

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

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<b>J.P., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 23-0442</b>
	)	<b>Issued: August 29, 2023</b>
<b>U.S. POSTAL SERVICE, DELTONA PINES</b>	)	
<b>POST OFFICE, Deltona, FL, Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 1, 2023 appellant filed a timely appeal from a January 3, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> During the pendency of this appeal, OWCP issued a February 21, 2023 decision denying modification of the January 3, 2023 schedule award decision. The Board and OWCP may not exercise simultaneous jurisdiction over the same issue in the same case at the same time. Thus, OWCP's February 21, 2023 decision is null and void. 20 C.F.R. §§ 501.2(c)(3), 10.626; *A.C.*, Docket No. 18-1730 (issued July 23, 2019); *M.C.*, Docket No. 18-1278, n.1 (issued March 7, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the January 3, 2023 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 greater than two percent permanent impairment of the right lower extremity, for which she previously received a schedule award.

## FACTUAL HISTORY

On August 17, 2016 appellant, then a 54-year-old lead sales service associate/clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained a lower back condition that was caused or aggravated by factors of her federal employment including repetitive bending over wires and cardboard boxes, as well as pulling mail. She first became aware of her condition and realized its relationship to her federal employment on August 5, 2016. Appellant stopped work on August 16, 2016.<sup>4</sup> OWCP accepted the claim for aggravation of intervertebral disc disorders with radiculopathy, lumbar region, and aggravation of spinal stenosis, lumbar region, L3-4 and L4-5.

An August 8, 2016 lumbar spine magnetic resonance imaging (MRI) scan revealed mild lumbar spondylosis with neural foraminal and central stenosis at L3-4 and L4-5 and mild scoliosis. A December 19, 2017 lumbar MRI scan indicated stable multilevel degenerative changes with no significant central canal compromise or distal cord compression and stable multilevel neuroforaminal narrowing most severely involving the right-sided L4-5. February 27, 2018 lumbar spine x-ray revealed mild dextroscoliosis with no dynamic screw fixation.

On February 12 and October 23, 2021 appellant filed claims for compensation (Form CA-7) for a schedule award.

In a January 14, 2021 medical report, Dr. Mark A. Seldes, a Board-certified family practitioner, noted appellant's accepted conditions, complaints of lower back pain with bilateral lower extremity radiculopathy, reviewed diagnostic test reports, and related her physical examination findings. He noted that she had daily pain in her lower extremities, with difficulty performing many activities of daily living, including prolonged standing, sitting, reclining, ambulation, and using stairs. Appellant experienced severe pain when dressing and required assistance from her spouse. Regarding her bilateral lower extremity neurologic findings, Dr. Seldes noted that she had decreased sensation to light touch as well as impaired sharp and dull discrimination over the lateral thighs, anterolateral legs, dorsum of the feet, posterolateral calves, and lateral aspect of both feet. He also noted that appellant continued to have weakness in the lower extremities with moderate motor deficits over the extensor hallucis longus muscle on the right side, with strength of 3/5 and mild motor deficit on the left extensor hallucis longus muscle with strength of 4/5. Appellant also had moderate motor deficit in the right ankle plantar flexor with 3/5 strength, and mild motor deficit in the left ankle plantar flexor muscle with strength of 4/5. Dr. Seldes opined that she reached maximum medical improvement (MMI) on the date of his impairment evaluation and her condition remained stable for calculation of an impairment rating for the bilateral S1 nerve root radiculopathy. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>5</sup> and Table 2 of *The Guides Newsletter, Rating Spinal Nerve Impairment* (July/August 2009) (*The Guides*

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<sup>4</sup> On June 1, 2019 appellant retired from the employing establishment.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

*Newsletter*), he set forth his impairment calculations, including grade modifiers, and opined that appellant had 9 percent permanent impairment of the left lower extremity due to left S1 nerve root radiculopathy and 14 percent permanent impairment of the right lower extremity due to right S1 nerve root radiculopathy. Regarding her left lower extremity, Dr. Seldes noted that her S1 nerve root radiculopathy was a class of diagnosis (CDX) of 1. Appellant's severe sensory deficit was a grade E, and her mild motor deficit was also grade E. Her grade modifier for functional history (GMFH) was 2, her grade modifier for physical examination (GMPE) was not used, and her grade modifier for clinical studies (GMCS) was 2. Dr. Seldes applied the net adjustment formula and calculated that appellant had four percent permanent impairment of the left lower extremity for sensory deficit, and five percent permanent impairment of the left lower extremity for motor deficit, for a total nine percent permanent impairment of the left lower extremity. For the right lower extremity, he utilized the same grade modifiers and related that she had a very severe sensory deficit of grade E, which resulted in 4 percent permanent impairment of the right lower extremity, and a moderate motor deficit, which resulted in 10 percent permanent impairment of the right lower extremity. Dr. Seldes concluded that appellant had a total of 14 percent permanent impairment of the right lower extremity.

In a May 12, 2022 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA), reviewed the medical record along with Dr. Seldes' January 14, 2021 report. He corroborated Dr. Seldes' rating calculations; however, he noted that the only MRI scan report of record, dated August 8, 2016, indicated mild findings therefore the degree of motor and sensory deficits noted by Dr. Seldes would seem to be out of proportion. Dr. Katz recommended a second opinion examination to address discrepancies in the findings of motor and sensory impairments noted by Dr. Seldes.

In a June 10, 2022 report, Dr. Omar D. Hussamy, a Board-certified orthopedic surgeon and second opinion physician, opined that appellant reached MMI as of the date of his impairment evaluation. He noted that the history of injury and the accepted conditions, reviewed a statement of accepted facts (SOAF) and the medical records, and set forth his examination findings. Dr. Hussamy related that appellant had subjective complaints of low back pain with radiation into the right lower extremity associated with numbness and tingling. Appellant's objective findings correlated with her subjective complaints and included limited range of motion of the lumbar spine, decreased sensation in the S1 dermatomal distribution of the right lower extremity, and positive straight leg raise on the right lower extremity at 40 degrees. Based on *The Guides Newsletter*, Dr. Hussamy calculated two percent right lower extremity permanent impairment for the accepted diagnoses of aggravation of intervertebral disc disorders with radiculopathy of lumbar region and aggravation of spinal stenosis, lumbar region. Under Proposed Table 2 of *The Guides Newsletter*, he noted that appellant had moderate sensory deficit at right S1, a CDX of 1 with a default value of 2 percent. Dr. Hussamy assigned a GMFH of 1, GMPE not applicable, a GMCS of 1, which resulted in a net adjustment of 0 from the default value, and equaled a CDX of 1, grade C impairment rating of two percent permanent impairment of the right lower extremity. For the left lower extremity, he found no sensory or motor deficits for the spinal nerves at L3, L4, L5, or S1, and therefore no permanent impairment.

In a July 19, 2022 report, Dr. Katz noted his review of the SOAF and the medical record, including Dr. Hussamy's June 10, 2022 report. He indicated that there were no discrepancies with his own calculation and Dr. Hussamy's June 22, 2022 report. As the FECA does not allow a schedule award for the spine, the DMA utilized Dr. Hussamy's examination findings and

calculated impairment under *The Guides Newsletter*. For the left lower extremity, he noted that, as Dr. Hussamy found no myotomal motor/dermatomal sensory deficits in the left lower extremity, there was no ratable impairment of any spinal nerve, and thus, no ratable impairment. For the right lower extremity, the DMA concurred with Dr. Hussamy's opinion that appellant had two percent permanent impairment. He reiterated that, for the reasons expressed in his May 12, 2022 report, he did not find Dr. Seldes' impairment rating probative. Dr. Katz concluded that appellant reached MMI on June 10, 2022.

By decision dated August 22, 2022, OWCP issued a schedule award for two percent permanent impairment of the right lower extremity. The award ran for 40.32 weeks from June 10 to July 20, 2022.

On November 28, 2022 OWCP asked Dr. Katz to clarify his July 19, 2022 report. In a December 1, 2022 addendum, Dr. Katz corrected his July 19, 2022 report. He advised that he had incorrectly referenced Dr. Hussamy's June 10, 2021 impairment evaluation as belonging to Dr. Seldes. The DMA reiterated that, for the reasons expressed in his May 12, 2022 report, he did not find Dr. Seldes' impairment rating probative and a second opinion impairment evaluation was recommended. Utilizing Dr. Hussamy's June 10, 2021 examination findings, he again calculated no ratable impairment for the left lower extremity as Dr. Hussamy found no myotomal motor/dermatomal sensory deficits in the left lower extremity. For the right lower extremity, the DMA again concurred with Dr. Hussamy's opinion that appellant had two percent permanent impairment.

By *de novo* decision dated January 3, 2023, OWCP again issued appellant a schedule award for two percent permanent impairment of the right lower extremity. The award ran for 40.32 weeks from June 10 to July 20, 2022, and was based on the opinion of the DMA.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>6</sup> and its implementing federal regulations,<sup>7</sup> 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter, which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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*, published in 2009.<sup>8</sup> The Board has approved the use by

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<sup>6</sup> *Supra* note 2.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>9</sup>

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the *World Health Organization's International Classification of Functioning Disability and Health (ICF): Contemporary Model of Disablement*.<sup>10</sup> Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by GMFH, grade modifier for physical examination (GMPE), and GMCS.<sup>11</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>12</sup> Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>13</sup>

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.<sup>14</sup> However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.<sup>15</sup> 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 OWCP's procedures.<sup>16</sup>

Section 8123(a) of FECA provides in 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."<sup>17</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical examiner (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.<sup>18</sup>

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<sup>9</sup> See *A.S.*, Docket No. 22-0930 (issued January 19, 2023); *T.K.*, Docket No. 19-1222 (issued December 2, 2019); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>10</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), p.3, section 1.3.

<sup>11</sup> *Id.* at 494-531.

<sup>12</sup> *Id.* at 521.

<sup>13</sup> *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>14</sup> 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).

<sup>15</sup> *Supra* note 8 at Chapter 2.808.5c(3) (March 2017).

<sup>16</sup> *Supra* note 8 at Chapter 3.700, Exhibit 4 (January 2010); *B.M.*, Docket No. 19-1069 (issued November 21, 2019).

<sup>17</sup> 5 U.S.C. § 8123(a).

<sup>18</sup> *D.C.*, Docket No. 20-0897 (issued August 11, 2021); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

## ANALYSIS

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

In a January 14, 2021 report, Dr. Seldes, appellant's treating physician, related her current physical complaints and physical examination findings in detail. He found that she had 14 percent permanent impairment of the right lower extremity and 9 percent permanent impairment of the left lower extremity due to bilateral S1 nerve root radiculopathy. Dr. Seldes ratings were based on a finding of very severe sensory deficit, moderate motor deficit severe sensory deficit of the right lower extremity, as well as severe sensory deficit and mild motor deficit of the left lower extremity.

However, Dr. Hussamy, OWCP's second opinion physician, noted appellant's physical examination findings and thereafter calculated two percent permanent impairment of the right lower extremity for moderate sensory deficit. For the left lower extremity, he found no sensory or motor deficits at nerves L3, L4, L5, or S1, resulting in zero percent permanent impairment. The Board has previously explained that in evaluating permanent impairment under *The Guides Newsletter*, if a conflict exists in the medical opinion between appellant's treating physician and OWCP's second opinion physician, regarding appellant's physical examination findings, a conflict is created as to the degree of appellant's lower extremity permanent impairment.<sup>19</sup>

The Board therefore finds that there is a conflict in the medical evidence between Dr. Seldes, appellant's treating physician, and Dr. Hussamy, OWCP's referral physician, regarding the severity of appellant's sensory and motor deficits of the S1 nerve root. Dr. Katz, the DMA, opined that Dr. Seldes findings did not seem to be based on the clinical studies, but he did not rule out Dr. Seldes findings.

Thus, the case must be remanded to OWCP for referral of appellant to an IME for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).<sup>20</sup> Following 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.

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<sup>19</sup> See *A.D.*, Docket No. 20-0553 (issued April 19, 2021).

<sup>20</sup> 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321; see also *A.P.*, Docket No. 22-1246 (issued April 25, 2023); *D.M.*, Docket No. 22-1139 (issued January 19, 2023); *M.B.*, Docket No. 20-0552 (issued May 14, 2021); *R.K.*, Docket No. 19-0247 (issued August 1, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 3, 2023 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 29, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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