United States Department of Labor
Employees' Compensation Appeals Board

B.D., Appellant	)	
and	)	**Docket No. 19-0975**
	)	**Issued: August 21, 2020**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Edison, NJ, Employer	)	

Appearances:
Robert D. Campbell, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On January 16, 2019 appellant, through counsel, filed a timely appeal from an October 23, 2018 merit decision 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 over the merits of this case.[3]

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[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.*

[3] The Board notes that, following the October 23, 2018 decision, OWCP 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.*

ISSUE

The issue is whether appellant has established permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board on appeal.[4] The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On March 4, 2004 appellant, then a 46-year-old former mail handler, filed a traumatic injury claim (Form CA-1) alleging a February 4, 2004 employment injury. He asserted that, due to unloading trailers at work between "just before Christmas" and February 4, 2004, he experienced progressively worse pain symptoms in his neck, back, and left leg/hip.[5] In a May 5, 2004 letter, OWCP advised appellant that his claim was being developed as a claim for an occupational disease because he implicated work duties over a period of time longer than one day or work shift. It initially denied his occupational disease claim on June 4, 2004. Following a series of requests for reconsideration, and continued denial of the claim by OWCP, on November 2, 2010 appellant appealed a May 6, 2010 OWCP merit decision to the Board.

By decision dated September 13, 2011, the Board affirmed the denial of the claim, finding that appellant had not established that he sustained an occupational disease in the performance of duty.[6] On July 26, 2012 appellant requested reconsideration of his claim. By decision dated December 4, 2012, OWCP accepted his claim for a lumbar sprain, finding that it had resolved as of October 8, 2012. On the same date, it terminated appellant's wage-loss compensation benefits.[7]

In a report dated August 21, 2013, Dr. Nicholas Diamond, an osteopath Board-certified in physical medicine and rehabilitation, detailed his physical examination of appellant and noted that he had reached maximum medical improvement (MMI) as of the date of examination.[8] He provided an impairment rating under Proposed Table 2 of *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*),

[4] Docket No. 16-1177 (issued October 27, 2016); Docket No. 15-0400 (issued May 12, 2016); *Order Dismissing Appeal*, Docket No. 13-0183 (issued December 20, 2012); Docket No. 11-0247 (issued September 13, 2011).

[5] On the reverse side of the Form CA-1, appellant's immediate supervisor advised that appellant had been terminated from the employing establishment prior to his filing of the present claim.

[6] Docket No. 11-0247 (issued September 13, 2011). On November 2, 2012 the Clerk of the Appellate Boards inadvertently docketed an appeal when no such appeal was intended by appellant. The Board dismissed the appeal by order dated December 20, 2012. *Order Dismissing Appeal*, Docket No. 13-0183 (issued December 20, 2012).

[7] On December 4, 2013 appellant requested reconsideration of the December 4, 2012 termination decision. By decision dated September 18, 2014, OWCP denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). Appellant filed an appeal with the Board and, by decision dated May 12, 2016, the Board affirmed the September 18, 2014 decision. Docket No. 15-0400 (issued May 12, 2016).

[8] Dr. Diamond noted that, when another physician in his office examined appellant on January 16, 2012, he diagnosed several conditions including cumulative and repetitive trauma disorder superimposed upon defined work-related injuries of February 4 and June 17, 2004. He did not clarify the nature of the June 17, 2004 injury.

which is a supplemental publication of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[9] Dr. Diamond determined that appellant's sensory and motor deficits associated with the bilateral L4 nerve distributions warranted a finding that appellant had nine percent permanent impairment of each lower extremity.

On October 11, 2013 appellant filed a claim for a schedule award (Form CA-7).

On December 17, 2013 OWCP forwarded the case record, including Dr. Diamond's August 21, 2013 report and a statement of accepted facts (SOAF), to Dr. Henry Magliato, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). It requested that Dr. Magliato review the report and provide an opinion on permanent impairment in accordance with the standards of the sixth edition of the A.M.A., *Guides*.

In a report dated December 30, 2013, the DMA found that Dr. Diamond's August 21, 2013 report was not acceptable as a basis for a schedule award because his report failed to consider the effect of a nonwork-related injury sustained by appellant on July 17, 2004.[10] He requested more records of appellant's treatment before issuing a final determination.

On March 18, 2014 OWCP forwarded the case record, supplemented by additional documents, to the DMA and requested that he provide a supplemental report regarding appellant's permanent impairment. In a report dated April 7, 2014, the DMA concluded that most, if not all, of the findings of Dr. Diamond and other attending physicians were due to appellant's July 17, 2004 nonfederal injury, as well as other injuries sustained outside of work (including an unspecified July 2008 injury). He explained that appellant's back condition had "cleared up before the reinjury of July 17, 2004 while working at another job."

On July 11, 2014 OWCP determined that a conflict existed in the medical opinion evidence regarding the degree of appellant's permanent impairment. It referred appellant and the case record (including a SOAF) to Dr. Howard M. Pecker, a Board-certified orthopedic surgeon, for an impartial medical examination and evaluation of the extent of appellant's permanent impairment.

In a report dated October 3, 2014, Dr. Pecker discussed appellant's factual and medical history and reported the findings of his physical examination. He determined that appellant's date of MMI was April 15, 2004. Dr. Pecker noted that appellant's variable reporting of numbness and weakness during the physical examination was not consistent with radiculopathy and indicated that there was no dermatomal distribution of sensory loss which would coincide with radiculopathy. He advised that all of the findings are consistent with normal degenerative changes of the cervical and lumbar spines. Dr. Pecker concluded, without referencing specific portions of the A.M.A., *Guides*, that appellant had zero percent permanent impairment of the upper or lower extremities.

On October 17, 2014 OWCP forwarded Dr. Pecker's October 3, 2014 report and the case record to Dr. Andrew A. Merola, a Board-certified orthopedic surgeon serving as a DMA, for review and an opinion on permanent impairment. In an October 25, 2014 report, the DMA agreed

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

[10] The case record reflects that on July 17, 2004, when appellant was working in a nonfederal job as a school bus driver, he felt a popping sensation in his lower back while "crawling under branches."

with Dr. Pecker that appellant had no permanent impairment. He determined that Dr. Pecker had addressed the discrepancy between the reports of Dr. Diamond and Dr. Magliato, the prior DMA, specifically indicating that the examination revealed no evidence of radiculopathy.

By decision dated January 6, 2015, OWCP denied appellant's claim for a schedule award. It noted that the special weight of the medical evidence rested with the opinion of Dr. Pecker, the impartial medical specialist, who found that appellant had zero percent permanent impairment of the upper and lower extremities.

On December 29, 2015 appellant, through counsel, requested reconsideration of OWCP's January 6, 2015 decision. Counsel argued that the weight of the medical evidence rested with Dr. Diamond's impairment rating. With the request for reconsideration, appellant attached a March 23, 2015 report from Dr. Diamond who disputed the findings of Dr. Pecker's October 3, 2014 report, noting that Dr. Pecker did not indicate which specific muscles were tested. Dr. Diamond also summarized findings from reports previously of record and noted that he "[stood] by [his] impairment rating" of August 21, 2013."

Appellant submitted a December 9, 2014 report from Dr. Garen E. Gajian, a Board-certified anesthesiologist, which contained results on examination and diagnoses of several cervical and back conditions.

By decision dated March 28, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). Appellant filed an appeal with the Board and, by decision dated October 27, 2016, the Board affirmed the March 28, 2016 decision.[11]

On December 29, 2017 appellant again filed a claim for a schedule award. In support of his claim, he submitted a September 14, 2017 report from Dr. Michael M. Cohen, an osteopath Board-certified orthopedic surgeon. Dr. Cohen noted that, during the most recent evaluation on August 21, 2013, appellant's diagnoses were cumulative and repetitive trauma disorder superimposed upon defined work-related injuries of February 4 and June 17, 2004, occupational low back syndrome, herniated nucleus pulposus at L3-4, L4-5, and L5-S1, aggravation of preexisting age-related osteoarthritis of the lumbar spine, left lumbar radiculopathy, disc bulge at L2-3, and status post pain management with lumbar rhizotomy. He noted that appellant presently complained of lumbosacral spine pain and stiffness on a constant and daily basis, and had radicular complaints into the bilateral lower extremities with numbness and tingling sensation. Dr. Cohen indicated that the sensory examination revealed decreased sharp sensation on the left side in the L4, L5 and S1 nerve distributions. He maintained that the cumulative and repetitive trauma disorder superimposed upon defined work-related injuries of February 4 and June 17, 2004 were the competent producing factors for appellant's subjective and objective findings on examination.

Utilizing Proposed Table 2 of *The Guides Newsletter*, Dr. Cohen determined that appellant had mild sensory deficits of the left L4, L5, and S1 nerve distributions which fell under a class of diagnosis (CDX) of 1, with each nerve distribution warranting a default impairment value of one percent permanent impairment of the left lower extremity. Appellant had a grade modifier for functional history (GMFH) of 1 and a grade modifier for clinical studies (GMCS) of 1. Dr. Cohen noted that application of the net adjustment formula did not require any movement from the default

[11] Docket No. 16-1177 (issued October 27, 2016).

values. Therefore, he concluded that combining the three default impairment values equaled a total left lower extremity permanent impairment of three percent. Dr. Cohen found that the date of MMI was September 14, 2017.

On April 12, 2018 OWCP forwarded the case file, including Dr. Cohen's September 14, 2017 report and a SOAF, to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA. It requested that he review Dr. Cohen's September 14, 2017 report and provided an opinion regarding permanent impairment.

In a report dated April 16, 2018, the DMA found that Dr. Cohen's impairment evaluation could not be accepted as probative for the purpose of recommending a schedule award. He explained that, given the history of Dr. Pecker finding no evidence of lumbar spine nerve impairment during an impartial medical examination on October 3, 2014 and a sole accepted condition of lumbar sprain deemed to have been resolved, he was unable to casually link any spinal nerve impairment findings by Dr. Cohen in his most recent examination to the accepted condition of lumbar sprain. The DMA concluded that appellant had no permanent impairment of his lower extremities.

By decision dated June 26, 2018, OWCP denied appellant's claim for a schedule award. It detailed the DMA's April 16, 2018 report and its discussion of Dr. Cohen's September 14, 2017 report, and it found that appellant had not submitted medical evidence supporting permanent impairment.

On July 16, 2018 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. In a September 14, 2018 letter, counsel asserted that it was improper for the DMA to solely rely on Dr. Pecker's October 3, 2014 report in rendering his impairment rating, as appellant asserted increased permanent impairment.

Appellant submitted a September 14, 2018 letter from Dr. Cohen who noted that, subsequent to Dr. Pecker's October 3, 2014 report, appellant had undergone further treatment for his lumbar spine. He noted that he "[stood] by [his] impairment rating" of September 14, 2017, finding that appellant had a left lower extremity impairment.

Appellant also submitted reports dated between November 28, 2016 and January 10, 2017 from Dr. Joseph Schulman, an osteopath Board-certified in family medicine, who treated appellant for diagnoses of lumbar radiculopathy, mixed hyperlipidemia, viral gastroenteritis, and a bulging lumbar disc. A magnetic resonance imaging scan dated December 22, 2016 demonstrated multilevel degenerative changes at L2-3, L3-4, L4-5, and L5-S1. In a report dated February 3, 2017, Dr. Orlee Hamer, an osteopath Board-certified in physical medicine and rehabilitation, diagnosed lumbar facet arthropathy and lumbar spinal stenosis. In a note dated March 1, 2017, Dr. Eric Freeman, Board-certified in pain medicine, described performing a bilateral L3, L4, and L5 medial branch block under fluoroscopic guidance to treat appellant's lumbar facet syndrome. On March 8, 2017 Dr. Hamer noted that appellant reported 70 percent relief from a medical branch block procedure. In a report dated March 22, 2017, he diagnosed appellant with lumbar facet arthropathy and lumbar spinal stenosis. In notes dated April 12 and 19, 2017, Dr. Freeman described performing bilateral L3, L4, and L5 radiofrequency ablation under fluoroscopic guidance without complication to treat lumbar spondylosis.

By decision dated October 23, 2018, OWCP's hearing representative affirmed the June 26, 2018 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[12] and its implementing regulations[13] 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, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[14] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[15]

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.[16] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[17] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[18]

In addressing upper or lower extremity impairment due to peripheral or spinal nerve root involvement, the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* require identifying the impairment CDX, which is then adjusted by the GMFH and the GMCS. The effective net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[19]

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[20] In situations where

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[12] 5 U.S.C. § 8107.

[13] 20 C.F.R. § 10.404.

[14] *Id. See also T.T.*, Docket No. 18-1622 (issued May 14, 2019).

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

[16] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo,* 51 ECAB 361, 367 (2000).

[17] *See supra* note 15 at Chapter 2.808.5c(3) (March 2017).

[18] *Id.*, at Chapter 3.700, Exhibit 4 (January 2010).

[19] *See The Guides Newsletter*; A.M.A., *Guides* 430.

[20] 5 U.S.C. § 8123(a).

there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[21]

ANALYSIS

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

The Board finds that there is an unresolved conflict in the medical opinion evidence between the opinions of Dr. Cohen, appellant's treating physician, and Dr. Katz, the most recent DMA, regarding whether appellant has established permanent impairment of a scheduled member or function of the body.

In a September 14, 2017 report, Dr. Cohen indicated that the sensory examination revealed decreased sharp sensation on the left side in the L4, L5 and S1 nerve distributions. He maintained that a defined work-related injury of February 4, 2004 was, in part, the competent producing factor for appellant's subjective and objective findings on examination.[22] Utilizing Proposed Table 2 of *The Guides Newsletter*, Dr. Cohen determined that appellant had mild sensory deficits of the left L4, L5, and S1 nerve distributions which fell under a CDX of 1, with each nerve distribution warranting a default impairment value of one percent permanent impairment of the left lower extremity. He found that appellant had a GMFH of 1 and a GMCS of 1. Dr. Cohen noted that application of the net adjustment formula did not require any movement from the default values.[23] Therefore, he concluded that combining the three default impairment values equaled a total left lower extremity permanent impairment of three percent.

In contrast, the DMA provided an opinion in his April 16, 2018 report that appellant did not have permanent impairment of the upper or lower extremities. He reviewed the medical evidence of record along with the SOAF and found that Dr. Cohen's impairment evaluation could not be accepted as probative. The DMA explained that, given the history of Dr. Pecker finding no evidence of lumbar spine nerve impairment during an impartial medical examination on October 3, 2014, and a sole accepted condition under this claim of lumbar sprain which was a self-limited condition deemed to have resolved, he was unable to casually link any spinal nerve impairment findings by Dr. Cohen in his most recent examination to the accepted condition of lumbar sprain.

As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint a referee physician or impartial medical specialist who shall make an examination.[24] While the DMA was unable to link any spinal nerve findings by Dr. Cohen to the accepted condition of lumbar sprain, Dr. Cohen's diagnosis related to permanent

[21] *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

[22] The Board notes that OWCP accepted that appellant sustained the occupational condition of lumbar sprain by February 4, 2004. Dr. Cohen referred to a June 17, 2004 work injury as also causing impairment, but the nature of this reference is unclear from the case record as there is no indication that such an injury has been accepted.

[23] *See supra* notes 18 and 19.

[24] *See supra* note 20.

impairment was a defined work-related injury which was established as having occurred by February 4, 2004. On October 3, 2014 Dr. Pecker, the impartial medical specialist, found that appellant's lumbar sprain had resolved as of October 3, 2014 and found no evidence of radiculopathy. However, appellant is claiming a schedule award based on medical evidence alleged to show progression of an employment-related condition resulting in permanent impairment.[25] As there remains an unresolved conflict in the medical evidence regarding the extent of permanent impairment of the left lower extremity due to appellant's accepted lumbar sprain, 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.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 21, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

[25] *See M.P.*, Docket No. 18-1298 (issued April 12, 2019).