United States Department of Labor
Employees' Compensation Appeals Board

E.M., Appellant	)	
and	)	**Docket No. 19-1535**
	)	**Issued: August 27, 2020**
U.S. POSTAL SERVICE, POST OFFICE, South Burlington, VT, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 11, 2019 appellant, through counsel, filed a timely appeal from May 14, 2019 merit decisions 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.

[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 permanent impairment of a scheduled member or function of the body.

FACTUAL HISTORY

On October 5, 2013 appellant, then a 44-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained herniated discs, causing symptoms in his lower back, hips, and right leg/foot, as a result of the his federal employment duties, including walking his mail delivery route and driving a postal vehicle. He noted that he first became aware of his condition on June 15, 2013 and first realized its relation to his federal employment on September 16, 2013. Appellant did not stop work, but began working in a limited-duty position. OWCP accepted his claim for central disc herniation at L5-S1 and bilateral lumbar radiculopathy.

In a report dated January 29, 2014, Dr. Mary T. Flimlin, Board-certified in physical medicine and rehabilitation, noted that appellant primarily complained of low back pain which radiated into his right hip. She indicated that, on physical examination, appellant exhibited negative results of straight leg raise testing, absent right Achilles reflex, left Achilles reflex of 1, and grossly normal strength for all major muscle groups. Dr. Flimlin advised that a January 24, 2014 electromyogram and nerve conduction velocity (EMG/NCV) study contained an impression of relatively normal results with a slight decrease in the complex action potential of the peroneal area (no elicitable F-wave), a finding which could be considered a normal variant. A September 4, 2013 magnetic resonance imaging (MRI) scan of the low back showed, *inter alia*, left foraminal disc protrusion and herniation at L2-3, mild facet hypertrophy at L3-4, and disc bulges at L4-5 and L5-S1.

In an undated note received by OWCP on September 6, 2016, Dr. Flimlin indicated that appellant had reached maximum medical improvement (MMI).

On December 1, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated December 15, 2016, OWCP informed appellant that he should submit a detailed narrative medical report from his treating physician that calculated lower extremity permanent impairment utilizing *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), which was a supplemental publication of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] It afforded him 30 days to submit the requested evidence.

In a March 8, 2017 report, Dr. Mesfin Seyoum, Board-certified in family medicine, discussed appellant's factual and medical history and reported findings on physical examination. On examination of the lumbosacral spine, he observed slightly limited lumbar range of motion with back pain at extreme ranges, as well as paraspinal tenderness and muscle spasms. Dr. Seyoum advised that the sensory examination revealed mildly decreased sensation of the bilateral L5 and

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

S1 dermatomes, while the motor examination revealed 4/5 motor strength of the bilateral extensor halluces longus and plantar flexor muscles, and deep tendon reflects of 1+/4 in the right knee and ankle compared to 2+/4 on the left side. Appellant's *Quick*DASH questionnaire indicated a mild deficit of the lower limb, a pain disability questionnaire indicated mild pain-related impairment, and he reported difficulty in performing activities of daily living. Dr. Seyoum discussed appellant's testing results and diagnosed lumbosacral neuritis and lumbar disc displacement. He then utilized *The Guides Newsletter* to calculate appellant's permanent impairment under the diagnosis-based impairment (DBI) rating method. Dr. Seyoum noted that appellant had lumbar radiculopathy involving the bilateral L5 and S1 nerve roots and calculated the percentage of impairment based on each nerve root.

With regard to the right L5 nerve root, Dr. Seyoum referenced Proposed Table 2 and noted that appellant's condition fell under a class of diagnosis (CDX) of 1 with default values for lower extremity permanent impairment of one percent (due to mild sensory deficit) and five percent (due to mild motor deficit). Referring to Tables 16-6 and 16-8 on pages 516 and 519 of the sixth edition of the A.M.A., *Guides*, he calculated a grade modifier for function history (GMFH) of 1 (mild deficit on the lower limb questionnaire) and a grade modifier for clinical studies (GMCS) of 2 (positive lumbar spine MRI scan findings). Application of the net adjustment formula required +1 movement from the default sensory and motor deficit values and resulted in nine percent permanent impairment associated with the L5 nerve root. With regard to the right S1 nerve root, Dr. Seyoum found that appellant's condition fell under a CDX of 1 with default values of one percent (due to mild sensory deficit) and three percent (due to mild motor deficit). He noted that adjustment was not applicable as it had been applied to the right L5 nerve root already, resulting in four percent permanent impairment associated with the S1 nerve root. Adding the percentages of impairment for the right L5 and S1 nerve roots together, Dr. Seyoum determined that appellant had a total right lower extremity impairment of 13 percent. He performed similar calculations for appellant's left L5 and S1 nerve roots to determine that he had a total left lower extremity impairment of 13 percent.

On April 20, 2017 OWCP routed Dr. Seyoum's report, a statement of accepted facts, and the case file to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for an opinion on permanent impairment under the standards of *The Guides Newsletter* and the sixth edition of the A.M.A., *Guides*.

In an April 24, 2017 report, the DMA reviewed the medical evidence of record and noted that the January 29, 2014 EMG/NCV study was within normal limits, and that Dr. Flimlin had observed physical examination findings of grossly normal strength for all major muscle groups. He maintained that there was a conflict of opinion between Dr. Seyoum's rating of significant permanent impairment and her essentially normal physical examination and diagnostic testing results. The DMA noted that, as this difference presented a conflict of information that could not be resolved on the basis of a medical records review, he recommended a second opinion examination to evaluate appellant's permanent impairment.

On May 8, 2017 OWCP referred appellant for a second opinion examination to Dr. Mark Bernhard, an osteopath Board-certified in physical medicine and rehabilitation. It requested that he provide an opinion on permanent impairment under the standards of *The Guides Newsletter* and the sixth edition of the A.M.A., *Guides*.

In a report dated May 19, 2017, Dr. Bernhard reviewed the medical record and noted that appellant presented complaining of low back pain, but no radiation of pain to his lower extremities. He performed a physical examination of appellant's lumbosacral spine and lower extremities and noted that appellant's date of MMI was the same as the date of his examination. On examination of the lumbosacral spine, Dr. Bernhard noted tenderness to palpation of the right, normal alignment, and no tenderness of the sacroiliac joint, pelvic brims, or buttocks. Range of motion testing indicated deficits of 10 degrees for true lumbar flexion, 3 degrees for sacral flexion, 3 degrees for extension, 5 degrees for left lateral bending, and 2 degrees for right lateral bending. Dr. Bernhard noted bilateral knee/ankle jerks and straight leg raising were within normal limits, while sensation to light touch and pinprick was intact bilaterally. Muscle strength was within normal limits in both lower extremities. Dr. Bernhard noted that, in contrast to Dr. Seyoum's report, he did not find asymmetry of the deep tendon reflexes or reduced strength of the bilateral extensor halluces muscles.

Dr. Bernhard then utilized *The Guides Newsletter* to calculate appellant's permanent impairment under the DBI rating method. Referencing Proposed Table 2, he noted that appellant's nerve root injury fell under a default value of one for the right and left L5 roots, as well as for the right and left S1 roots, due to mild sensory deficit. Dr. Bernhard observed that the findings on examination were confined predominantly to the bilateral L5 and S1 nerve roots with diminished sensory findings to light touch and pinprick at L5 and S1 bilaterally. He noted that appellant had a GMFH of 1 in both lower extremities given some degree of difficulty in performing heavy work and the need for anti-inflammatory medication. Appellant had a GMCS of 1 due to normal clinical studies. Dr. Bernhard indicated that rating the right L5 nerve root resulted in an adjustment one grade to the left of the one percent default value for mild sensory deficit (moving from grade C to grade B) and warranted a finding of one percent permanent impairment due to right L5 sensory deficit. Rating the right S1 nerve root also resulted in movement one grade to the left of the one percent default value for mild sensory deficit, but warranted a finding of zero percent impairment. Dr. Bernhard therefore concluded that appellant had one percent permanent impairment of his right lower extremity. He performed a similar calculation to conclude that appellant had one percent permanent impairment of his left lower extremity.

On June 29, 2017 OWCP routed Dr. Bernhard's May 19, 2017 report back to the DMA for review and an opinion on permanent impairment. In a June 30, 2017 report, the DMA concurred with Dr. Bernhard's calculation of one percent permanent impairment of each lower extremity. He explained that Dr. Bernhard's determination of impairment was more consistent with Dr. Flimlin's findings than with those of Dr. Seyoum, and noted that Dr. Bernhard had performed his calculations in accordance with standards of the sixth edition of the A.M.A, *Guides*.

In a report dated October 18, 2017, Dr. Seyoum maintained that Dr. Bernhard's May 19, 2017 report contained an inconsistency as he noted intact sensation to light touch and pinprick in one portion of the report and also noted diminished sensory findings to light touch and pinprick at L5 and S1 bilaterally in another portion. He asserted that Dr. Bernhard had not specified whether his sensory examination had been performed on the lower extremities.

By decision dated October 27, 2017, OWCP granted appellant a schedule award for one percent permanent impairment of each lower extremity. The award ran for 5.76 weeks from May 19 through June 28, 2017 and was based on the rating reports of Dr. Bernhard and the DMA.

On November 6, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Prior to a hearing being held, OWCP's hearing representative issued a February 9, 2018 decision setting aside OWCP's October 27, 2017 decision and remanding the case to OWCP for further development. She determined that there was an unresolved conflict in the medical opinion evidence regarding permanent impairment between Dr. Seyoum and Dr. Bernhard. The hearing representative directed OWCP, on remand, to refer appellant to an impartial medical specialist for examination and evaluation of his permanent impairment, to be followed by issuance of a *de novo* decision.

Appellant submitted a February 21, 2018 report from Dr. Seyoum who repeated the objections to Dr. Bernhard's May 19, 2017 impairment rating contained in his October 18, 2017 report. Dr. Seyoum opined that an updated EMG/NCV study was necessary to accurately assess appellant's radiculopathy.

On August 30, 2018 OWCP referred appellant to Dr. Amit Sahasrabudhe, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on permanent impairment under the standards of *The Guides Newsletter* and the sixth edition of the A.M.A., *Guides*.

In a report dated October 18, 2018, Dr. Sahasrabudhe discussed appellant's history of injury and reviewed the medical reports of record. On examination of the lower back, he observed no tenderness to palpation, mild limitation of range of motion, mild low back pain on extension, and a negative straight leg raise test bilaterally. On examination of the lower extremities, Dr. Sahasrabudhe observed no tenderness to palpation, full range of motion with 5/5 strength, grossly intact sensation to light touch bilaterally from L2 to S1, 2+ dorsalis pedis pulses, and 1+ patellar tendon and Achilles reflexes. He advised that appellant reached MMI as of May 19, 2017. Dr. Sahasrabudhe noted that appellant's claim was accepted for lumbar disc displacement at L4-5 and lumbar neuritis/radiculopathy, but indicated that the June 6, 2018 MRI scan demonstrated spinal canal stenosis at L4-5 which would explain his reported ongoing lower back pain and intermittent radicular complaints. He then referenced *The Guides Newsletter* and noted that there were no unequivocal ratable sensory or motor deficits seen during the October 18, 2018 examination. Dr. Sahasrabudhe indicated that Dr. Bernhard noted in his May 19, 2017 report that appellant denied radicular symptoms and advised that, although Dr. Bernhard found impairment, he reported normal sensory and motor examination findings. He also discussed Dr. Seyoum's clinical findings, noting that they differed from his own. Dr. Sahasrabudhe further indicated that, as appellant had normal examination findings during the October 18, 2018 examination, according to Proposed Table 2 there would be no impairment given for motor or sensory deficits of the lower extremities, resulting in zero percent permanent impairment of each lower extremity.

By decision dated November 5, 2018, OWCP denied appellant's claim for an increased schedule award. It explained that this denial was based on the fact that Dr. Sahasrabudhe, the impartial medical specialist, determined in an October 18, 2018 report that appellant had no permanent impairment of either lower extremity. OWCP found that, because Dr. Sahasrabudhe's October 18, 2018 report fully resolved the conflict in the medical opinion evidence regarding permanent impairment, further review by a DMA was not necessary.

On November 12, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review with respect to the November 5, 2018 schedule award decision.

The hearing regarding the schedule award was held on March 1, 2019.

By decision dated May 7, 2019, OWCP's hearing representative remanded the case file for referral to a DMA in order to review the October 18, 2018 report of Dr. Sahasrabudhe, to be followed by issuance of a *de novo* decision.

By decision dated May 14, 2019, a representative of OWCP's Branch of Hearings and Review, acting on OWCP's discretionary authority to review an award for or against payment of compensation, vacated the May 7, 2019 decision and affirmed the November 5, 2018 schedule award decision. The representative explained that, under OWCP's procedures, if a case had been referred for referee evaluation to resolve the issue of permanent impairment, it was not necessary to route the file to another DMA to review the referee calculations as long as the referee's report fully resolved the conflict and provided a thorough explanation of impairment according to the sixth edition of the A.M.A., *Guides*.

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. 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.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* 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] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[9] 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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

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

[7] 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).

[8] 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).

[9] *See supra* note 7 at Chapter 2.808.5c(3) (March 2017).

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.[10]

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."[11] In situations where 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.[12]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body.

OWCP properly declared a conflict in medical opinion based on the differing opinions regarding the extent of appellant's bilateral lower extremity impairment. Whereas appellant's treating physician, Dr. Seyoum, found 13 percent permanent impairment of each lower extremity, Dr. Bernhard, an OWCP referral physician, found 1 percent permanent impairment of each lower extremity. On remand from its October 27, 2017 decision granting appellant a schedule award for one percent permanent impairment of each lower extremity, OWCP properly referred appellant to Dr. Sahasrabudhe for an impartial medical examination and opinion on permanent impairment. In his October 18, 2018 report, Dr. Sahasrabudhe applied the FECA-approved methodology for rating spinal nerve extremity impairment and correctly found that appellant had zero percent permanent impairment of each lower extremity.

When a case is referred to an impartial medical specialist to resolve a conflict, the resulting medical opinion, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight. The Board finds that OWCP properly relied on Dr. Sahasrabudhe's October 18, 2018 opinion.[13] Dr. Sahasrabudhe provided a well-reasoned report based on a proper factual and medical history. Additionally, his report included detailed findings on physical examination, provided a thorough review of the record, and provided medical rationale supporting his opinion. Dr. Sahasrabudhe properly referenced *The Guides Newsletter* and explained that appellant exhibited no unequivocal sensory or motor deficits during the October 18, 2018

[10] *See supra* note 7 at Chapter 3.700, Exhibit 4 (January 2010).

[11] 5 U.S.C. § 8123(a).

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

[13] The Board notes that OWCP properly found that, under its procedures, it was not necessary to route Dr. Sahasrabudhe's October 18, 2018 referee's report to another DMA to review the referee calculations, as Dr. Sahasrabudhe's report fully resolved the conflict of medical opinion and provided a thorough explanation of his calculation of impairment. *See supra* note 7 at Chapter 2.808.6g (March 2017).

examination. He indicated that, as appellant had normal examination findings, according to Proposed Table 2 of *The Guides Newsletter*, there would be no impairment given for motor or sensory deficits of the lower extremities. As the impartial medical specialist, Dr. Sahasrabudhe's well-reasoned October 18, 2018 opinion is entitled to special weight.[14] Accordingly, OWCP properly found that appellant currently had zero percent permanent impairment of each lower extremity under the sixth edition of the A.M.A., *Guides*.

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 permanent impairment of a scheduled member or function of the body.

[14] *See id*.

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 27, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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