United States Department of Labor
Employees' Compensation Appeals Board

L.R., Appellant	)	
and	)	**Docket No. 24-0903**
	)	**Issued: December 10, 2024**
U.S. POSTAL SERVICE, POST OFFICE, Wallingford, CT, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On September 9, 2024 appellant filed a timely appeal from an August 6, 2024 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]

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than two percent permanent impairment of the left lower extremity or any permanent impairment of the right lower extremity, for which she previously received schedule award compensation.

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that following the August 6, 2024 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*.

FACTUAL HISTORY

On June 7, 2011 appellant, then a 47-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained back and leg conditions causally related to factors of her employment, including bending, lifting, stretching, and pushing heavy equipment and trays. She noted that she first became aware of her conditions and realized their relation to her federal employment on May 4, 2011. The employing establishment indicated that appellant was last exposed to the work factors alleged to have caused her conditions on May 7, 2011. OWCP accepted the claim for lumbar subluxation at L2, left lumbar radiculitis, and lumbar degenerative disc disease. It paid appellant wage-loss compensation on the supplemental rolls for the period May 6 through July 15, 2011.

On August 21, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In an August 23, 2023 development letter, OWCP requested that appellant submit an impairment evaluation from her attending physician in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] It afforded her 30 days to submit the requested information.

In a September 19, 2023 report, Dr. Patrick J. Hackett, a chiropractor, opined that appellant had reached maximum medical improvement (MMI) on May 15, 2015. He noted that appellant had been treated for intermittent flareups of her chronic low back condition, including a recent flareup that occurred on May 17, 2023 as a result of a motor vehicle accident (MVA). Dr. Hackett opined that a final impairment rating should be determined by an independent medical examination.

On November 7, 2023 OWCP referred appellant, along with the medical record, a November 7, 2023 statement of accepted facts (SOAF), and a series of questions, for a second opinion examination with Dr. Ira Spar, a Board-certified orthopedic surgeon. It requested that Dr. Spar provide an opinion regarding appellant's lower extremity permanent impairment under the standards of the A.M.A., *Guides*.

In a December 14, 2023 report, Dr. Spar reviewed the medical evidence and the SOAF, and noted that appellant was involved in an MVA on May 17, 2023 when her vehicle was rear-ended by another vehicle. On physical examination, he found equal deep tendon reflexes, no motor deficits, diminished light touch and pin prick of the anterior lateral left thigh and left distal quadriceps, no atrophy, and a normal gait. Dr. Spar noted that x-rays showed degenerative changes and minor retrolistheses at L2-3 and mild facet hypertrophy at L5-S1. He also noted that the September 2011 magnetic resonance imaging (MRI) scan of the lumbar spine indicated degenerative disc disease and facet arthropathy worse at L4-5, a mild diffuse disc bulge, left paracentral protrusion, and facet hypertrophy with mild to moderate central spinal canal stenosis, and a left lateral recess encroachment potentially contacting the L5 nerve. Dr. Spar diagnosed degenerative lumbar intervertebral disc disease and lumbosacral neuritis or radiculitis on the left side as work related. He opined that appellant had reached MMI in May 2015. Using the

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

diagnosis-based impairment (DBI) rating methodology for peripheral nerve impairment of the lower extremity, as outlined in Section 16.4(c) and Table 16-12 (peripheral nerve impairment), Dr. Spar set forth his impairment calculations and concluded that appellant had one percent impairment of the left lower extremity for Class 1 femoral nerve with no motor deficit. No impairment rating was provided for the right lower extremity. Dr. Spar further opined that the range of motion (ROM) rating methodology was not allowed for lumbosacral disc disease.

On January 19, 2024 OWCP referred the medical record and the November 7, 2023 SOAF to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA).

In a January 30, 2024 report, Dr. Harris reviewed Dr. Spar's December 14, 2023 report finding decreased left L3 and L4 dermatomal sensation and one percent permanent left lower extremity impairment based on DBI method for peripheral nerve impairments. He also noted that the September 6, 2011 lumbar MRI scan demonstrated lumbar bulging at L2, L3, L4, L5, and S1. Dr. Harris disagreed with Dr. Spar's impairment methodology, noting that spinal nerve impairments from accepted lumbar conditions were rated using the A.M.A., *Guides* and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment* (July/August 2009) (*The Guides Newsletter*).[4] For the right lower extremity, he indicated that appellant did not have any neurologic deficit in the lower extremities consistent with lumbar radiculopathy. Dr. Harris opined that this was consistent with severity zero under Table 16-11 on page 533 of the A.M.A., *Guides*, relevant to evaluating the severity of sensory and motor deficits, and a class zero placement under Proposed Table 2 of *The Guides Newsletter*. Thus, he concluded that appellant had no right lower extremity impairment under *The Guides Newsletter* due to radiculopathy.[5] For the left lower extremity, Dr. Harris found that appellant had a Class 1 sensory lumbar radiculopathy at L3 and L4, which each yielded one percent lower extremity impairment under Proposed Table 2, for a total of two percent impairment of the left lower extremity. He further opined that she had reached MMI on December 14, 2023, at the time of Dr. Spar's evaluation.

OWCP requested clarification from Dr. Harris, noting that Dr. Spar had provided one percent impairment of the left lower extremity. It provided an updated SOAF dated June 6, 2024.

In a June 7, 2024 report, Dr. Harris reviewed the June 6, 2024 updated SOAF and the medical record, noting that Dr. Spar found one percent permanent left lower extremity impairment based on decreased left L3 and L4 dermatomal sensation and the September 6, 2011 lumbar MRI scan demonstrating lumbar bulging at L2, L3, L4, L5, and S1. As described in his earlier report, Dr. Harris reiterated his disagreement with Dr. Spar's impairment methodology, noting that Dr. Spar had calculated impairment based on a peripheral nerve impairment while spinal nerve impairment is calculated based on *The Guides Newsletter*. He reiterated his previous opinion that appellant had reached MMI on December 14, 2023, the date of Dr. Spar's evaluation, and that she

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[5] Dr. Harris referred to cervical radiculopathy; however, this appears to be a typographical error as the case was not accepted for cervical radiculopathy and his lower extremity impairment rating was based on L3 and L4 lumbar radiculopathies.

had no permanent impairment of the right lower extremity and two percent permanent impairment of the left lower extremity.

By decision dated August 6, 2024, OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity and zero percent permanent impairment of the right lower extremity. The period of the award ran for 5.76 weeks from December 14, 2023 to January 23, 2024.

LEGAL PRECEDENT

The schedule award provisions of FECA[6] and its implementing regulations[7] 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 way the percentage of loss of a member 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 and the Board has concurred in such adoption.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[9]

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*.[10] Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), a grade modifier for physical examination (GMPE), and/or a grade modifier for clinical studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] The standards for evaluation 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.[13]

[6] *Supra* note 1.

[7] 20 C.F.R. § 10.404.

[8] *Id.* at § 10.404(a); *see R.M.*, Docket No. 20-1278 (issued May 4, 2022); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[9] 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).

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

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

[12] *Id.* at 521.

[13] *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).

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.[14] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[15] The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. 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.[16] 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 a GMFH and a GMCS. The effective net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[17]

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 impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[18]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than zero percent permanent impairment of the right lower extremity.

In a December 14, 2023 report, Dr. Spar, the second opinion physician, found one percent impairment of the left lower extremity due to a Class 1 sensory deficit of the femoral nerve using Table 16-12. However, lower extremity impairments due to peripheral or spinal nerve root involvement are calculated under the A.M.A., *Guides* and *The Guides Newsletter*.[19] As Dr. Spar did not utilize the A.M.A., *Guides* and *The Guides Newsletter*, his report is of diminished probative value.[20]

OWCP properly routed appellant's claim to a DMA, Dr. Harris. In his January 30 and June 7, 2024 reports, Dr. Harris evaluated the December 14, 2023 examination findings of Dr. Spar to calculate the permanent impairment of appellant's right and left lower extremity. A schedule award for a spinal nerve impairment radiculopathy must be based on evidence of spinal

[14] 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).

[15] *Supra* note 9 at Chapter 2.808.5c(3).

[16] *Id.* at Chapter 3.700, Exhibit 4 (January 2010); *see L.H.*, Docket No. 20-1550 (issued April 13, 2021); *N.G.*, Docket No. 20-0557 (issued January 5, 2021).

[17] *G.W.*, Docket No. 22-0301 (issued July 25, 2022); *see also The Guides Newsletter*; A.M.A., *Guides* 430.

[18] *See supra* note 9 at Chapter 2.808.6f.

[19] *See supra* note 16.

[20] *See L.L.*, Docket No. 19-0214 (issued May 23, 2019); *see also G.S.*, Docket No. 13-1649 (issued December 24, 2013).

radiculopathy affecting sensory and motor deficits of the extremities.[21] With regard to the right lower extremity, Dr. Harris properly explained that as appellant did not have any neurologic deficit causing sensory or motor loss, she had severity zero placement under Table 16-11 and a Class zero placement under Proposed Table 2 of *The Guides Newsletter*, resulting in no permanent impairment of the right lower extremity. The Board finds that Dr. Harris properly applied the A.M.A., *Guides* and *The Guides Newsletter,* and therefore is accorded the weight of the medical evidence. Thus, appellant has not met her burden of proof to establish greater than zero percent permanent impairment of the right lower extremity.

The Board further finds that the case is not in posture for decision as to whether appellant has met her burden of proof to establish greater than two percent permanent impairment of the left lower extremity, for which she previously received a schedule award. Dr. Harris did not fully explain his calculation of the two percent lower extremity impairment. While he properly determined under Proposed Table 2 of *The Guides Newsletter* that a Class one, grade C mild sensory deficit for the L3 and L4 lumbar radiculopathies resulted in a default impairment of one percent each, he did not discuss the applicable grade modifier adjustments for functional history and clinical studies under the net adjustment formula to determine appellant's final left lower extremity impairment.[22]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[23] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and has the obligation to see that justice is done.[24] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve all the relevant issues in the case.[25]

The Board, therefore, finds that the case must be remanded for OWCP to obtain a supplemental report from Dr. Harris clarifying the nature and percentage of impairment of appellant's left lower extremity in accordance with the A.M.A., *Guides* and *The Guides Newsletter*.[26] On remand, OWCP shall provide an updated SOAF and request that he address the applicable grade modifier adjustments using the net adjustment formula to determine appellant's final left lower extremity impairment. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding any additional impairment of appellant's left lower extremity.

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[21] *See supra* note 16.

[22] *See supra* note 17.

[23] *See R.R.*, Docket No. 18-0914 (issued February 24, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

[24] *C.T.*, Docket No. 20-0043 (issued April 20, 2021); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[25] *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

[26] *See T.T.*, Docket No. 23-0116 (issued June 28, 2023); *E.G.*, Docket No. 21-0113 (issued October 7, 2022).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish greater than zero percent permanent impairment of the right lower extremity. The Board further finds that the case is not in posture for decision as to whether appellant has met her burden of proof to establish greater than two percent permanent impairment of the left lower extremity, for which she previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2024 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: December 10, 2024
Washington, DC

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

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

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