

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

G.C., Appellant)	
)	
and)	Docket No. 24-0619
)	Issued: July 11, 2024
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE, SHENANDOAH)	
NATIONAL PARK, Luray, VA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 20, 2024 appellant, through counsel, filed a timely appeal from an April 17, 2024 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.

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, warranting a schedule award.

FACTUAL HISTORY

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

On February 27, 2015 appellant, then a 53-year-old maintenance worker, filed an occupational disease claim (Form CA-2) alleging that he contracted Lyme disease due to factors of his employment, which required that he work outside in an environment where ticks carrying Lyme disease were present. He did not stop work. OWCP accepted the claim for Lyme disease.

In a February 24, 2017 report, Dr. Robert W. Macht, a general surgeon, recounted appellant's history of injury and diagnosed status post Lyme disease with extremities sequelae. Citing to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ he referenced the Shoulder Regional Grid, Table 15-5, page 401 and assigned a class of diagnosis (CDX) of nonspecific shoulder pain. Dr. Macht concluded that appellant had one percent permanent impairment of each upper extremity for this diagnosis. Using Table 15-3, page 395, he determined that appellant had a bilateral wrist CDX of soft-tissue injury, resulting in one percent permanent impairment of each upper extremity. Dr. Macht found one percent permanent impairment of each lower extremity using Table 16-4, page 512 for the CDX of soft bilateral hip lesion. Using Table 16-2, page 501, he found one percent permanent impairment of each ankle for the CDX of bilateral ankle soft-tissue problem. Dr. Macht combined the impairments to find two percent right upper extremity permanent impairment, two percent left upper extremity permanent impairment, two percent right lower extremity permanent impairment, and two percent left lower extremity permanent impairment. He attributed appellant's bilateral upper and lower extremity permanent impairments to Lyme disease and opined that appellant had reached maximum medical improvement (MMI) on February 17, 2017.

On December 22, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On January 31, 2018 OWCP referred the medical record, including Dr. Macht's report, and a statement of accepted facts (SOAF), to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as a district medical adviser (DMA), for review. In a February 15, 2018 report, the DMA opined that Dr. Macht's report could not be accepted as probative, because it documented only limited objective findings and did not note valid range of motion

³ Docket No. 20-0238 (issued February 17, 2021).

⁴ A.M.A., *Guides* (6th ed. 2009).

measurements. The DMA recommended a second opinion evaluation to determine the extent of appellant's employment-related permanent impairment.

By decision dated February 21, 2018, OWCP denied appellant's schedule award claim based on the DMA's report.

On March 2, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on July 12, 2018.

In a July 18, 2018 report, Dr. Macht reviewed the DMA's report and noted that his interpretation of the A.M.A., *Guides* was incorrect. He related that many conditions could be rated pursuant to the A.M.A., *Guides*, based on subjective, not objective factors. Dr. Macht concluded that his impairment rating should be used to grant appellant a schedule award, and that a new physical examination was unnecessary.

By decision dated August 22, 2018, OWCP's hearing representative vacated the February 21, 2018 decision denying a schedule award, and remanded the case for referral to a second opinion physician, as recommended by the DMA.

On September 7, 2018 OWCP referred appellant, together with a SOAF and the medical records, to Dr. D. Burke Haskins, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether appellant had a ratable permanent impairment pursuant to the A.M.A., *Guides* due to appellant's accepted Lyme disease.

In a September 25, 2018 report, Dr. Haskins concluded that appellant had no ratable permanent impairment due to the accepted Lyme disease and that appellant reached MMI as of September 25, 2018. He noted that appellant's back and neck complaints were nonspecific, no spinal nerve impairment or complaints were noted, and, thus, were not ratable impairments under the A.M.A., *Guides*. Additionally, appellant's shoulder complaints were nonspecific and likely due to rotator cuff pathology, not to Lyme disease. Dr. Haskins attributed appellant's hip complaints to osteoarthritis, his knee complaints to a prior injury and multiple surgeries, and right ankle complaints to a prior fracture and surgery. He opined that the exact etiologies of appellant's left ankle and knee complaints were unclear, but that they were unrelated to the accepted Lyme disease due to the lack of objective findings and the type of symptoms appellant expressed.

By decision dated October 4, 2018, OWCP denied appellant's claim for a schedule award finding the weight of the medical opinion evidence rested with Dr. Haskins' report.

In a letter dated October 11, 2018, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 27, 2018, an OWCP hearing representative set aside the October 4, 2018 decision as OWCP had failed to forward a copy of Dr. Haskins' report to a DMA for review prior to issuing its schedule award decision.

On January 28, 2019 OWCP referred Dr. Haskins' report to DMA, Dr. Slutsky, for review. In a February 8, 2019 report, the DMA, concurred with Dr. Haskins' opinion that appellant had no

ratable permanent impairment due to his accepted Lyme disease. He explained that Lyme disease may result in nonspecific symptoms without any objective physical findings, which appeared to be true in appellant's case. The DMA added that Dr. Haskin performed a very thorough evaluation, and did not find any specific objective residual findings related to the accepted condition of Lyme disease, therefore, no basis was established for a schedule award under the A.M.A., *Guides*.

By decision dated February 13, 2019, OWCP denied appellant's schedule award claim.

On February 21, 2019 appellant, through counsel, requested a telephonic hearing before representative of OWCP's Branch of Hearings and Review. The hearing was held on June 11, 2019.

In a June 12, 2019 report, Dr. Macht noted that there was no definitive test for Lyme disease sequelae. He opined that the fact that appellant had underlying hip arthritis, nonspecific back and neck complaints, and shoulder rotator cuff pathology did not preclude a finding that appellant's complaints were causally related to his Lyme disease.

By decision dated August 14, 2019, OWCP's hearing representative affirmed the February 13, 2019 decision denying appellant's schedule award claim.

On November 11, 2019 appellant, through counsel, appealed to the Board. By decision dated February 17, 2021, the Board set aside the November 11, 2019 decision.⁵ The Board found that a conflict existed in the medical opinion evidence between Dr. Macht, appellant's treating physician, and Dr. Haskins, OWCP's referral physician, and the DMA, Dr. Slutsky, regarding whether appellant had permanent impairment to a schedule member causally related to the accepted Lyme disease. The Board remanded the case for referral of appellant to an impartial medical examiner (IME) to resolve the conflict in medical opinion evidence.

On July 13, 2021 OWCP referred appellant, together with a SOAF and the medical records, to Dr. Prita Bhardwaj, a physician specializing in internal medicine, for a second opinion evaluation to determine whether appellant had a ratable permanent impairment pursuant to the A.M.A., *Guides*.

In a report dated October 1, 2021, Dr. Bhardwaj reviewed appellant's medical history. While Dr. Bhardwaj explained that appellant continued to have symptoms of late-stage Lyme disease including rheumatologic/joint pain, cardiac and neurologic manifestation, and signs of mammalian meat allergy, she determined that appellant had no ratable permanent impairment due to the accepted Lyme disease, and that appellant reached MMI due to his Lyme disease as of August 4, 2021. Dr. Bhardwaj concluded that appellant's neck and hip complaints were likely attributable to his lumbar osteoarthritis, his hip complaints were attributable to bilateral hip osteoarthritis, his bilateral knee complaints were attributable to bilateral knee osteoarthritis and prior right knee surgeries, and his bilateral shoulder complaints were likely due to osteoarthritis or

⁵ *Supra* note 3.

rotator cuff pathology. She also attributed appellant's bilateral hand pain as likely due to osteoarthritis or degenerative changes.

By decision dated November 18, 2021, OWCP denied appellant's schedule award claim.

On November 24, 2021 appellant, through counsel, requested a telephonic hearing before representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated January 24, 2022, OWCP's hearing representative found the case not in posture for decision and remanded the case for OWCP to refer appellant for an impartial medical evaluation and issue a *de novo* decision as OWCP did not follow the proper protocols in selecting Dr. Bhardwaj as the IME.

On August 14, 2023 OWCP referred appellant, together with a SOAF, the medical record, and a series of questions, for an impartial medical evaluation with Dr. Ralph T. Salvagno, a Board-certified orthopedic surgeon.

In a report dated October 23, 2023, Dr. Salvagno reviewed the medical record, including diagnostic data and medical records. He noted appellant's history of injuries related to his preexisting upper and lower extremity conditions. Dr. Salvagno provided physical examination findings and diagnosed documented history of Lyme disease with post-Lyme generalized infection sequelae, left ankle fracture, left shoulder rotator cuff tear, lumbar spine degenerative disc disease, and bilateral hip and knee osteoarthritis. He opined that there was no physical evidence of upper or lower extremity permanent impairment causally related to the diagnosis of Lyme disease. On physical examination he found no atrophy, no crepitus, no instability, no abnormal swelling, no synovitis, or limitations of motions of the lower or upper extremities. Dr. Salvagno explained that while appellant has documented reports of muscle aches due to the accepted Lyme disease, these symptoms did not fall into either the diagnosis-based impairment (DBI) method or range of motion (ROM) method for rating permanent impairment comporting with the sixth edition of the A.M.A., *Guides*. Moreover, there is no rheumatologic category for Lyme disease or any specific diagnosis within the lower and upper extremity portions of the A.M.A., *Guides* comporting with his current physical condition. He determined MMI to be October 23, 2023, the date of his examination. Using the A.M.A., *Guides*, Dr. Salvagno found zero percent permanent impairment of both upper and lower extremities.

By decision dated November 3, 2023, OWCP denied appellant's claim for a schedule award claim finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body. It found that the opinion of Dr. Salvagno, the IME, represented the special weight of the medical evidence.

On November 21, 2023 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on February 13, 2024.

By decision dated April 17, 2024, OWCP's hearing representative affirmed the November 3, 2023 decision finding that the special weight of the medical evidence remained with Dr. Salvagno who found no permanent impairment of a scheduled member or function of the body.

LEGAL PRECEDENT

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

The schedule award provisions of FECA⁶ and its implementing regulations⁷ 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, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁸ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁹ The Board has approved the use by 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.¹⁰

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based impairment (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, the evaluator identifies the impairment CDX, which is then adjusted by a grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS).¹² The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹³

No schedule award is payable for a member, function, or organ of the body that is not specified in FECA or the implementing regulations.¹⁴ The list of scheduled members includes the eye, arm, hand, fingers, leg, foot, and toes.¹⁵ Additionally, FECA specifically provides for

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); see also Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

¹⁰ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3.

¹² *Id.* at 494-531.

¹³ *Id.* at 411.

¹⁴ *D.L.*, Docket No. 20-0059 (issued July 8, 2020); *W.C.*, 59 ECAB 374 (2008); *Anna V. Burke*, 57 ECAB 521 (2006).

¹⁵ 5 U.S.C. § 8107(c).

compensation for loss of hearing and loss of vision.¹⁶ By authority granted under FECA, the Secretary of Labor expanded the list of scheduled members to include the breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix, vulva/vagina, and skin.¹⁷ In 1966, amendments to FECA modified the schedule award provision to provide for an award for permanent impairment of a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member.¹⁸

Section 8123(a) of FECA provides that, 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 When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.²⁰ Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.²¹

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, warranting a schedule award.

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata*, absent further review by OWCP under section 8128 of FECA. It is, therefore, unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's August 14, 2019 decision as the Board considered that evidence in its February 17, 2021 decision.²²

In the prior appeal, the Board found a conflict in medical opinion between Dr. Macht, appellant's attending physician, and Dr. Haskins, OWCP's referral physician and Dr. Slutsky, the DMA, regarding whether appellant had permanent impairment to a schedule member causally

¹⁶ *Id.*

¹⁷ 20 C.F.R. § 10.404(b).

¹⁸ *D.L.*, *supra* note 14; *see T.O.*, Docket No. 16-1328 (issued March 13, 2017); *see also George E. Williams*, 44 ECAB 530 (1993).

¹⁹ 5 U.S.C. § 8123(a). *See M.E.*, Docket No. 21-0281 (issued June 10, 2022); *R.C.*, Docket No. 18-0463 (issued February 7, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016).

²⁰ *See M.E.*, *id.*; *M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

²¹ *M.E.*, *id.*; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

²² *R.A.*, Docket No. 23-0408 (issued August 14, 2023); *M.S.*, Docket No. 20-1095 (issued March 29, 2022); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

related to the accepted Lyme disease. On remand, OWCP properly referred him to Dr. Salvagno, pursuant to 5 U.S.C. § 8123(a), for an impartial medical evaluation.

In an October 23, 2023 report, Dr. Salvagno opined that appellant had no ratable permanent impairment due to the accepted Lyme disease under the sixth edition of the A.M.A., *Guides*. He discussed appellant's history of prior injuries, and reviewed his medical record, including diagnostic test results. Dr. Salvagno diagnosed a documented history of Lyme disease with post-Lyme generalized infection sequelae, and prior history of left ankle fracture, left shoulder rotator cuff tear, lumbar spine degenerative disc disease, and bilateral hip and knee osteoarthritis. He noted the lack of findings on physical examination of appellant's upper and lower extremities. Dr. Salvagno explained that while appellant had documented complaints of muscle aches, his muscle aches are not ratable using either DBI method or ROM method for rating permanent impairment. Additionally, he explained there is no rheumatologic category for Lyme disease or any specific diagnosis within the lower and upper extremity portions of the A.M.A., *Guides* comporting with appellant's current physical condition. Dr. Salvagno thus determined that appellant had no ratable impairment pursuant to the A.M.A., *Guides*.

As noted, when a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.²³ The Board finds that Dr. Salvagno's October 23, 2023 report is entitled to special weight and establishes that appellant had no permanent impairment causally related to his accepted diagnosis of Lyme disease.²⁴ Dr. Salvagno's opinion was based on a proper factual and medical history, as well as his physical examination of appellant, during which he did not find physical evidence of documented lower or upper extremity permanent impairment due to appellant's Lyme disease. The Board finds that Dr. Salvagno provided a rationalized medical opinion that appellant had no ratable permanent impairment due to his accepted condition of Lyme disease, which constitutes the special weight of the medical evidence.²⁵

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 permanent 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, warranting a schedule award.

²³ *R.A., id.*; see also *supra* note 21.

²⁴ See *R.A., id.*; *M.E.*, Docket No. 21-0281 (issued June 10, 2022); *V.G.*, Docket No. 19-1728 (issued September 2, 2020); *H.K.*, Docket No. 18-0528 (issued November 1, 2019); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

²⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 11, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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