United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 19-0063**
	)	**Issued: June 21, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Kansas City, MO, 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 October 9, 2018 appellant filed a timely appeal from a June 13, 2018 merit decision and an August 3, 2018 nonmerit 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]

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish more than 13 percent permanent impairment of his right lower extremity, for which he previously received a schedule award, and more than 0 percent permanent impairment of his left lower extremity; and

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the August 3, 2018 decision, OWCP and the Board received additional evidence. 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.*

(2) whether OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative.

FACTUAL HISTORY

On August 24, 1963 appellant, then a 23-year-old distribution clerk, filed a notice of traumatic injury (Form CA-1) alleging that he had reinjured his back following a September 1962 employment injury.[3] He retired from the employing establishment in 1995. OWCP accepted the claim for lumbosacral sprain and authorized medical treatment, including several surgical procedures in 1964, 1965, 1994, 1998, 2012, and 2013. In 2014 it expanded acceptance of appellant's claim to include additional conditions of a 1998 lumbar wound infection, L4-5 pseudo-arthritis, lumbar post-laminectomy syndrome L4-S1, and lumbar radiculopathy.

By decision dated February 26, 2015, OWCP awarded appellant a schedule award for 10 percent permanent impairment of his right lower extremity and 0 percent permanent impairment of his left lower extremity. The award ran for 28.8 weeks for the period November 13, 2014 to June 2, 2015.

On March 15, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. By decision dated October 21, 2015, an OWCP hearing representative denied appellant's request for an oral hearing. He found that as the injury occurred in 1962 there was no right to an oral hearing and the issue in the case could be equally addressed by requesting reconsideration.

On January 20, 2016 appellant filed a claim for an increased schedule award (Form CA-7).

In a January 28, 2016 report, Dr. M. Stephen Wilson, an orthopedic surgeon, noted the history of appellant's injury, his review of the medical records, and his examination findings. He provided an impairment rating pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] and *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (*The Guides Newsletter*) (July/August 2009) opining that appellant had a total right lower extremity permanent impairment of 28 percent and a total left lower extremity permanent impairment of 28 percent. For both the right lower and left lower extremities, Dr. Wilson found 11 percent permanent impairment due to L4 nerve deficits, 11 percent permanent impairment due to L5 deficits, and 6 percent permanent impairment due to S1 nerve deficits, which combined to equal a total permanent impairment of 28 percent. He also opined that appellant had reached maximum medical improvement (MMI) at the time of his examination.

On August 24, 2016 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWC district medical adviser (DMA), reviewed an updated statement of accepted facts (SOAF)

[3] On September 7, 1962 appellant, filed a notice of traumatic injury (Form CA-1) alleging that on that day he sustained an acute lumbosacral sprain while bending over and repositioning mail trays in the performance of duty. OWCP assigned this File No. xxxxxx227.

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

and the medical record, including Dr. Wilson's January 28, 2016 report, which represented the date of MMI. The DMA indicated that Dr. Wilson had erroneously combined the impairments for appellant's L4, L5, and S1 radiculopathy instead of using the Combined Values Chart as recommended in the A.M.A., *Guides* and *The Guides Newsletter*, July/August 2009. He noted that Dr. Wilson's examination demonstrated that appellant had impaired sensation in the bilateral L4, L5, and S1 dermatomes as well as weakness in the bilateral L4, L5, and S1 innervated muscles. Using Dr. Wilson's examination findings, the DMA opined that appellant had 26 percent total permanent impairment of the right lower extremity and 26 percent total permanent impairment of the left lower extremity. As appellant previously received a schedule award for 10 percent permanent impairment of the right lower extremity and 0 percent permanent impairment of the left lower extremity, the DMA opined that appellant was entitled to an additional schedule award for 16 percent permanent impairment of the right lower extremity and 26 percent permanent impairment of the left lower extremity.

On February 13, 2017 Dr. Kevin Komes, a Board-certified physiatrist and second opinion specialist, noted appellant's history of injury, reviewed the medical records and presented examination findings, which demonstrated weakness in the right L4, L5, and S1 muscles without neurologic deficit. He noted that appellant reached MMI on September 15, 2014 and that appellant had a previous impairment rating of 10 percent permanent impairment of the right lower extremity and zero percent permanent impairment of the left lower extremity. Dr. Komes indicated that there were no progressive abnormalities on radiographic studies of the lumbosacral spine that would indicate the advancement of any of the accepted conditions. Additionally there was no new evidence of pathology in the thoracic, lumbar, or sacral region which should affect any previous impairment ratings. Dr. Komes noted that there was significant medical evidence of a progressive neuropathy which accounted for appellant's progressive symptoms. He did not perform an impairment calculation.

OWCP forwarded Dr. Komes' report to Dr. Arthur S. Harris, the DMA. In a March 26, 2017 report, he rereviewed the medical record, including Dr. Komes' February 13, 2017 report, which he indicated represented the date of MMI. Utilizing Dr. Komes' findings of weakness in the L4, L5, and S1 innervated muscles and *The Guides Newsletter* July/August 2009, the DMA calculated 13 percent permanent impairment of the right lower extremity and 0 percent permanent impairment to the left lower extremity. As appellant previously received a schedule award for 10 percent permanent impairment to the right lower extremity, the DMA found that he was entitled to an additional award for 3 percent permanent impairment.

By decision dated June 13, 2018, OWCP awarded appellant an additional three percent permanent impairment to the right lower extremity and zero percent permanent impairment to the left lower extremity. The award ran for 8.64 weeks for the period February 13 through April 14, 2017, a fraction of a day.

On June 19, 2018 appellant, through counsel, requested a telephonic hearing of OWCP's June 13, 2018 decision.

By decision dated August 3, 2018, an OWCP hearing representative denied the request for an oral hearing. She referenced 5 U.S.C. § 8124 and found a right to a hearing existed for injuries occurring after July 4, 1966, and because appellant's injury occurred on August 24, 1963 he had

no right to a hearing. The hearing representative further found that appellant could pursue alternative appellate remedies under FECA such as requesting reconsideration before OWCP or an appeal to the Board.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA[5] and its implementing 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. 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[7] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[8]

No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the implementing regulations.[9] Neither FECA nor its implementing federal regulations provide for payment of a schedule award for the permanent loss of use of the back, the spine, or the body as a whole; a claimant is not entitled to such a schedule award.[10] The Board notes that section 8101(19) specifically excludes the back from the definition of organ.[11] A claimant may receive a schedule award for any permanent impairment to the upper or lower extremities even though the cause of the impairment originated in the spine.[12]

The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve impairment, set forth in the July/August 2009 *The Guides Newsletter*.[13] It was designed for situations in which a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal

[5] *Supra* note 1.

[6] 20 C.F.R. § 10.404.

[7] *Id.* For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (March 2017).

[8] *Id.*; *see C.G.*, Docket No. 18-0392 (issued August 14, 2018); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[9] *G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[10] *See C.G.*, *supra* note 8; *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[11] 5 U.S.C. § 8101(9).

[12] *See C.G.*, *supra* note 8; *W.D.*, Docket No. 10-0274 (issued September 3, 2016).

[13] The methodology and applicable tables were published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairments Using the Sixth Edition (July/August 2009).

nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[14] The Board has recognized the adoption of this methodology as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[15]

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[16] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[17]

ANALYSIS -- ISSUE 1

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

In support of his claim for an increased schedule award, appellant submitted a January 28, 2016 report from Dr. Wilson, who used appropriate tables in the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* and opined that appellant had 28 percent permanent impairment of both lower extremities. The DMA reviewed Dr. Wilson's report and concluded, in an August 24, 2016 report, that Dr. Wilson erroneously combined the impairments for appellant's L4, L5, and S1 radiculopathy instead of using the Combined Values Chart as recommended in the A.M.A., *Guides* and *The Guides Newsletter*. He indicated that the correct calculation resulted in 26 percent permanent impairment of each lower extremity. As appellant previously received 10 percent permanent impairment to the right lower extremity and zero percent impairment to the left lower extremity, the DMA indicated that appellant was entitled to an additional 16 percent impairment of the right lower extremity and 26 percent impairment of the left lower extremity.

OWCP subsequently referred the record to Dr. Komes, a second opinion physician, who opined in a report dated February 13, 2017 that the accepted conditions had not significantly changed appellant's thoracic, lumbar or sacral pathology, which would result in additional impairment. As Dr. Komes did not provide an impairment calculation, the DMA used Dr. Komes' examination findings and found 13 percent permanent impairment of appellant's right lower extremity and 0 percent permanent impairment of his left lower extremity. This equated to an additional award of three percent impairment to the right lower extremity from the original schedule award.

As noted above, if there is disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint a referee physician or impartial medical specialist who shall

[14] *See supra* note 7 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[15] *See C.G., supra* note 8; *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

[16] 5 U.S.C. § 8123(a); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

[17] *See A.G., id.; C.H.*, Docket No. 18-1065 (issued November 29, 2018).

make an examination.[18] The Board finds that there is an unresolved conflict in the medical evidence regarding the extent of the permanent impairment of appellant's bilateral lower extremities due to his accepted conditions. Therefore, the case must be remanded to OWCP for referral to an impartial medical specialist for resolution of the conflict in the medical opinion evidence in accordance with 5 U.S.C. § 8123(a).

After such further development as OWCP deems necessary, it shall issue a *de novo* decision.[19]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: June 21, 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

[18] 5 U.S.C. § 8123(a); *see A.G., supra* note 16; *G.W.*, Docket No. 17-0957 (issued June 19, 2017); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[19] In light of the disposition of the first issue, the second issue is rendered moot.