United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 22-0301**
	)	**Issued: July 25, 2022**
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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On December 15, 2021 appellant filed a timely appeal from a July 22, 2021 merit 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]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the July 22, 2021 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 met his burden of proof to establish greater than 13 percent permanent impairment of his right lower extremity for which he previously received a schedule award and greater than 0 percent permanent impairment of his left lower extremity.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 24, 1963 appellant, then a 23-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that he had reinjured his back following a September 1962 employment injury.[4] He retired from the employing establishment in 1995. OWCP accepted the claim for lumbosacral sprain and authorized medical treatment, including surgical procedures in 1964, 1965, 1994, 1998, 2012, and 2013. By decision dated December 17, 2014, it expanded the acceptance of the claim to include a 1998 lumbar wound infection, L4-5 pseudo-arthritis, lumbar postlaminectomy syndrome L4-S1, and lumbar radiculopathy.

By decision dated February 26, 2015, OWCP granted 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 March 7, 2015.

On March 16, 2015 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated October 21, 2015, OWCP's hearing representative denied appellant's request for an oral hearing. He found that, as the injury occurred in 1963, 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 compensation (Form CA-7) for an increased schedule award.

By decision dated June 13, 2018, OWCP granted appellant an additional schedule award for three percent permanent impairment of the right lower extremity for a total permanent impairment of 13 percent of the right lower extremity, and 0 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 before a representative of OWCP's Branch of Hearings and Review. By decision dated August 3, 2018,

[3] Docket No. 19-0063 (issued June 21, 2019).

[4] On September 7, 1962 appellant filed a Form CA-1 alleging that on that date he sustained an acute lumbosacral sprain when bending over and repositioning mail trays while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx227.

OWCP's hearing representative denied the request for an oral hearing. She referenced 5 U.S.C. § 8124 and found that 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 he could pursue alternative appellate remedies under FECA such as requesting reconsideration before OWCP or an appeal to the Board.

On October 9, 2018 appellant appealed to the Board. By decision dated June 21, 2019, the Board set aside OWCP's June 13, 2018 decision and remanded the case for further development.[5] The Board found that there was a unresolved conflict in the medical evidence between Dr. Kevin Komes, a Board-certified physiatrist and second opinion physician, and Dr. M. Stephen Wilson, appellant's treating orthopedic surgeon, regarding the extent of permanent impairment of appellant's bilateral lower extremities due to his accepted conditions. Thus, the Board remanded the case for referral to an impartial medical examiner (IME) to resolve the conflict in medical opinion evidence.

On March 4, 2021 OWCP referred appellant, along with an August 17, 2016 statement of accepted facts (SOAF), and the medical record, for an impartial medical examination with Dr. William Hopkins, a Board-certified orthopedic surgeon. The August 17, 2016 SOAF noted appellant's accepted condition only as acute lumbosacral strain.

In a March 9, 2021 report, Dr. Hopkins noted appellant's history of injury, reviewed the medical record and set forth examination findings, which he indicated that were appropriate for appellant's complaints and positive electromyography (EMG) test of his lower extremities. He opined that appellant's lumbar spine impairments were more probably than not a combination of appellant's injuries and the complications of his age and treatments. Based on appellant's September 2, 2022 EMG test, Dr. Hopkins opined that appellant was at maximum medical improvement. He noted that appellant had diminished sensation in both right and left lower extremities from the abdomen distally to his feet. Dr. Hopkins also noted that appellant had weakness in all of appellant's leg motors extending up to the hip joint both right and left with his loss of strength appearing to be equal on both the right and left side. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[6] he opined that appellant had 27 percent permanent impairment of the whole body due to his August 24, 1963 work injury.

On July 9, 202 OWCP routed the August 17, 2016 SOAF, the medical record, and a list of questions, to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, serving as a district medical adviser (DMA).

In a July 9, 2021 report, Dr. Harris indicated that he reviewed the SOAF and the medical record. He reported that Dr. Hopkins' examination of appellant demonstrated diffuse decreased sensation and weakness in the bilateral lower extremities in a nonanatomic distribution. Dr. Harris noted that Dr. Hopkins' impairment rating was based on Table 17-4, page 570-574 of the A.M.A., *Guides*, which rates permanent impairment of the spine based on mechanical low back pain,

[5] *Supra* note 3.

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

radiculopathy and documented spinal pathology based on diagnostic studies. However, FECA utilizes *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) for rating permanent impairment of the lower extremities based upon a permanent impairment originating in the spine. Dr. Harris utilized the diagnosis-based impairment (DBI) method to render an impairment rating as the A.M.A., *Guides* did not allow for range of motion methodology for the lower extremities/lumbar spine. Using Dr. Hopkins' examination findings, he noted that appellant did not have any neurologic deficit in either lower extremity consistent with lumbar radiculopathy. This was consistent with a Class 0 impairment based on the Table 2 of *The Guides Newsletter*. Dr. Harris opined that this resulted in 0 percent bilateral lower extremity permanent impairment for lumbar radiculopathy.

By decision dated July 22, 2021, OWCP denied appellant's request for an increased schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA[7] and its implementing regulations[8] 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.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.*[11] Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and/or grade modifier for clinical studies (GMCS).[12] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[13] The standards for evaluation

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id*. at Chapter 3.700 and Exhibit 1 (January 2010).

[11] A.M.A., *Guides*, page 3, section 1.3.

[12] *Id*. at 493-556.

[13] *Id*. at 521.

of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.[14]

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.[15] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[16] The sixth edition of the A.M.A., *Guides* 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.[17]

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).[18]

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."[19] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME 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.[20]

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 permanent

[14] *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[15] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.D.*, Docket No. 20-0553 (issued April 19, 2021); *A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[16] *See supra* note 10 at Chapter 2.808.5c(3) (March 2017).

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

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

[19] 5 U.S.C. § 8123(a).

[20] *See A.D., supra* note 15; *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *D.M.*, Docket No. 18-0476 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[21]

OWCP's procedures further provide that, "[w]hen the DMA, second opinion specialist or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[22]

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of the June 13, 2018 decision because the Board considered that evidence in its June 21, 2019 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[23]

On March 4, 2021 OWCP referred appellant, along with the August 17, 2016 SOAF, and the medical record, for an impartial medical examination with Dr. Hopkins. It subsequently referred the same SOAF to the DMA, Dr. Harris. The August 17, 2016 SOAF noted appellant's accepted condition as acute lumbosacral strain. However, it did not list his additional conditions of a 1998 lumbar wound infection, L4-5 pseudo-arthritis, lumbar postlaminectomy syndrome L4-S1, and lumbar radiculopathy, which OWCP accepted by decision dated December 17, 2014. The Board also notes that the August 17, 2016 SOAF did not indicate that he had previously received a schedule award for permanent impairment of his right lower extremity.

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF. As noted above, OWCP's procedures dictate that, when an OWCP DMA, second opinion specialist, or IME renders a medical opinion based on a SOAF, which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[24] As neither the IME, Dr. Hopkins, nor the DMA, Dr. Harris, had an accurate SOAF available, their opinions are of diminished probative value.[25] The Board, therefore, finds that the opinion of Dr. Hopkins is insufficient to carry the special weight of the medical evidence. Thus, the conflict remains unresolved.

On remand OWCP shall refer appellant and an updated SOAF to Dr. Hopkins for a supplemental report, or if Dr. Hopkins is unavailable, to another physician in the appropriate field

[21] *See supra* note 11 at Chapter 2.808.6(f) (March 2017).

[22] *Id.* at Chapter 3.600.3 (October 1990); *Y.D.*, Docket No. 17-0461 (issued July 11, 2017).

[23] *M.D.*, Docket No. 19-0510 (issued August 6, 2019).

[24] *See supra* note 22; *see also K.C.*, Docket No. 20-1628 (issued September 1, 2021); *N.W.*, Docket No. 16-1890 (issued June 5, 2017).

[25] *Id.*; *see also Y.D., supra* note 22.

of medicine to resolve the existing conflict as to the extent of permanent impairment of appellant's bilateral lower extremities due to his accepted conditions. After this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2021 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: July 25, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board