United States Department of Labor
Employees' Compensation Appeals Board

E.L., Appellant	)	
and	)	**Docket No. 23-0515**
	)	**Issued: May 8, 2024**
U.S. POSTAL SERVICE, BELLMAWR CARRIER ANNEX, Bellmawr, NJ, Employer	)	

Appearances:
Russell T. Uliase, Esq., for the appellant[1]
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
JANICE B. ASKIN, Judge

JURISDICTION

On March 2, 2023 appellant, through counsel, filed a timely appeal from an October 4, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.[3]

[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.*

[3] The Board notes that, following the October 4, 2022 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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 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.[4] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 18, 2005 appellant then a 30-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed herniated discs due to factors of his federal employment, including repetitively carrying heavy loads of mail on his mail route. He noted that he first became aware of his condition and its relationship to his federal employment on July 25, 2002. OWCP accepted appellant's claim for herniated disc at L3-4. Appellant did not immediately stop work. OWCP paid him wage-loss compensation benefits on the supplemental rolls, effective August 9, 2004 through July 13, 2006 and March 7 through May 7, 2019.[5]

On December 29, 2008 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated February 23, 2011, OWCP denied appellant's schedule award claim.

On March 2, 2011 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on June 21, 2011.

By decision dated September 1, 2011, OWCP's hearing representative affirmed the February 23, 2011 decision.

On November 17, 2011 appellant, through counsel, appealed to the Board. By decision dated January 4, 2013, the Board affirmed OWCP's September 1, 2011 decision denying appellant's schedule award claim.[6]

On March 8, 2019 Dr. Christopher K. Kepler, a Board-certified orthopedic surgeon, performed an OWCP-authorized posterior lumbosacral decompression using limited laminectomy approach at L5-S1. He diagnosed lumbosacral disc herniation with associated radiculopathy, spinal stenosis.

---

[4] Docket No. 12-0259 (issued January 4, 2013).

[5] A May 18, 2006 electromyogram and nerve conduction velocity (EMG/NCV) study dated revealed trivial abnormalities, trivial motor unit remodeling, and scattered muscles which did not meet the electrodiagnostic criteria for radiculopathy because they were so mild and etiology could not be delineated, and there was no evidence of generalized large fiber sensory motor polyneuropathy or of lower extremity mononeuropathy.

[6] *Supra* note 4.

On April 23, 2019 Dr. Kepler treated appellant in follow up after decompression surgery at L5-S1 and indicated that he was "doing well" with resolution of his presurgical leg pain. He noted findings on examination of minimal back pain, full strength in appellant's legs, and intact sensation to light touch.

On September 6, 2019 appellant filed another Form CA-7 claim for a schedule award.

OWCP received a July 1, 2019 report wherein Dr. David Weiss, a Board-certified orthopedic surgeon, related that he had examined appellant and advised that he had reached maximum medical improvement (MMI) as of the date of his examination. Dr. Weiss noted findings on examination of antalgic gait, positive straight leg raising bilaterally, sensory deficit over the L3, L5, and S1 dermatomes to pinprick involving the left lower extremity, and diminished light touch sensibility on the right over the S1 dermatome. He referred to the sixth edition of the A.M.A., *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[7] and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*). Dr. Weiss determined that appellant had 35 percent permanent impairment of the left lower extremity and 3 percent permanent impairment of the right lower extremity.

On September 12, 2019 OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA). In a September 19, 2019 report, Dr. Katz reviewed the medical evidence, including Dr. Weiss' report, and recommended a second opinion examination to address discrepancies in the findings of neurological impairment between Dr. Weiss and Dr. Kepler.

On September 25, 2019 OWCP referred appellant, the medical record, including a September 12, 2019 statement of accepted facts (SOAF), and a series of questions, to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether his work-related condition resulted in permanent impairment warranting a schedule award. It advised Dr. Askin that he should rate appellant's permanent impairment using *The Guides Newsletter*.[8]

In an October 17, 2019 report, Dr. Askin discussed appellant's factual and medical history, reviewed the SOAF and the medical record, and reported the findings of his physical examination of appellant. He noted that appellant's claim was accepted for a herniated disc at L3-4. Findings on examination revealed negative straight leg raising bilaterally, symmetrical deep tendon reflexes at the knees and ankles, intact sensation in both lower extremities, and no paresthesia. Dr. Askin noted that appellant had no objective symptomology in the upper or lower extremities and no evidence that he sustained a condition in the extremities causally related to the accepted work injury. He indicated that appellant had degenerative disc disease of the lumbosacral spine affecting multiple levels. Dr. Askin advised that appellant's complaints of mechanical back pain were purely due to degenerative changes in the low back. He found no neurologic impairment but determined that appellant's painful motion of the arthritic facet joints were solely due to aging

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

[8] The SOAF noted, *inter alia*, that appellant "underwent lumbar decompression surgery on March 8, 2019."

changes, which made musculoskeletal tissues less tolerant of physically demanding activities. Dr. Askin opined that appellant did not have a ratable impairment according to the A.M.A., *Guides*. He found that appellant's current symptoms were related to degenerative changes and noted that appellant reached MMI on October 17, 2019.

OWCP again referred appellant's case to Dr. Katz, the DMA. In a November 8, 2019 report, Dr. Katz reviewed the SOAF and the medical record, including Dr. Askin's report. He concurred with Dr. Askin's opinion that appellant had no ratable impairment for the accepted conditions of his claim.

By decision dated December 23, 2019, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On December 30, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on April 17, 2020.

OWCP received additional evidence. In an addendum report dated May 8, 2020, Dr. Weiss noted that Dr. Askin found in his October 17, 2019 report that appellant's sensation was intact about the lower extremities and asserted that Dr. Askin failed to indicate how he tested sensation. He concluded that Dr. Askin failed to provide accurate sensory and motor deficits according to the criteria set by the A.M.A., *Guides*. Dr. Weiss reaffirmed his previous left lower extremity rating of 35 percent permanent impairment and right lower extremity rating of 3 percent permanent impairment.

By decision dated July 2, 2020, OWCP's hearing representative set aside OWCP's December 23, 2019 decision denying appellant's schedule award claim, finding that there was a conflict in the medical opinion evidence between Dr. Weiss and Dr. Askin, regarding whether appellant had permanent impairment of the lower extremities causally related to his accepted employment injury, under the A.M.A., *Guides*. The case was remanded for referral for an independent medical examination and, following any further development deemed necessary, a *de novo* decision.

On December 22, 2020 OWCP referred appellant, along with the medical record, a July 14, 2020 SOAF and a series of questions, to Dr. Ian Blair Fries, a Board-certified orthopedic surgeon, selected as the independent medical examiner (IME) to resolve the conflict in the medical opinion evidence.[9]

OWCP received additional evidence. A March 19, 2021 magnetic resonance imaging scan of the lumbar spine revealed multilevel degenerative disc disease including bulges and protrusions, no significant central stenosis, mild foraminal stenosis at left L3-4, mild left and mild-to-moderate right foraminal stenosis at L4-5, and moderate bilateral foraminal stenosis at L5-S1. The study revealed increased foraminal stenosis since the prior study.

[9] The SOAF noted, *inter alia*, that appellant "underwent lumbar decompression surgery on March 8, 2019."

In a May 30, 2021 report, Dr. Fries reviewed the SOAF and the medical record, and discussed the physical examination. He determined that appellant had reached MMI as of the date of his examination. Dr. Fries noted the accepted condition of herniated disc at L3-4. On examination, he found a well-healed midline lumbar incision, mild percussion sensitivity at the lumbosacral area in the midline, negative Trendelenburg test, passive straight leg raising on the right at 45 degrees caused stabbing left lower back pain, left buttock discomfort on the left at 60 degrees, tenderness over the left sacroiliac joint and lumbosacral interspace, and intact range of motion of the ankles, hips, and knees. Dr. Fries noted no atrophy in the lower extremities, no claimed sensory deficits in the lower extremities, no findings to light touch, and no findings to suggest chronic sensory deficiencies, and observed normal hallux position sense bilaterally with incidental negative straight leg raising while seated. He diagnosed multilevel degenerative lumbosacral spondylosis, post left L5-S1 laminectomy/disc excision/foraminotomies, ankle surgery, right carpal tunnel syndrome, fractures of the left clavicle and left tibia, plantar fasciitis, and torn rotator cuff repair. Dr. Fries noted that appellant had minor complaints consistent with left radiculopathy, but he found no confirmatory sensory loss, reflex asymmetry, provoked radiculopathy, or measurable atrophy. He concluded that he did not find any sensory deficits or widespread bilateral lower extremity paresis. Dr. Fries concurred with the findings of Drs. Askin and Katz noting that appellant had zero percent permanent impairment of the left lower extremity and zero percent permanent impairment of the right lower extremity.

By decision dated June 23, 2021, OWCP again denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On June 28, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated October 7, 2021, OWCP's hearing representative set aside the June 23, 2021 decision, finding that Dr. Fries concurred with the opinions of Drs. Askin and Katz without providing an independent impairment evaluation. Thus, the hearing representative remanded the case to Dr. Fries for a supplemental opinion, explaining how he independently determined that appellant had zero percent permanent impairment of the lower extremities, pursuant to the A.M.A., *Guides*.

On December 16, 2021 OWCP requested that Dr. Fries provide a supplemental opinion in accordance with the October 7, 2021 hearing representative's decision.

In a report dated January 31, 2022, Dr. Fries clarified that appellant claimed no sensory deficits in his lower extremities at the time of his examination and advised that there were no abnormal findings to light touch in any of the lower extremity dermatomes and no objective findings to support chronic sensory deficiencies. He referenced Table 16-12, page 535, of the sixth edition of the A.M.A., *Guides*, regarding the femoral and sciatic nerves, and noted that appellant had a class zero impairment as he had no objective or motor deficits or abnormal reflexes in either lower extremity. Dr. Fries found that, therefore, appellant had a default value of zero percent for the bilateral lower extremities. As such, he concluded that appellant had zero percent permanent impairment of the lower extremities.

By decision dated February 24, 2022, OWCP again denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On March 3, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on June 16, 2022.

OWCP received additional evidence. In a report dated June 8, 2022, Dr. Weiss reviewed Dr. Fries' reports, noting that Dr. Fries found no atrophy in the calves bilaterally and no sensory deficits in the lower extremities. He asserted that Dr. Fries did not indicate how sensory deficits were tested. Dr. Weiss further noted that Dr. Fries failed to use the Semmes Weinstein Monofilament method which, was the preferred method according to the A.M.A., *Guides*. He reaffirmed his previous rating of 35 percent permanent impairment of the left lower extremity and 3 percent permanent impairment of the right lower extremity.

By decision dated October 4, 2022, OWCP's hearing representative affirmed the February 24, 2022 decision.

LEGAL PRECEDENT

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.[10]

The schedule award provisions of FECA[11] and its implementing regulations[12] 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.[13] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[14] 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.[15]

---

[10] *See T.H.*, Docket No. 19-1066 (issued January 29, 2020); *D.F.,* Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

[13] *Id. See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

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

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,[16] or the body as a whole. However, a schedule award is permissible where the employment-related spinal conditions affect the upper and/or lower extremities.[17] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*, which is a supplemental publication of the sixth edition of the A.M.A., *Guides*. 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 the Federal (FECA) Procedure Manual.[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 (5 U.S.C. § 8123(a)), 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]

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical opinion, and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.[22]

ANALYSIS

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

On September 25, 2019 OWCP referred appellant, along with the medical record, a September 12, 2019 SOAF, and a series of questions, to Dr. Askin for a second opinion regarding whether appellant's accepted employment injury resulted in permanent impairment of a scheduled member or function of the body, warranting a schedule award. In his October 17, 2019 report,

---

[16] 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); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[17] *Supra* note 11 at Chapter 2.808.5c(3) (March 2017).

[18] *Supra* note 11 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).

[19] 5 U.S.C. § 8123(a). *See 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.R.,* Docket No. 19-0526 (issued July 24, 2019); *C.R.,* Docket No. 18-1285 (issued February 12, 2019).

[21] *V.H.,* Docket No. 20-0012 (issued November 5, 2020).

[22] *R.T.*, Docket No. 20-0081 (issued June 24, 2020); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

Dr. Askin noted his review of the SOAF and the medical record, and reported the findings of his physical examination. He found that appellant reached MMI on October 17, 2019 and, as appellant's current symptoms were related to degenerative changes, appellant did not have permanent impairment according to the A.M.A., *Guides*. The September 12, 2019 SOAF provided to Dr. Askin, however, was deficient as it failed to indicate that OWCP had authorized the March 8, 2019 posterior lumbosacral decompression at L5-S1. It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.[23] OWCP's procedures dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF, which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[24]

In his July 2, 2020 decision, OWCP's hearing representative found that a conflict in the medical opinion evidence existed between Dr. Weiss and Dr. Askin, regarding whether appellant had permanent impairment of the lower extremities causally related to his accepted employment injury, under the A.M.A., *Guides*. However, as Dr. Askin's opinion is of diminished probative value, the conflict was improper. The Board, therefore, finds that Dr. Fries' opinion may not be afforded the special weight of an IME and should instead be considered for its own intrinsic value.[25] Dr. Fries' opinion is instead considered to be that of a second opinion.[26]

In his May 30, 2021 report, Dr. Fries reviewed a July 14, 2020 SOAF and the medical record, and discussed his physical examination. He determined that appellant had reached MMI as of the date of his examination and concluded that he did not find any sensory deficits or widespread bilateral lower extremity paresis. Dr. Fries concurred with the findings of Drs. Askin and Katz, finding that appellant had zero percent permanent impairment of the left lower extremity and zero percent permanent impairment of the right lower extremity. The July 14, 2020 SOAF provided to Dr. Fries, however, was also deficient as it too failed to indicate that OWCP had authorized the March 8, 2019 posterior lumbosacral decompression at L5-S1. As noted above, it is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.[27] OWCP's procedures dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF, which is

---

[23] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (September 1995); *see L.J.,* Docket No. 14-1682 (issued December 11, 2015).

[24] *N.W.,* Docket No. 16-1890 (issued June 5, 2017).

[25] *P.L.,* Docket No. 21-0821 (issued April 15, 2022); *L.G.,* Docket No. 20-0611 (issued February 16, 2021). *See also M.G.,* Docket No. 19-1627 (issued April 17, 2020); *S.M.,* Docket No. 19-0397 (issued August 7, 2019) (at the time of the referral for an impartial medical examination there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); *see also Cleopatra McDougal-Saddler,* 47 ECAB 480 (1996) (as there was no conflict in medical opinion evidence, the report of the physician designated as the IME was not afforded the special weight of the evidence, but instead considered for its own intrinsic value as he was a second opinion specialist).

[26] *Id.*

[27] *Supra* note 22.

incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[28]

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.[29] Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[30]

On remand, OWCP shall prepare an updated SOAF which accurately presents all accepted conditions and authorized medical procedures and refer appellant to a new physician in the appropriate field of medicine, for an evaluation and second opinion which addresses whether appellant has any permanent impairment of a scheduled member or function of the body, warranting a schedule award. 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.

[28] *Supra* note 23.

[29] *S.S.,* Docket No. 18-0397 (issued January 15, 2019); *D.G.,* Docket No. 15-0702 (issued August 27, 2015); *Donald R. Gervasi,* 57 ECAB 281, 286 (2005); *William J. Cantrell,* 34 ECAB 1233, 1237 (1983).

[30] *S.S., id.*; *Richard F. Williams,* 55 ECAB 343, 346 (2004).

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: May 8, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board