2016, Dr. Benjamin Levinson, a Board-certified internist, found that appellant had 23 percent permanent impairment of the left lower extremity due to osteoarthritis and avascular necrosis of the hip, 7 percent permanent impairment of the right lower extremity due to degenerative joint disease of the hip, and 2 percent whole person impairment due to degenerative changes.

On August 29, 2016 appellant filed a claim for schedule award compensation (Form CA-7).

In a development letter dated August 31, 2016, OWCP notified appellant of the type of evidence needed to establish his schedule award claim, including a statement from his physician that the accepted condition had reached maximum medical improvement (MMI) and an impairment rating utilizing the appropriate provisions of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ It advised that the physician should assess any permanent impairment of his affected extremities under *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (*The Guides Newsletter*) (July/August 2009). OWCP afforded appellant 30 days for the submission of the necessary evidence. No additional evidence was received.

By decision dated October 25, 2016, OWCP denied appellant's schedule award claim, finding that the medical evidence was insufficient to establish that he had reached MMI or had sustained permanent impairment of a scheduled member or function of the body.

On November 1, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

³ A.M.A., *Guides* (6th ed. 2009).

At the telephonic hearing, held on May 11, 2017, appellant asserted that he had injured his left hip as a result of his employment injury. Counsel requested that OWCP's hearing representative review the June 13, 2016 report from Dr. Levinson.

By decision dated July 25, 2017, OWCP's hearing representative affirmed the October 25, 2016 decision. She noted that OWCP had accepted only a lumbar sprain as employment related. The hearing representative found that there was no evidence establishing that appellant had sustained any permanent impairment causally related to his accepted lumbar sprain.

On December 14, 2017 appellant, through counsel, requested reconsideration.

Thereafter, appellant submitted an impairment evaluation dated June 10, 2016 from Dr. Levinson, who obtained a history of appellant falling on August 10, 2010 while exiting his vehicle, following which he experienced left hip pain. He diagnosed hip osteoarthritis and chronic low back pain.

On January 29, 2018 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed the medical evidence of record and found that Dr. Levinson's impairment evaluation was not probative for schedule award purposes as he did not rate appellant's impairment based on the accepted condition. He recommended OWCP refer appellant for a second opinion examination.

On October 19, 2018 OWCP referred appellant to Dr. Henry Clark Deriso, a Board-certified orthopedic surgeon, for a second opinion examination.⁴

In a report dated November 7, 2018, Dr. Deriso reviewed appellant's history of an October 15, 2010 employment injury, accepted for a lumbar sprain. He noted that several years after the injury appellant was diagnosed with hip osteoarthritis. On examination Dr. Deriso found positive straight leg raise with no muscle atrophy. He noted that appellant had recently had a magnetic resonance imaging (MRI) scan. Dr. Deriso diagnosed a history of lumbar disc strain and a nonemployment-related hip arthroplasty. He requested a copy of the MRI scan.

In a November 8, 2018 telephone call, OWCP advised appellant to submit a copy of any recent MRI scan for review by the second opinion examiner.

In a supplemental report dated November 20, 2018, Dr. Deriso related that he had reviewed x-rays that had revealed multilevel degenerative disc disease unrelated to an injury. He advised that he was rendering a preliminary opinion regarding the extent of appellant's impairment that might alter after review of an MRI scan. Dr. Deriso found that he had no objective evidence showing an impairment due to his October 2010 back strain. He noted that appellant had no "real radicular pain" and that the examination revealed "no focal lesions and [appellant] has essentially some incredulous responses in regard to his examination." Dr. Deriso opined that appellant had no residuals of his back strain and thus no criteria indicating an impairment rating.

⁴ OWCP initially referred appellant to Dr. John B. Bieltz, an osteopath, for a second opinion examination; however, Dr. Bieltz failed to submit a supplemental report as requested. Consequently, it referred appellant to Dr. Deriso.

By decision dated November 30, 2018, OWCP denied modification of its July 25, 2017 decision. It found that the relevant issue was not whether appellant's claim should be expanded to include a bilateral hip condition, but rather whether he had established a ratable impairment due to his accepted lumbar sprain.

On appeal counsel contends that there exists a conflict in medical opinion and that OWCP erred in failing to give deference to the attending physician.

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 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 a 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*, published in 2009.⁷ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁸

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).⁹ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹²

⁵ *Supra* note 2.

⁶ 20 C.F.R. § 10.404.

⁷ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ *Supra* note 3 at page 3, section 1.3, ICF: A Contemporary Model of Disablement.

¹⁰ *Id.* at 494-531.

¹¹ *Id.* 411.

¹² *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.¹³ Furthermore, the back is specifically excluded from the definition of organ under FECA.¹⁴ 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 procedures indicate that *The Guides Newsletter* is to be applied.¹⁵

The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.¹⁶

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

ANALYSIS

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

OWCP referred appellant to Dr. Deriso for an opinion regarding whether appellant was entitled to a schedule award based on his accepted condition of lumbar sprain. On November 7, 2018 Dr. Deriso diagnosed lumbar disc strain and a hip arthroplasty unrelated to appellant's employment. In an addendum dated November 20, 2018, he indicated that his opinion regarding the impairment rating was preliminary and might change upon review of an MRI scan. Dr. Deriso opined that appellant had degenerative disc disease unrelated to the accepted employment injury. He advised that appellant had no significant radicular pain or focal lesions on examination. Dr. Deriso found that appellant had no residuals of his back strain and that there was no basis to render an impairment rating.

OWCP denied appellant's claim based on the findings of Dr. Deriso in his November 7 and 20, 2018 reports. Pursuant to its procedures, however, it should have routed the evidence from Dr. Deriso to a DMA for review regarding the nature and percentage of impairment.¹⁸ OWCP's procedures provide that it should request that the DMA "verify the calculations of the attending physician or second opinion examiner" and rate the impairment consistent with the provision of

¹³ See *J.L.*, Docket No. 18-1380 (issued May 1, 2019). FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

¹⁴ 5 U.S.C. § 8101(19).

¹⁵ *Supra* note 7 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁶ See *G.S.*, Docket No. 18-0827 (issued May 1, 2019).

¹⁷ *Supra* note 7 at Chapter 2.808.6(f) (March 2017).

¹⁸ *Id.*; see also *L.T.*, Docket No. 18-1405 (issued April 8, 2019).

the A.M.A., *Guides*.¹⁹ As this was not done, the case must be remanded for referral to a DMA to determine the nature and extent, if any, of appellant's impairment due to his accepted condition.²⁰ Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 29, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

¹⁹ *Supra* note 7 at Chapter 2.808.6(f)(1); *see also R.H.*, Docket No. 17-1017 (issued December 4, 2018).

²⁰ *See L.T.*, *supra* note 18.