

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

R.M., Appellant)	
)	
and)	Docket No. 20-0725
)	Issued: May 5, 2021
DEPARTMENT OF THE NAVY, NAVAL SEA)	
SYSTEMS COMMAND, Philadelphia, PA,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Jason S. Lomax, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On February 7, 2020 appellant, through counsel, filed a timely appeal from an August 12, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUE

The issue is whether appellant has established permanent impairment of his lower extremities warranting a schedule award.

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.*

FACTUAL HISTORY

On October 25, 2003 appellant, then a 36-year-old computer engineer, filed a traumatic injury claim (Form CA-1) alleging that on October 25, 2003 he sustained an injury when he fell off a ladder while in the performance of duty. He stopped work on October 26, 2003. OWCP accepted appellant's claim for displacement of lumbar intervertebral disc without myelopathy contusion of the face, scalp, and neck, contusion of the back, contusion of the left elbow/forearm, left elbow dislocation, villonodular synovitis of the upper left extremity, left limb pain, loose body of the left upper arm, effusion of joint of the left upper arm, and left olecranon bursitis. It paid appellant wage-loss compensation on the supplemental rolls for disability from work commencing December 15, 2003. On June 9, 2006 appellant underwent OWCP-authorized left elbow arthroscopy/open arthrotomy with removal of loose bodies.

On July 6, 2018 appellant filed a claim for a schedule award (Form CA-7) due to his accepted October 25, 2003 employment injury.

In a March 27, 2018 report, Dr. Nicholas Diamond, an osteopath and Board-certified physical medicine and rehabilitation physician, discussed appellant's factual and medical history and reported the findings of his physical examination. He noted that examination of the left elbow revealed well-healed portal arthroscopy scars. Dr. Diamond reported that there is an effusion and tenderness over the olecranon. He also indicated that appellant had tenderness over the medial epicondyle and over the lateral epicondyle. Appellant did not have any sensory deficits in either upper extremity. Dr. Diamond also indicated that the sensory examination failed to reveal any perceived sensory deficit involving either lower extremity. He noted that deep tendon reflexes were +2 and physiological, and that manual muscle strength testing was graded at 4/5 on the right versus 4+/5 on the left involving hip flexion. Hip adduction strength was graded at 4/5 on the right versus 4+/5 on the left and hip abduction strength was graded at 4/5 on the right versus 4+/5 on the left. Dr. Diamond indicated that extensor hallucis longus strength was graded at 5/5 bilaterally and that the gastrocnemius circumference measured 40 centimeters on the right versus 39.5 centimeters on the left. He determined that appellant had seven percent permanent impairment of his left upper extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ Dr. Diamond rated appellant's condition of loose bodies in the left elbow utilizing Table 15-4 (Elbow Regional Grid) on page 399 of the sixth edition of the A.M.A., *Guides*.

On June 8, 2018 Dr. Diamond updated his March 27, 2018 report to include a permanent impairment rating for the lower extremities. He utilized Table 2 of *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*) to determine that appellant had nine percent permanent impairment of his right lower extremity. Dr. Diamond found that appellant's mild IV/V motor strength deficit upon right hip abduction (associated with the right L5 nerve) fell under a class of diagnosis (CDX) of 1. He determined that appellant had a grade modifier for functional history (GMFH) of 2 and a grade modifier for clinical studies (GMCS) of 2. Dr. Diamond utilized the net adjustment formula, $(GMFH - CDX) + (GMCS - CDX) = (2 - 1) + (2 - 1) = +2$, which resulted in movement two spaces on Table 2 of *The Guides Newsletter* to grade E or nine percent permanent impairment of the right lower extremity. He also amended his left upper extremity rating, which he previously indicated

³ A.M.A., *Guides* (6th ed. 2009).

consisted of a seven percent permanent impairment due to loose bodies in the left elbow. Dr. Diamond now found that, utilizing Table 23 on page 449 of the sixth edition of the A.M.A., *Guides*, appellant also had five percent impairment of the left upper extremity due to entrapment neuropathy of the left ulnar nerve at the left elbow. He found that, therefore, the total permanent impairment of appellant's left upper extremity was 12 percent.

OWCP referred appellant's case to Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). In an October 17, 2018 report, Dr. Hammel noted that he agreed with Dr. Diamond that the total permanent impairment of appellant's left upper extremity was 12 percent. However, he determined that appellant did not have any permanent impairment of his lower extremities. With respect to Dr. Diamond's evaluation of appellant's lower extremity impairment, Dr. Hammel noted that he found that Dr. Diamond's "strength exam[ination] is inconsistent and diffusely weak. It is felt to be unreliable in the face of normal sensation and reflexes." He also noted that, with regard to Dr. Diamond's spinal nerve impairment rating, the examination was felt to be inconsistent with respect to objective motor impairment as there was diffuse bilateral weakness of the upper and lower extremities. Dr. Hammel indicated that the documented strength loss was felt to be invalid in light of this circumstance.

By decision dated October 30, 2018, OWCP granted appellant a schedule award for 12 percent permanent impairment of the left upper extremity.

By decision dated October 31, 2018, OWCP denied appellant's schedule award claim with regard to his lower extremities, finding that appellant has not established permanent impairment of his lower extremities, warranting a schedule award.⁴

On November 20, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review with regard to the October 31, 2018 decision.

By decision dated February 6, 2019, the hearing representative set aside the October 31, 2018 decision regarding appellant's lower extremity schedule award claim and remanded the case to OWCP for further medical development regarding permanent impairment of appellant's lower extremities.

On remand, OWCP received a December 17, 2018 report from Dr. Diamond who noted that he disagreed with Dr. Hammel regarding right lower extremity impairment. Dr. Diamond noted that Dr. Hammel had indicated that the strength examination was inconsistent and diffusely weak, but he maintained that the motor strength deficit was only calculated for the L5 nerve distribution, which correlated with the disc herniation at L4-5 and with a February 5, 2006 electromyogram and nerve conduction velocity (EMG/NCV) study, which revealed muscle atrophy at the L5 nerve in the right lower extremity.

OWCP again referred appellant's case to Dr. Hammel in his role as DMA. In an April 3, 2019 report, Dr. Hammel continued to assert that appellant did not have permanent impairment of his lower extremities. He again found that Dr. Diamond's strength examination of the lower

⁴ Both the October 30 and 31, 2018 decisions were based on Dr. Hammel's October 17, 2018 evaluation of Dr. Diamond's physical findings.

extremities was inconsistent and diffusely weak. Dr. Hammel further noted that, under Table 15-14 (Sensory and Motor Severity) on page 425 of the sixth edition of the A.M.A., *Guides*, “grades are 0-5 in whole numbers. As such, 4+ documented versus a 4 on the other side as is the case here demonstrates no motor deficit according to the sixth edition of the A.M.A., *Guides*.”

By decision dated April 4, 2019, OWCP denied appellant’s schedule award claim with regard to the lower extremities.

On April 15, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review. During the hearing held on July 9, 2019, counsel argued that there was a conflict in the medical opinion evidence regarding whether appellant had permanent impairment of his lower extremities.

By decision dated August 12, 2019, OWCP’s hearing representative affirmed the April 4, 2019 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,⁵ and its implementing federal regulation,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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

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.⁹ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹⁰ The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*, which is a supplemental publication of the sixth edition of the A.M.A., *Guides*. 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

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* See also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ 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).

¹⁰ *Supra* note 8 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3) (March 2017).

the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.¹¹

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.”¹²

ANALYSIS

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

The Board finds that there is a conflict in the medical opinion evidence regarding appellant’s permanent impairment of the right lower extremity between Dr. Diamond, the attending physician, and Dr. Hammel, the DMA, which requires further development of the medical evidence.¹³

On June 8, 2018 Dr. Diamond updated his March 27, 2018 report to include a permanent impairment rating for the lower extremities. He utilized Table 2 of *The Guides Newsletter* to determine that appellant had nine percent permanent impairment of his right lower extremity. Dr. Diamond found that appellant’s mild IV/V motor strength deficit upon right hip abduction (associated with the right L5 nerve) fell under a CDX of class 1. He determined that appellant had a GMFH of 2 and a GMCS of 2. Dr. Diamond utilized the net adjustment formula, (GMFH - CDX) + (GMCS - CDX) = (2 - 1) + (2 - 1) = +2, which resulted in movement two spaces on Table 2 of *The Guides Newsletter* to grade E or nine percent permanent impairment of the right lower extremity. The record also contains a December 17, 2018 report in which Dr. Diamond argued that his strength findings for the right lower extremity were valid. He noted that the motor strength deficit was only calculated for the L5 nerve distribution, which correlated with the disc herniation at L4-5 and with a February 5, 2006 EMG/NCV study, which revealed muscle atrophy at the L5 nerve in the right lower extremity.

In contrast, Dr. Hammel produced reports in which he provided a conflicting opinion regarding appellant’s right lower extremity permanent impairment. In an October 17, 2018 report, Dr. Hammel determined that appellant did not have any permanent impairment of his lower extremities. With respect to Dr. Diamond’s evaluation of appellant’s right lower extremity impairment, he noted that he found that Dr. Diamond’s “strength exam[ination] is inconsistent and diffusely weak. It is felt to be unreliable in the face of normal sensation and reflexes.” Dr. Hammel also noted that, with regard to Dr. Diamond’s spinal nerve impairment rating, the examination was felt to be inconsistent with respect to objective motor impairment as there was diffuse bilateral weakness of the lower extremities. He indicated that the documented strength loss was felt to be invalid in light of this circumstance. In an April 3, 2019 report, Dr. Hammel continued to assert that appellant did not have permanent impairment of his lower extremities. He again found that Dr. Diamond’s strength examination of the right lower extremity was inconsistent and diffusely weak. Dr. Hammel further noted that under Table 15-14 (Sensory and Motor Severity) of the sixth

¹¹ *Supra* note 8 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹² 5 U.S.C. § 8123(a).

¹³ *See id.*

edition of the A.M.A., *Guides* “grades are 0-5 in whole numbers. As such, 4+ documented versus a 4 on the other side as is the case here demonstrates no motor deficit according to the sixth edition of the A.M.A., *Guides*.”

Consequently, the case must be referred to an impartial medical specialist to resolve the existing conflict in the medical opinion evidence regarding appellant’s lower extremity permanent impairment. On remand, OWCP shall refer appellant, along with the case file and a statement of accepted facts, to an appropriate specialist for an impartial medical evaluation for a rating of permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. After this and other such development as deemed necessary, it shall issue a *de novo* decision regarding appellant’s schedule award claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2019 decision of the Office of Workers’ Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: May 5, 2021
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