United States Department of Labor
Employees' Compensation Appeals Board

S.L., Appellant	)	
and	)	**Docket No. 24-0522**
	)	**Issued: June 17, 2024**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Orlando, FL, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On April 21, 2024 appellant filed a timely appeal from a February 16, 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than 12 percent permanent impairment of each upper extremity (the arms), for which she previously received schedule award compensation.

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

On May 14, 2009 appellant, then a 42-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that on May 13, 2009 she injured her neck, shoulders, and jaw in a motor vehicle accident (MVA). OWCP accepted the claim for thoracic sprain and neck sprain. It subsequently expanded its acceptance of the claim to include left temporomandibular joint disorder (TMJ) and displacement of cervical intervertebral disc without myelopathy. OWCP paid appellant wage-loss compensation for intermittent time lost from work until September 12, 2010. On October 22, 2010 appellant underwent an OWCP-authorized anterior cervical discectomy, excision of posterior longitudinal ligament, and wide foraminotomy at C4-5 and C5-6. OWCP paid her wage-loss compensation on the periodic rolls effective September 26, 2010.

On May 14, 2015 Dr. Richard C. Smith, an orthopedic surgeon and OWCP referral physician, provided physical examination findings of decreased sensation of the bilateral outer upper arm at C5 and measured motor strength of the neck and upper extremities. He diagnosed neck pain, brachial radiculitis, arthrodesis, neck sprain, and thoracic back sprain.

On June 26, 2015 Dr. James W. Dyer, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), discussed appellant's history of an anterior cervical discectomy and fusion at C4-5 and C5-6. Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[2] and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), he found that, pursuant to Proposed Table 1 of *The Guides Newsletter*, appellant had 3 percent permanent impairment for a moderate sensory deficit and 9 percent impairment for a moderate motor deficit, for 12 percent total impairment of each arm.

By decision dated September 1, 2017, OWCP terminated appellant's wage-loss compensation effective September 2, 2017 as the weight of the evidence established that she had no further disability causally related to her May 13, 2009 employment injury.

By decision dated February 13, 2018, OWCP granted appellant a schedule award for 12 percent permanent impairment of each upper extremity (the arms). The period of the award ran for 74.88 weeks from September 2, 2017 to February 8, 2019.

In an impairment evaluation dated December 10, 2018, Dr. David Weiss, an osteopath, found that, according to *The Guides Newsletter*, appellant had three percent permanent impairment of each upper extremity due to a moderate sensory deficit from the right and left C5 nerve root.

On July 11, 2019 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, concurred with Dr. Weiss's impairment rating. He advised that it did not exceed the prior award of 12 percent permanent impairment of each upper extremity due to a C5 spinal nerve impairment, and thus appellant was not entitled to an additional schedule award.

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

By decision dated August 7, 2019, OWCP denied appellant's claim for an increased schedule award.

An electromyogram (EMG) and nerve conduction velocity (NCV) study, performed on February 24, 2020, revealed probable cervical radiculopathy on the right and mild right carpal tunnel syndrome.

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

On July 20, 2021 OWCP expanded its acceptance of the claim to include lumbar degenerative disc disease and lumbar radiculopathy. It also noted headache as an accepted condition.

In an impairment evaluation dated February 3, 2021, Dr. Mark A. Seldes, Board-certified in family medicine, discussed appellant's history of injury and surgery. Referencing *The Guides Newsletter*, he found five percent permanent impairment due to sensory deficit at C6 on the right and nine percent permanent impairment due to C6 mild motor deficits. Dr. Seldes further found three percent impairment for moderate sensory deficits on the right at C7 and nine percent impairment for mild motor deficits at C7. He additionally opined that appellant had six percent impairment due to carpal tunnel syndrome according to Table 15-23 on page 449 of the A.M.A., *Guides* and 10 percent whole person impairment due to chronic left TMJ. Dr. Seldes concluded that she had 29 percent permanent impairment of the right upper extremity due to C6 and C7 radiculopathy and right carpal tunnel syndrome and 10 percent whole person impairment due to TMJ.

On August 5, 2021 Dr. Katz questioned the accuracy of Dr. Seldes' findings and recommended a second opinion examination. He further noted that the TMJ was not the basis for an impairment rating under FECA.

A magnetic resonance imaging (MRI) scan of the lumbar spine, obtained on August 23, 2021, demonstrated interval worsening right disc herniation at L5-S1 with an annular tear causing moderate-to-severe right foraminal stenosis and impingement of the exiting right L5 nerve root and interval worsening of the L2-3 disc herniation which now impinged the thecal sac causing mild central canal stenosis.

OWCP referred appellant to Dr. Omar David Hussamy, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated September 16, 2021, Dr. Hussamy observed that appellant had objective findings of a loss of sensation in the C6 and C7 dermatomal distributions of the upper extremity. Citing *The Guides Newsletter*, he found eight percent permanent impairment of each upper extremity due to sensory deficits at C5 and C6. In a supplemental report dated December 20, 2021, Dr. Hussamy reviewed Dr. Seldes's impairment evaluation and noted that he had found motor deficits at C6 and C7. He advised that he found only moderate sensory deficits with no motor deficits. Dr. Hussamy opined that appellant was disabled from employment.

On January 6, 2022 Dr. Robert C. Nucci, a Board-certified orthopedic surgeon, evaluated appellant for neck and low back pain. On examination he observed intact dermatomes from C5 to T1 to light touch and full motor strength, and intact L1 to S1 dermatomes bilaterally with full motor strength. Dr. Nucci found radicular symptoms in the C7 nerve root distribution on the left and sciatica at the S1 nerve root distribution on the left. He further diagnosed chronic lumbar strain with lumbar spasm with "likely discogenic L5-S1 pain with pain in flexion and sitting and left radicular leg pain in an S1 nerve root distribution."

By decision dated February 9, 2022, OWCP denied appellant's claim for an increased schedule award.

On May 17, 2022 appellant filed a Form CA-7 for an increased schedule award.

An EMG/NCV study performed on February 2, 2023 by Dr. Michael Creamer, an osteopath and Board-certified physiatrist, revealed mild bilateral right more than left carpal tunnel syndrome and no bilateral cervical radiculopathy or diffuse upper extremity peripheral neuropathy. A subsequent EMG/NCV performed on March 16, 2023 by Dr. Creamer revealed chronic bilateral left more than right lumbar radiculopathy at S1 and no evidence of bilateral defuse or focal lower extremity peripheral neuropathy.

In an impairment evaluation dated May 1, 2023, Dr. Seldes discussed appellant's continued complaints of cervical, thoracic, and lumbar spine pain due to degenerative disc disease, bilateral radiculopathy of the upper and lower extremities, jaw pain from TMJ, and chronic headaches due to her accepted employment injury. He noted that electrodiagnostic testing obtained in February 2023 showed mild bilateral carpal tunnel syndrome. Dr. Seldes found a *Quick*DASH score of 72. On examination, he found decreased sensation to light touch and impaired two-point discrimination from the shoulders extending into the wrist, hand, and thumb area bilaterally, mild weakness of the deltoid and biceps, and 4/5 strength of the wrist flexors and extensors. Dr. Seldes further found a loss of sensation to touch and discrimination in the bilateral lower extremities and mild motor deficits in the extensor hallucis longus and plantar flexor muscles with 4/5 strength. He provided range of motion (ROM) measurements for the wrists and found a positive right Tinel's sign and Phalen's test bilaterally, 4/5 grip strength, and muscle atrophy over the thenar and hypothenar prominence on the right and left. Dr. Seldes noted that an EMG/NCV obtained on March 16, 2023 revealed chronic bilateral S1 lumbar radiculopathy. He opined that appellant reached maximum medical improvement (MMI) on May 1, 2023. With regard to lumbar radiculopathy, Dr. Seldes applied a grade modifier for functional history (GMFH) of two, a grade modifier for clinical studies (GMCS) of two and found that a grade modifier for physical examination (GMPE) was not used. Dr. Seldes found a net adjustment of two or grade E lumbar radiculopathy at L5 and S1. Referencing *The Guides Newsletter*, he found 5 percent sensory deficit and 9 percent motor deficit at L5 bilaterally, and 4 percent sensory deficit and 5 percent motor deficit at S1 bilaterally, which he combined to find 22 percent permanent impairment of each lower extremity. For radiculopathy of the upper extremity, Dr. Seldes found a GMFH and GMCS of two and that a GMPE was not used, for a net adjustment of two. He found 3 percent impairment for a moderate sensory deficit and 8 percent impairment due to a mild motor deficit at C5 bilaterally, for a total of 11 percent, and 5 percent sensory deficit and 9 percent motor deficit at C6 bilaterally, for a total of 14 percent, which he combined to find 23 percent permanent impairment of each upper extremity. Dr. Seldes further found six percent permanent impairment of each upper

extremity due to carpal tunnel syndrome using Table 15-23 on page 449. He combined the impairment ratings to find 28 percent permanent impairment of each upper extremity.

On June 26, 2023 appellant filed a Form CA-7 for an increased schedule award.

On July 5, 2023 Dr. Katz reviewed the newly submitted impairment evaluation from Dr. Seldes and recommended that OWCP refer appellant for a second opinion examination. He noted that on February 2, 2023 Dr. Creamer had found full motor function of the upper extremities and no evidence of cervical radiculopathy. Dr. Katz further noted that a finding of atrophy was not supported by the level of impairment of the median nerve.

OWCP, on July 26, 2023, referred appellant to Dr. Hussamy for a second opinion evaluation. It provided a SOAF of accepted facts setting forth the initially accepted conditions and the subsequently accepted lumbar conditions.

In an August 25, 2023 impairment evaluation, Dr. Hussamy listed the accepted conditions as back sprain, thoracic region, neck sprain, TMJ, displacement of a cervical intervertebral disc without myelopathy, and headache. He subsequently noted that appellant's claim had been expanded to include lumbar degenerative disc disease and lumbar radiculopathy. Dr. Hussamy found objective loss of motion of the cervical spine, decreased sensation at the C6 and C7 dermatomal distributions bilaterally, and no motor weakness or loss of sensation in the lower extremities. He related, "The subjective complaints correspond with the objective findings regarding the cervical spine, but not the lumbar spine." Citing *The Guides Newsletter*, Dr. Hussamy found three percent impairment of the right and left C5 dermatomes and five percent impairment of the right and left C6 dermatomes, for a total of eight percent permanent impairment of each upper extremity after the application of grade modifiers. For the lower extremities, he found no ratable impairment as there were no sensory or motor deficits.

On September 1, 2023 appellant maintained that the SOAF provided to Dr. Hussamy failed to include lumbar radiculopathy and disc degeneration.

On September 21, 2023 Dr. Katz concurred with Dr. Hussamy's finding of eight percent permanent impairment of each upper extremity and no lower extremity impairment. He found that Dr. Hussamy's opinion was entitled to greater weight than that of Dr. Seldes as he was a Board-certified orthopedic surgeon.

By decision dated September 27, 2023, OWCP denied appellant's claim for an increased schedule award. It noted that the SOAF provided to Dr. Hussamy included the accepted conditions.

Subsequently, OWCP received a September 22, 2023 statement from appellant, who clarified that while the SOAF was not incorrect, Dr. Hussamy initially omitted lumbar radiculopathy and disc degeneration from the accepted conditions. Appellant asserted that he further failed to explain the lack of objective findings for the lower extremities given the results of diagnostic studies.

In a report dated November 12, 2023, Dr. Seldes reiterated his impairment determination. He reviewed Dr. Hussamy's findings and noted that he failed to address appellant's bilateral carpal

tunnel syndrome and had combined the neurological findings for the upper and lower extremities. Dr. Seldes related, "I stand firmly by my impairment rating examination performed on May 1, 2023 [which] states emphatically that [appellant] has an impairment rating of 22 [percent] for the bilateral lower extremities and 28 [percent] for the bilateral upper extremities for the radiculopathy to include the L5 and S1 nerve root radiculopathy bilaterally, the C5 and C6 nerve root radiculopathy bilaterally as well as the left and right carpal tunnel syndrome." He asserted that a conflict existed between his opinion and that of the DMA necessitating a referee examination.

On December 27, 2023 appellant requested reconsideration.

On February 8, 2024 Dr. Katz reviewed Dr. Seldes's November 12, 2023 report. He noted that on February 2, 2023 Dr. Creamer had found an intact motor function of the upper extremities and no evidence of cervical radiculopathy, which supported Dr. Hussamy's determination.

By decision dated February 16, 2024, OWCP denied modification of its September 27, 2023 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,[3] and its implementing federal regulation,[4] 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.[5] 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.[6]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[7]

[3] *Supra* note 2.

[4] 20 C.F.R. § 10.404.

[5] 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 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

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

[7] *Supra* note 5 at Chapter 2.808.6f (March 2017); *see D.J.*, Docket No. 19-0352 (issued July 24, 2020).

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.[8] Furthermore, the back is specifically excluded from the definition of an organ under FECA.[9] 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.[10]

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."[11] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[12]

ANALYSIS

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

In a May 1, 2023 impairment evaluation, Dr Seldes, appellant's attending physician, provided examination findings of decreased sensation from the shoulders into the thumbs bilaterally, mild weakness of the deltoid and biceps, and 4/5 strength of the wrist flexors and extensors. He further found reduced sensation and discrimination in the bilateral lower extremities with mild motor deficits in the extensor hallucis longus and plantar flexor muscles with 4/5 strength. Referencing *The Guides Newsletter*, Dr. Seldes found 5 percent sensory deficit and 9 percent motor deficit at L5 bilaterally, for a total impairment of 14 percent, and 4 percent sensory deficit and 5 percent motor deficit at S1 bilaterally, for a total impairment of 9 percent. He combined the deficits at L2 and S1 to find 22 percent permanent impairment of each lower extremity after application of grade modifiers. Dr. Seldes further found 3 percent impairment for a moderate sensory deficit and 8 percent impairment due to a mild motor deficit at C5 bilaterally, for a total of 11 percent, and 5 percent sensory deficit and 9 percent motor deficit at C6 bilaterally, for a total of 14 percent, which he combined to find 23 percent permanent impairment of each upper extremity after the application of grade modifiers due to sensory and motor deficits originating in the cervical spine.

[8] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see R.S.*, Docket No. 24-0030 (issued March 19, 2024); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

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

[10] *Supra* note 5 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[11] 5 U.S.C. § 8123(a).

[12] 20 C.F.R. § 10.321; *see R.J.*, Docket No. 23-0580 (issued April 15, 2024); *V.B.*, Docket No. 19-1745 (issued February 25, 2021); *K.C.*, Docket No. 19-1251 (issued January 24, 2020).

On August 25, 2023 Dr. Hussamy, an OWCP referral physician, provided objective findings of reduced motion of the cervical spine, a loss of sensation at the C6 and C7 dermatomes bilaterally, and full sensation and no weakness of the lower extremities. He found that, according to *The Guides Newsletter*, appellant had 3 percent impairment of the right and left C5 dermatomes and 5 percent impairment of the right and left C6 dermatomes, for a total of 8 percent permanent impairment of each upper extremity after applying the appropriate grade modifiers. On September 21, 2023 Dr. Katz concurred with Dr. Hussamy's findings.

In a November 12, 2023 report, Dr. Seldes reviewed Dr. Hussamy's report, disagreed with his impairment rating, and reiterated his impairment rating.

The Board finds that a conflict exists between Dr. Seldes and Dr. Hussamy and the DMA, Dr. Katz, regarding the extent of appellant's permanent impairment of the upper extremities due to her cervical spine condition, and whether she has an employment-related permanent impairment of the lower extremities, necessitating referral to an impartial medical examiner (IME) for resolution of the conflict in accordance with 5 U.S.C. § 8123(a).[13]

The Board notes that Dr. Seldes further found that appellant had an impairment due to carpal tunnel syndrome. In determining entitlement to a schedule award, preexisting impairment to the scheduled member are included.[14] Subsequently acquired conditions, however, are not included in schedule award determinations.[15] On remand, the IME shall provide an opinion regarding whether appellant's carpal tunnel syndrome preexisted her employment injury.

On remand OWCP shall refer the case record, the SOAF, and appellant to a specialist in the appropriate field of medicine, to serve as an IME, for a reasoned opinion regarding the extent of permanent impairment, if any, of appellant's upper extremities.[16] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[13] 5 U.S.C. § 8123(a).

[14] *See L.Y.*, Docket No. 20-0398 (issued February 9, 2021); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *C.K.*, Docket No. 16-1294 (issued January 13, 2017); *Peter C. Belkind*, 56 ECAB 580 (2005).

[15] *See D.A.*, Docket No. 19-0314 (issued September 18, 2019); *D.G.*, Docket No. 16-1855 (issued August 28, 2017); *Peter C. Belkind, id*.

[16] *See S.W.*, Docket No. 22-0917 (issued October 26, 2022); *K.D.*, Docket No. 19-0281 (issued June 30, 2020).

ORDER

IT IS HEREBY ORDERED THAT the February 16, 2024 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: June 17, 2024
Washington, DC

Alec J. Koromilas, 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