

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

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| D.D., Appellant |) | |
| |) | |
| and |) | Docket No. 24-0203 |
| |) | Issued: May 2, 2024 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Kansas City, MO, Employer |) | |
| |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 26, 2023 appellant filed a timely appeal from November 14 and December 18, 2023 merit decisions of the Office of Workers' Compensation Programs (OWCP).¹ 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 Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). Appellant, in support of his request for oral argument, argued that he was disabled and had not received all of the schedule award compensation to which he was entitled. The Board, in exercising its discretion, denies appellant's request for oral argument as his case can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 11 percent permanent impairment of each lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

On March 15, 1999 appellant, then a 40-year-old mechanic helper, filed a traumatic injury claim (Form CA-1) alleging that on February 1, 1999 he injured his cervical spine when he reached overhead to pull down an air hose from a reel and felt a pop in his neck and upper back.³ He stopped work on February 1, 1999. By decision dated April 29, 1999, OWCP accepted appellant's claim for herniated disc at C5-6. It paid him wage-loss compensation on the periodic rolls, effective July 3, 1999. On August 16, 1999 appellant returned to part-time, modified duty for four hours per day.

On May 10, 2000 OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity (right leg) and two percent permanent impairment of the left lower extremity (left leg). The period of the award ran for 11.52 weeks.

On December 21, 2022 appellant filed a claim for compensation (Form CA-7) for an additional schedule award.

On January 17, 2023 OWCP referred appellant to Dr. Kala Danushkodi, a Board-certified physiatrist, for a second opinion evaluation and to provide an impairment rating in conformity with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*).

In a January 31, 2023 report, Dr. Danushkodi described the February 1, 1999 employment injury and noted appellant's additional work-related injuries. She recounted his complaints of constant pain in his neck and low back radiating to the right upper extremity. On physical examination, Dr. Danushkodi observed C7 tenderness of the cervical spine and normal range of motion (ROM). Spurling's test caused radiating pain to the right shoulder. Examination of the

³ OWCP assigned the present claim OWCP File No. xxxxxx008. Appellant has several previously accepted traumatic injury claims. Under OWCP File No. xxxxxx946, OWCP accepted that he sustained a lumbar strain and lumbar disc herniation, which required surgery, causally related to an October 15, 1990 employment injury. Under OWCP File No. xxxxxx780, it accepted that appellant sustained a lumbar strain causally related to an August 14, 1991 employment injury. Under OWCP File No. xxxxxx742, OWCP accepted that he sustained a recurrent herniated disc at L4-5 causally related to a September 16, 1991 employment injury. Under OWCP File No. xxxxxx006, it accepted that appellant sustained a lumbar strain causally related to a September 22, 1997 employment injury. Under OWCP File No. xxxxxx727, OWCP accepted his claim for lumbar strain causally related to a September 15, 1998 employment injury. Appellant also filed a traumatic injury claim on September 16, 1998 alleging that on that date he experienced back pain while in the performance of duty. However, by decision dated October 30, 1998, OWCP denied his claim. OWCP has administratively combined OWCP File Nos. xxxxxx008, xxxxxx946, xxxxxx780, xxxxxx006, xxxxxx727, and xxxxxx742, with the latter designated as the master file.

⁴ A.M.A., *Guides* (6th ed. 2009).

lumbar spine revealed mild tenderness of the sacroiliac joint, positive bilateral straight leg raise testing, and diminished sensation in the right L5-S1 and left L5 dermatome. Dr. Danushkodi reported that appellant had reached maximum medical improvement (MMI) as his present symptoms were related to post-lumbar laminectomy syndrome and degenerative changes secondary to lumbar stenosis. She diagnosed post-lumbar laminectomy syndrome.

Dr. Danushkodi referred to the A.M.A., *Guides* and utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 16-12 (Peripheral Nerve Impairment), page 535, the class of diagnosis (CDX) for sciatic right lower extremity mild sensory deficit resulted in a Class 1 impairment with a default value of four percent. She assigned a grade modifier for functional history (GMFH) of 2 and a grade modifier for clinical studies (GMCS) of 3 for severe pathology as demonstrated in diagnostic imaging. Dr. Danushkodi indicated that a grade modifier for physical examination (GMPE) was inapplicable because it was used to define the Class. She utilized the net adjustment formula, $(GMFH - CDX) + (GMCS - CDX) = (2 - 1) + (3 - 1) = 3$, which resulted in a +3 net adjustment for a total of 9 percent permanent impairment of the lower extremity for sensory deficit and 14 percent permanent impairment of the lower extremity for motor deficit in the right lower extremity. Dr. Danushkodi determined that, utilizing the same table and grade modifiers, appellant also had 9 percent permanent impairment of the lower extremity for sensory deficit and 14 percent permanent impairment of the lower extremity for motor deficit in the left lower extremity. She concluded that he had a total of 22 percent permanent impairment of each lower extremity.

OWCP forwarded Dr. Danushkodi's January 31, 2023 report to Dr. Kenekwue Ugokwe, a Board-certified neurosurgeon serving as the district medical adviser (DMA), for review and opinion on whether appellant sustained a permanent impairment of his lower extremities under the A.M.A., *Guides* and *The Guides Newsletter*. In a report dated March 16, 2023, Dr. Ugokwe utilized *The Guides Newsletter* and indicated that appellant had a default value of one percent for mild sensory deficit in the left L5 nerve and a net adjustment of +2 for functional history and examination, which resulted in two percent permanent impairment. He also assigned mild motor deficit in the left L5 nerve with a default value of five percent and a net adjustment of +2 for history and examination, which resulted in nine percent permanent impairment. Dr. Ugokwe concluded that appellant had a total of 11 percent permanent impairment of the left lower extremity. Regarding appellant's right lower extremity, he indicated that for mild sensory deficit in the right L5 nerve deficit appellant had a default of one percent and a net adjustment of +2 for history and examination, which resulted in two percent permanent impairment. Dr. Ugokwe also assigned a default of five percent permanent impairment for mild motor deficit in the right L5 nerve and a net adjustment of +2 for history and examination, which resulted in nine percent permanent impairment. He concluded that appellant had a total of 11 percent permanent impairment of the right lower extremity. Dr. Ugokwe reported that the A.M.A., *Guides* did not allow for use of the ROM rating method for the diagnosis in question. He explained that he disagreed with Dr. Danushkodi's impairment rating of 22 percent bilateral lower extremity permanent impairment because she used the diagnosis for sciatic nerve for her calculation instead of using individual nerve roots. Dr. Ugokwe reported that appellant reached MMI as of January 31, 2023.

On March 28, 2023 OWCP requested that Dr. Ugokwe clarify whether appellant's current impairment rating included appellant's "prior percentage awarded or if it should be considered an

addition to the prior percentage awarded.” It informed him that appellant had received a prior award of two percent permanent impairment each for his right and left lower extremities due to his spinal injury.

In an April 5, 2023 report, Dr. Ugokwe explained that appellant’s current impairment rating included the previous award of two percent permanent impairment. He reported that appellant had additional impairment rating of nine percent permanent impairment for each lower extremity.

On April 27, 2023 OWCP granted appellant a schedule award for nine percent permanent impairment of each lower extremity (both legs). The period of the award ran for 51.84 weeks for the period January 31, 2023 through January 28, 2024.

On May 11, 2023 appellant, through his then-counsel, requested reconsideration. Appellant noted that the payment dates were January 31 through April 22, 2023. Counsel asserted that the dates should be at least to 2019 and explained that appellant had been disabled for a very long time.

In an April 27, 2023 statement, appellant noted his disagreement with the March 16 and April 5, 2023 DMA reports. He also alleged that, for his first schedule award, he was supposed to receive two percent permanent impairment for his left lower side, two percent permanent impairment for his right lower side, and two percent permanent impairment for his right upper side. Appellant asserted that he never received the two percent right upper extremity permanent impairment related to his upper spine injury under another claim.

Appellant submitted a May 12, 2000 schedule award decision, and an OWCP summary report which indicated that his claim was accepted for disc herniation at C5-6.

In a letter dated January 9, 2020, Dr. Christine L. Moore, an osteopath Board-certified in internal medicine, hematology, and medical oncology, indicated that appellant presented for his first visit on February 12, 2000 with a history of work-related injuries to his cervical and lumbar spine. She discussed the medical treatment that he received and reported that his conditions had worsened over the years so that now he was no longer able to maintain the physical demands of his occupation.

By decision dated August 8, 2023, OWCP denied modification of its April 27, 2023 decision.

On August 19, 2023 appellant requested reconsideration. In a statement of the same date, he alleged that he sustained injuries to two areas of his spine in his lumbar and cervical spine. Appellant explained that he received a schedule award for his lumbar spine, but he was not paid a schedule award for permanent impairment to his cervical spine.

By decision dated November 8, 2023, OWCP denied appellant’s request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a).

On November 14, 2023 OWCP issued a corrected decision identical to the April 27, 2023 decision, which granted appellant a schedule award for nine percent left lower extremity

permanent impairment (leg) and nine percent right lower extremity permanent impairment (leg). The period of the award ran for 51.84 weeks for the period January 31, 2023 through January 28, 2024.

In a statement dated November 15, 2023, appellant alleged that OWCP had not paid him under the current claim, OWCP File No. xxxxxx008. He asserted that he was paid for L4 and L5, but not for C4 and C5 under his other claims.

Appellant submitted a partial copy of a September 18, 2002 report by Dr. Moore who noted that appellant was evaluated by a rehabilitative physician who determined that appellant had 10 percent permanent impairment. He also submitted articles concerning the calculation of schedule awards.

OWCP again referred the claim, along with an updated SOAF, to Dr. Ugokwe, serving as OWCP's DMA, for an addendum report regarding whether appellant sustained an increase in permanent impairment rating due to his accepted cervical injury.

In a December 8, 2023 report, Dr. Ugokwe indicated that he had reviewed Dr. Danushkodi's January 31, 2023 report and agreed with the impairment rating of 11 percent permanent impairment of each lower extremity. He explained that the 11 percent permanent impairment for each lower extremity was the total impairment rating, which included the previously awarded 2 percent permanent impairment for each lower extremity. Dr. Ugokwe noted that there was no increase in impairment for the C5-6 herniated disc condition.

By decision dated December 18, 2023, OWCP denied appellant's claim for an additional schedule award, finding that he was not entitled to greater than 11 percent permanent impairment of each lower extremity.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing regulations⁶ 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. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.⁸

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404 (a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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.⁹ Furthermore, the back is specifically excluded from the definition of an organ under FECA.¹⁰ 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.¹¹

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.¹²

ANALYSIS

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

In a January 31, 2023 report, Dr. Danushkodi described the February 1, 1999 employment injury and noted appellant's other work-related injuries. She noted physical examination findings of C7 tenderness of the cervical spine and radiating pain to the right shoulder on Spurling's test. Dr. Danushkodi referred to the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 16-12 (Peripheral Nerve Impairment), appellant had 9 percent lower extremity permanent impairment for sensory deficit and 14 percent lower extremity permanent impairment for motor deficit in each lower extremity for the diagnosis of sciatic lower extremity mild sensory and motor deficits. She concluded that he had a total of 22 percent permanent impairment of each lower extremity.

The Board has reviewed Dr. Danushkodi's January 31, 2023 report and finds that her opinion on permanent impairment requires clarification. Dr. Danushkodi did not address appellant's accepted condition of disc herniation at C5-6. She also did not utilize the appropriate methodology for rating spinal nerve impairment affecting the upper or lower extremities in accordance with the A.M.A., *Guides*.¹³ Dr. Danushkodi did not discuss the standards of *The Guides Newsletter*, the above-described methodology, which provides for a permanent impairment

⁹ 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).

¹⁰ *See id.* at § 8101(19); *see also G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹¹ *Supra* note 8 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹² *Supra* note 8 at Chapter 2.808.6f (March 2017).

¹³ *See C.J.*, Docket No. 21-1389 (issued July 24, 2023); *C.T.*, Docket No. 20-0043 (issued April 30, 2021); *L.L.*, Docket No. 19-0214 (issued May 23, 2019).

rating based on peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries.¹⁴

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹⁵ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁶ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve all of the relevant issues in the case.¹⁷

The case must, therefore, be remanded for clarification from Dr. Danushkodi regarding the above-noted issues with her permanent impairment evaluation of appellant's lower extremities due to the accepted February 1, 1999 employment injury. On remand, OWCP shall request a supplemental report from her regarding whether he sustained additional permanent impairment of the bilateral lower extremities as a result of her accepted cervical injury in accordance with the standards of the A.M.A., *Guides* and *The Guides Newsletter*. If Dr. Danushkodi is unable to clarify or elaborate on her previous report, or if the supplemental report is also vague, speculative, or lacking rationale, OWCP must submit the case record and a detailed SOAF to another second opinion specialist for the purpose of obtaining a rationalized medical opinion on the issue.¹⁸ After this and such other 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 regarding whether he has met his burden of proof to establish greater than 11 percent permanent impairment of each lower extremity, for which he previously received schedule award compensation.

¹⁴ See *supra* note 11.

¹⁵ See *R.R.*, Docket No. 18-0914 (issued February 24, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

¹⁶ *C.T.*, Docket No. 20-0043 (issued April 20, 2021); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

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

¹⁸ *J.W.*, Docket No. 22-0223 (issued August 23, 2022); *R.O.*, Docket No. 19-0885 (issued November 4, 2019); *Talmadge Miller*, 47 ECAB 673 (1996).

ORDER

IT IS HEREBY ORDERED THAT the November 14 and December 18, 2023 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 2, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy 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