United States Department of Labor
Employees' Compensation Appeals Board

A.P., Appellant	)	
and	)	**Docket No. 24-0348**
	)	**Issued: June 7, 2024**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL COMPLEX COLEMAN, Coleman, FL, Employer	)	

Appearances:
Appellant, pro se
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 February 20, 2024 appellant filed a timely appeal from an August 21, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] The Board's *Rules of Procedure* provide that: "Any notice of appeal must be filed within 180 days from the date of issuance of a decision of OWCP." 5 U.S.C. § 501.3(e). The 180th day following the August 21, 2023 OWCP decision, was February 17, 2024. As this fell on a Saturday, and Monday, February 19, 2024 was a federal holiday, appellant had until Tuesday, February 20, 2024 to file the appeal. *Id*. at § 501.3(f). As this appeal was received by the Clerk of the Appellate Boards on February 20, 2024, it was timely filed.

[2] 5 U.S.C. § 8101 *et seq*.

ISSUE

The issue is whether appellant met his burden of proof to establish greater than nine percent permanent impairment of the right lower extremity, for which he previously received schedule award compensation.

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 decisions are incorporated herein by reference. The relevant facts are as follows.

On September 12, 2015 appellant, then a 35-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained injuries to his right buttock, back, neck, left shoulder, and feet, as well as a mild concussion, blurred vision, and dizziness when a hatch door gave way causing him to slip and fall while in the performance of duty. OWCP accepted the claim for concussion with loss of consciousness, cervical, lumbar, and pelvic sprains, L4-5 intervertebral disc displacement, lumbar herniated disc with radiculopathy, herniated cervical discs at C4-5 with radiculopathy, right knee chondromalacia, and right ankle tibiofibular ligament sprain.[4] OWCP paid appellant on the supplemental rolls commencing May 1, 2016 and on the periodic rolls commencing May 29, 2016. On July 9, 2017 appellant returned to full-time work. By decision dated September 27, 2017, OWCP accepted his claim for a recurrence of medical care.

In a report dated December 22, 2020, Dr. Mark A. Seldes, a Board-certified family practitioner, advised that appellant reached maximum medical improvement (MMI) in regard to his lumbar radiculopathy and right ankle injury as of December 22, 2020. Dr. Seldes used Table 16-22, page 549 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A, *Guides*)[5] to rate appellant's right ankle permanent impairment for loss of range of motion (ROM). He concluded that appellant's right ankle permanent impairment resulted in 21 percent right lower extremity permanent impairment. Next, Dr. Seldes calculated appellant's permanent impairment for the diagnosis of lumbar spine with radiculopathy in the right S1 nerve root using *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment* (July/August 2009) (*The Guides Newsletter*). He added the percentages for sensory and motor loss for a total of nine percent permanent impairment of the right lower extremity due to S1 radiculopathy. Dr. Seldes combined the two lower extremity impairments of 21 percent right lower extremity impairment for the right ankle with the 9 percent permanent impairment for right S1 lumbar radiculopathy, resulting in a total 28 percent right lower extremity permanent impairment.

[3] Docket No. 22-1246 (issued April 25, 2023).

[4] Under OWCP File No. xxxxxx666 appellant has an accepted occupational disease claim. This claim is accepted for lumbar intervertebral disc displacement and lumbar intervertebral disc disorders with radiculopathy. In a letter dated December 8, 2017, OWCP informed appellant that it had administratively combined OWCP File Nos. xxxxxx666 and xxxxxx572, with the latter serving as the master file.

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

On May 10, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On July 13, 2021 OWCP referred appellant's case record, along with a statement of accepted facts (SOAF), to Dr. Michael Katz, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA) for a permanent impairment rating. In a July 14, 2021 report, Dr. Katz recommended that OWCP obtain a second opinion impairment evaluation for an assessment of appellant's right ankle ROM and spinal nerve deficits.

On April 20, 2022 OWCP referred appellant along with a SOAF to Dr. Omar David Hussamy, a Board-certified orthopedic surgeon, for a second opinion examination and rating of permanent impairment using the sixth edition of the A.M.A., *Guides*.

In a May 6, 2022 report, Dr. Hussamy provided findings following physical examination of the right ankle/foot and right lower extremity. He referred to Table 16-2 for the foot and ankle regional grid,[6] and determined that, for the diagnosis of joint instability/ligamentous laxity, appellant had a zero percent permanent impairment. Next, Dr. Hussamy found zero percent permanent impairment using the ROM method and Table 16-22.[7] Regarding right S1 radiculopathy, he noted that based on *The Guides Newsletter*, appellant had four percent permanent impairment for loss of motor deficit and one percent permanent impairment for sensory deficit. Combining the sensory and motor deficits for the S1 nerve root resulted in a total of five percent right lower extremity permanent impairment.

On May 24, 2022 OWCP referred the case back to the DMA, Dr. Katz, for a permanent impairment rating. In a report dated May 27, 2022, Dr. Katz cited Table 16-2, page 501 of the A.M.A., *Guides* and related that the diagnosis of joint instability/ligamentous of the right ankle resulted in zero percent right lower extremity permanent impairment. Dr. Katz noted that the ROM methodology was not applicable. Next, using *The Guides Newsletter*, he combined the sensory and motor deficits for the S1 nerve root, which resulted in a total five percent right lower extremity permanent impairment. Dr. Katz concurred with Dr. Hussamy's date of MMI and assessment of no permanent impairment of appellant's right foot/ankle and five percent permanent impairment for S1 spinal nerve right lower extremity permanent impairment.

By decision dated June 6, 2022, OWCP granted appellant a schedule award for five percent right lower extremity permanent impairment. The period of the award ran from May 6 to August 14, 2022.

In a June 21, 2022 report, Dr. Seldes reviewed Dr. Hussamy's May 6, 2022 report and noted his disagreement with Dr. Hussamy's finding of no right ankle ROM deficits.

On June 27, 2022 appellant requested reconsideration of the June 6, 2022 schedule award decision.

[6] A.M.A., *Guides* 502.

[7] *Id.* at 549.

On July 11, 2022 OWCP again referred the case to the DMA, Dr. Katz, for review of the newly submitted medical evidence. In a July 14, 2022 report, Dr. Katz opined that his earlier opinion regarding impairment remained unchanged.

By decision dated July 25, 2022, OWCP denied modification of its June 6, 2022 decision denying appellant's schedule award claim.

On August 22, 2022 appellant appealed to the Board. By decision dated April 25, 2023, the Board set aside OWCP's July 25, 2022 decision.[8] The Board determined that a conflict existed in the medical opinion evidence between Dr. Seldes, appellant's attending physician, and Dr. Hussamy, OWCP's referral physician, regarding whether appellant had a permanent impairment of the right lower extremity greater than the five percent previously awarded. The Board remanded the case to OWCP for referral of appellant to an impartial medical examiner (IME), pursuant to 5 U.S.C. § 8123(a), to resolve the conflict in medical opinion evidence.[9]

On June 7, 2023 OWCP referred appellant, together with a SOAF, the medical record, and a series of questions, for an impartial medical evaluation with Dr. Theodore P. Vlahos, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Seldes, appellant's treating physician, and Dr. Hussamy, OWCP's referral physician, regarding appellant's right lower extremity permanent impairment.

In a report dated July 5, 2023, Dr. Vlahos reviewed the medical evidence of record, the SOAF, and series of questions. On physical examination, regarding the right ankle, he reported no right ankle deformity or swelling, mild peroneal tenderness, tenderness at the anterior talo-fibular ligament, calcaneofibular ligament, and posterior talofibular ligament, as well as pain with inversion test. Dr. Vlahos listed right ankle ROM measurements including plantar flexion of 20 degrees, inversion of 10 degrees and eversion of 10 degrees. Regarding neurological testing of the lower extremities, he found 5/5 lower extremity motor strength, equal sensation, intact L4, L5, and S1 distributions to light touch and pinprick. Regarding the right knee, Dr. Vlahos found no right knee effusion, no right patellar tendon or patella tenderness, and negative anterior drawer, Lachman, and posterior drawer tests.

In rating appellant's permanent impairment of the right ankle, Dr. Vlahos reported using Table 16-2, page 502 for a diagnosis-based impairment (DBI) rating. He assigned a Class 1 impairment for the class of diagnosis (CDX) of joint instability/ligamentous laxity with clinical instability, resulting in a grade C or one percent permanent impairment. Dr. Vlahos assigned a grade modifier for functional history (GMFH) of 1 for a mild problem; he assigned a grade modifier for physical examination (GMPE) of 1 for mild restrictions in ROM and minimal palpatory findings; and a grade modifier for clinical studies (GMCS) of 1 for confirming studies. Using the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) = (1 - 1) + (1 - 1) + (1 - 1) = 0 resulted in no adjustment from the one percent default rating for permanent impairment of the

[8] *Supra* note 2.

[9] By decision dated June 27, 2023, OWCP granted appellant a schedule award for 16 percent permanent impairment of the right upper extremity and 14 percent permanent impairment of the left upper extremity based on the opinions of Dr. Seldes, appellant's treating physician, and Dr. Katz, an OWCP DMA.

right lower extremity. Using the ROM method and Table 16-22, page 549, Dr. Vlahos noted 20 degrees flexion and 10 degrees dorsiflexion of the ankle both fell into the mild impairment category resulting in seven percent lower extremity permanent impairment. Next, he determined that under Table 16-20, 10 degrees of inversion and 10 degrees eversion fell into the mild category, which resulted in two percent impairment lower extremity permanent impairment. Dr. Vlahos combined these impairment ratings which resulted in nine percent right lower extremity permanent impairment. He found zero percent impairment for the right knee using the ROM method. Dr. Vlahos explained that using the DBI method there was no permanent impairment because there was no category for mild chondromalacia patella under Table 16-3. He further found zero percent permanent impairment for appellant's L4-5 and S1 radiculopathy due to the lack of objective sensory and motor findings on examination. Thus, Dr. Vlahos concluded that appellant had nine percent right lower extremity permanent impairment. Lastly, he found that appellant reached MMI on July 5, 2023, the date of his examination.

By decision dated August 21, 2023, OWCP granted appellant a schedule award for an additional four percent permanent impairment of the right lower extremity, resulting in a total permanent impairment of nine percent. The period of the award was for 11.52 weeks and ran from August 15 through November 3, 2022. OWCP found that Dr. Vlahos, the IME, resolved the conflict in the medical opinion evidence.

LEGAL PRECEDENT

The schedule award provisions of FECA[10] and its implementing regulations[11] 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 of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, good administrative practice necessitates 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.[12] 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.[13]

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*

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th 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).

[13] *D.M.*, Docket No. 21-1209 (issued March 24, 2022); *L.E.*, Docket No. 20-1505 (issued June 7, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

and Health (ICF): A Contemporary Model of Disablement.[14] In determining permanent impairment of the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the ankle, the relevant portion of the leg for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.[15] After the CDX is determined from the Foot and Ankle Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[16] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating of choices, including choices of diagnoses from regional grids and calculations of modifier scores.[17]

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.[18] Furthermore, the back is specifically excluded from the definition of an organ under FECA.[19] The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that the July/August 2009 edition of *The Guides Newsletter* is to be applied.[20]

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."[21] 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.[22]

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[14] A.M.A., *Guides* (6th ed. 2009), p. 3, section 1.3.

[15] *See* A.M.A., *Guides* 501-08, Table 16-2.

[16] *Id*. at 515-22.

[17] *Id*. at 23-28.

[18] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[19] *See id*. at § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[20] *Supra* note 12 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[21] 5 U.S.C. § 8123(a).

[22] *W.G.*, Docket No. 23-0843 (issued January 12, 2024); *A.P.*, Docket No. 22-1246 (issued April 25, 2023); *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 appellant has not met his burden of proof to establish greater than nine percent permanent impairment of the right lower extremity, for which he previously received schedule award compensation.

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 July 25, 2022 decision, as the Board considered that evidence in its April 25, 2023 decision.[23]

Following the Board's prior remand for an impartial medical evaluation, OWCP referred appellant to Dr. Vlahos. In a report dated July 5, 2023, Dr. Vlahos reviewed the medical evidence of record, and the SOAF. He related appellant's physical examination findings regarding appellant's right ankle, knee, and lower extremity motor and sensory deficits arising from his accepted lumbar conditions.

In rating appellant's permanent impairment of the right ankle, Dr. Vlahos reported using Table 16-2, page 502 for a DBI rating. He assigned a Class 1 impairment for the CDX of joint instability/ligamentous laxity with clinical instability resulting in a grade C or one percent permanent impairment. Dr. Vlahos properly assigned grade modifiers and applied the net adjustment formula to find that appellant had one percent default rating for permanent impairment of the right lower extremity. Using the ROM methodology and Table 16-22, page 549, he noted 20 degrees flexion and 10 degrees dorsiflexion of the ankle both fell into the mild impairment category resulting in seven percent lower extremity permanent impairment. Next, Dr. Vlahos determined that under Table 16-20, 10 degrees of inversion and 10 degrees eversion fell into the mild category, which led to two percent impairment lower extremity permanent impairment. He combined these impairment ratings which result in nine percent right lower extremity permanent impairment. Dr. Vlahos concluded that appellant was entitled to a schedule award for his loss of ROM of the ankle and hindfoot. The Board notes that Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that DBI is the primary method of calculation for the lower limb and that most impairments are based on the DBI methodology. ROM is primarily used as a physical examination adjustment factor.[24] The A.M.A., *Guides*, however, also explain that some of the diagnosis-based grids refer to the ROM section when that is the most appropriate mechanism for grading the impairment. This section is to be used as a stand-alone rating when other grids refer to this section or no other diagnosis-based sections of the chapter are applicable for impairment rating of a condition.[25]

Regarding appellant's right knee permanent impairment, Dr. Vlahos found zero percent impairment for the right knee permanent impairment using the ROM method. He explained that

[23] *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).

[24] A.M.A., *Guides* 497, Section 16.2.

[25] *Id.* at 543; *see also M.D.*, Docket No. 16-0207 (issued June 3, 2016); *D.F.*, Docket No. 15-0664 (issued January 8, 2016).

using the DBI method there was no impairment because there was no category for mild chondromalacia patella under Table 16-3.

Regarding, appellant's accepted lumbar spine conditions, he further found zero percent permanent impairment for appellant's L4-5 and S1 radiculopathy due to the lack of objective sensory and motor findings on examination. As appellant had no neurologic deficit in the lower extremities from the accepted lumbar conditions, Dr. Vlahos properly found that appellant had zero percent permanent impairment pursuant to *The Guides Newsletter*, Table 2.[26] Thus, he concluded appellant had nine percent right lower extremity permanent impairment. Lastly, Dr. Vlahos found that appellant reached MMI on July 5, 2023, the date of his examination.

The Board finds that Dr. Vlahos opinion constitutes the special weight of the medical evidence and is sufficient to establish that appellant is not entitled to an additional schedule award for the accepted lumbar conditions. When a case is referred to an IME to resolve a conflict, the resulting medical opinion, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[27] Dr. Vlahos provided a well-reasoned opinion based on a proper factual and medical history. He also accurately summarized the relevant medical evidence and provided thorough physical examination findings. Dr. Vlahos provided detailed findings and medical rationale supporting his opinion, based upon the entire medical record, that appellant had nine percent permanent impairment of the right lower extremity.

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 that he has greater than nine percent permanent impairment of the right lower extremity, for which he previously received schedule award compensation.

[26] *See J.C.*, Docket No. 23-0889 (issued February 8, 2024).

[27] *A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts, supra* note 22.

ORDER

IT IS HEREBY ORDERED THAT the August 21, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 7, 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