United States Department of Labor
Employees' Compensation Appeals Board

W.H., Appellant	)	
and	)	**Docket No. 24-0855**
	)	**Issued: November 26, 2024**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Los Angeles, CA, 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
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On August 18, 2024 appellant filed a timely appeal from a July 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.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that following the July 16, 2024 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* 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 greater than 31 percent permanent impairment of his right lower extremity and 31 percent permanent impairment of his left lower extremity, for which he has previously received schedule award compensation.

FACTUAL HISTORY

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

On March 17, 2000 appellant, then a 50-year-old senior customs inspector, filed an occupational disease claim (Form CA-2) alleging that he developed several respiratory conditions due to factors of his federal employment. He indicated that he first became aware of his condition in October 1992 while on a temporary assignment to Ukraine and realized its relationship to his federal employment on August 21, 1999 as his respiratory conditions persisted. OWCP assigned OWCP File No. xxxxxx323.[4] It accepted the claim for automatic neuropathy in disease classified elsewhere; benign hypertension; carpal tunnel syndrome, bilateral; chronic idiopathic constipation, unspecified; diabetes mellitus (DM) without complication, Type II or not otherwise specified (NOS); essential hypertension; extrinsic asthma; hypoxemia; impotence of organic origin; lesion of left ulnar nerve; lesion of ulnar nerve, left upper limb; obstructive sleep apnea; other acute and subacute respiratory condition due to chemicals, gases fumes and vapors; other lack of coordination; other specified functional intestinal disorders; outlet dysfunction constipation; polyneuropathy in diabetes, bilateral; sensorineural hearing loss, bilateral; spinal stenosis, lumbar region; spondylolisthesis, lumbar region; trigger finger, left index finger; trigger finger, left middle finger; trigger finger, left ring finger; trigger finger, right index finger; trigger finger, right middle finger; trigger finger, right ring finger; type 2 diabetes mellitus with diabetic neuropathy, unspecified; type 2 diabetes mellitus with diabetic polyneuropathy; unspecified asthma, uncomplicated.[5] Appellant initially lost time from work intermittently from the date of first exposure through June 25, 2002. OWCP has paid appellant on periodic rolls since July 26, 2002.

By decision dated October 30, 2012, OWCP granted appellant a schedule award for six percent permanent impairment of the right upper extremity, nine percent permanent impairment of the left upper extremity, five percent permanent impairment of the right lower extremity, and five percent permanent impairment of the left lower extremity. The period of the award ran for 75.6 weeks from October 21, 2012 to April 3, 2014.

[3] Docket No. 14-1662 (issued February 3, 2015); Docket No. 15-1434 (issued December 3, 2015).

[4] OWCP designated this case as the master file, which encompasses OWCP File Nos. xxxxxx428, xxxxxx700, xxxxxx323, xxxxxx160, xxxxxx175, xxxxxx176, xxxxxx177, xxxxxx861, xxxxxx124, xxxxxx572, xxxxxx098, xxxxxx144, xxxxxx145, and xxxxxx985.

[5] Appellant underwent OWCP-approved surgical procedures on March 11, 2009; November 1, 2011; December 28, 2011; September 29, 2014; January 18, 2017, and 2020.

Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated February 20, 2013, an OWCP hearing representative affirmed OWCP's October 30, 2012 decision. The hearing representative found that schedule award payments could not be paid concurrently with wage-loss compensation in this case as the schedule award was being paid for the same injury which resulted in wage loss.

In a February 11, 2020 report, Dr. John W. Ellis, a physician Board-certified in family medicine, noted the history of injury along with OWCP's January 9, 2020 letter of accepted conditions. He reviewed the medical records and found that appellant had severe diabetes and polyneuropathy, a loss of station gait, and frequent falls, with the latest fall occurring on December 16, 2019 when he contused his left knee. Dr. Ellis presented examination findings of multiple conditions and opined that appellant had reached maximum medical improvement (MMI) on February 11, 2020.[6] He referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[7] and indicated, in relevant part, that appellant was rated for polyneuropathy of the lower extremities for station and gait disorder under Table 13-12 since the electromyogram and nerve conduction velocity (EMG/NCV) studies did not show specific spinal nerve impingements. For both the right and left lower extremities, Dr. Ellis determined that appellant had a class 3 station and gait disorder, which resulted in a 52 percent impairment of each lower extremity. Worksheets, including a copy of Figure 16-2 lower extremity worksheet and Table 13-12 were provided for appellant's right and left lower extremities.

In a May 7, 2020 report, Dr. Ellis noted examination findings, in relevant part, revealed severe polyneuropathy and decreased sensation to light touch, pin prick, and 2-point discrimination in the lower extremities at L3 through S1. He continued to opine MMI was reached on February 11, 2020. For the lower extremities, Dr. Ellis reiterated that he rated appellant for polyneuropathy under Table 13-12 and that, for both the right and left lower extremities, appellant had a total combined impairment of 52 percent impairment. A Figure 16-2 lower extremity worksheet, a worksheet for Table 13-12, and adjustment worksheets were provided for appellant's right and left lower extremities. Dr. Ellis found 18 percent permanent impairment of each upper extremity using the diagnosis-based impairment (DBI) method. In a May 7, 2020 addendum to his schedule award report of February 11, 2020, he reviewed additional medical reports, but indicated it did not change his February 11, 2020 impairment ratings.

On June 8, 2020 appellant filed a claim for compensation (Form CA-7) for an increased schedule award. In an accompanying May 25, 2020 letter, he requested an increased schedule award for the upper and lower extremities, lungs, asthma/reactive airways disease, and hands. OWCP subsequently developed appellant's schedule award claims for other conditions.

[6] With regard to the back, Dr. Ellis noted that appellant has had two back surgeries that helped the spinal nerve pain down his legs but not the peripheral neuropathy, the marked weakness down his legs, and the loss of sensation. He indicated that appellant used a cane to walk and needed assistance in dressing and walking.

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

On June 28, 2021[8] OWCP referred appellant's case and an April 4, 2018 SOAF to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to provide an impairment rating of the lower extremities in conformity with the A.M.A., *Guides*.

In a July 24, 2021 report, Dr. Katz, serving as DMA, reviewed the submitted records and opined that appellant had reached MMI on May 7, 2020, the date of Dr. Ellis' impairment examination. He indicated that Dr. Ellis incorrectly applied the 21 percent whole person impairment under Table 13-12 twice and provided an explanation as to why it was incorrect, noting that the 52 percent should be apportioned to each lower extremity. Based on Dr. Ellis' May 7, 2020 findings, Dr. Katz opined that pursuant to the Combined Values Chart on page 604, appellant had 31 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower extremity. He further opined that the key diagnostic factors utilized in determination of the diagnosis-based impairment (DBI) calculation for the accepted conditions were not eligible for an alternative range of motion (ROM) impairment calculation. Dr. Katz requested copies of the prior DMA reports upon which the prior schedule awards for impairment of the right and left lower extremity were based to determine any additional impairments.

In an August 27, 2021 addendum report, Dr. Katz determined the net additional award due by subtracting the overlapping prior award of 5 percent right lower extremity and prior award of 5 percent left lower extremity from the present impairment of 31 percent impairments to the right and left lower extremities and found a new net additional award of 26 percent impairment to each of the lower extremities. He further opined that the alternative ROM impairment calculation was not applicable.

In May 14 and 16, 2021 letters, appellant questioned the medical evidence.

By decision dated September 15, 2021, OWCP granted appellant schedule award compensation for an additional 26 percent permanent impairment of right lower extremity (leg), for a total of 31 percent, and an additional 26 percent permanent impairment of the left lower extremity (leg), for a total of 31 percent. The period of the award was scheduled to run for 149.76 weeks for the period May 26, 2024[9] through April 10, 2027. The amount of appellant's weekly compensation, his payment and continuing compensation payments were "to be determined." OWCP accorded the weight of the medical evidence to the May 7, 2020 report of Dr. Ellis dated May 7, 2020 and the July 24 and August 27, 2021 reports of Dr. Katz, the DMA.

On May 11, 2022 appellant requested reconsideration of OWCP's September 15, 2021 schedule award decision. He argued that Dr. Katz failed to review all of the medical evidence and incorrectly applied Table 13-12 of the A.M.A., *Guides* and the Combined Values Chart.

[8] OWCP had previously referred appellant's case to Dr. David I. Krohn, a Board-certified orthopedic surgeon serving as an OWCP DMA. Dr. Krohn rendered an August 9, 2020 report but failed to respond to OWCP's March 7 and June 28, 2021 requests for clarification.

[9] The award period started on May 26, 2024 following the end of the award period in OWCP's June 22, 2021 schedule award decision.

By decision dated August 2, 2022, OWCP denied modification of its September 15, 2021 decision. It found that the weight of the medical evidence continued to rest with the rationalized medical opinion of Dr. Katz.

On April 21, 2023 OWCP referred appellant to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, along with the medical record, an amended March 29, 2023 SOAF, and a list of questions, for a second opinion examination to address a medical upgrade request for the right ulnar nerve and left knee as a consequential injury of appellant's accepted conditions and to determine the extent of any employment-related permanent impairments.

In a May 18, 2023 report, Dr. Einbund reviewed the medical evidence and the SOAF. For the lumbar spine, he noted appellant's November 1, 2022 and 1986 lumbar surgeries, provided his review of the diagnostic studies, and set forth physical examination findings of the lower extremities. Dr. Einbund opined that appellant's left knee osteoarthritis, for which he underwent a total left knee replacement on September 24, 2020, was not causally related to the accepted work injury.

Under Table 13-12 Dr. Einbund opined that appellant had 31 percent right lower extremity impairment and 31 percent left lower extremity impairment based on Class 3 station and gait disorder, which was 21 percent whole person impairment. Under Table 16-10, page 530 of the A.M.A., *Guides*, he converted the 21 percent whole person lower extremity impairment to 52 percent lower extremity impairment. Dr. Einbund then apportioned 50 percent to each extremity under Appendix A, page 604, which resulted in 31 percent impairment to both right and left lower extremities, which when combined resulted in the 52 percent lower extremity impairment. He noted that the spinal nerve impairments were considered duplicative to station and gait impairment as both impairments were based on the etiology of the nerve deficit affecting the lower extremities. Dr. Einbund further indicated that the station and gait disorder yielded a higher impairment when compared to a spinal nerve impairment and, thus, recommended that the station and gait disorder impairment be used.

Dr. Einbund also opined that while the left knee was not work related, there was no apportionment under FECA. For the left lower extremity, he found, under Table 16-3, page 511, the total knee replacement was Class 2 with a grade C or default impairment of 25 percent. Dr. Einbund applied a grade modifier for functional history (GMFH) of 2, a grade modifier for physical examination (GMPE) of 1, and determined that a grade modifier for clinical studies (GMCS) was not applicable as the x-ray findings were the basis of the diagnosis. He applied the net adjustment formula, to find a -1 or Grade B, which equated to 23 percent impairment. Dr. Einbund opined that there was no basis for range of motion impairment as the left knee had full motion.

For the left lower extremity, Dr. Einbund combined 31 percent gait and station impairment with 23 percent impairment from total knee replacement to find a total of 47 percent impairment. Thus, he opined that appellant was entitled to an additional 16 percent impairment from the prior award. For the right lower extremity, Dr. Einbund opined that it remained at 31 percent as he had found no additional impairment.

On February 17, 2024 appellant requested reconsideration. He presented several arguments and submitted additional medical reports and diagnostic testing.

OWCP subsequently accepted additional conditions of chronic respiratory failure with hypoxia, lesion of ulnar nerve, right upper limb, unspecified epiphora, bilateral lacrimal glands, and spinal stenosis at L1-L2 and L2-L3.

On February 6, 2024 OWCP determined that a conflict in medical opinion existed between the May 7, 2020 report of Dr. Ellis, the treating physician, and the May 18, 2023 report of Dr. Einbund, the second opinion physician, regarding the extent of the lower extremity impairment rating and if the A.M.A., *Guides* were correctly applied.

On May 3, 2024 OWCP referred appellant, along with the medical record, an August 1, 2023 SOAF, and a list of questions, to Dr. Steven Ma, an orthopedic surgeon, for an impartial medical examination to determine the extent of permanent partial impairment of the lower extremities.

In a May 16, 2024 letter, OWCP notified both Dr. Ma, the impartial medical examiner (IME) and appellant that the examination would take place on July 24, 2024 at 10:00 a.m. in Riverside, California.

OWCP continued to receive medical reports regarding the status of appellant's conditions.

By decision dated July 16, 2024, OWCP issued a revised decision of its September 15, 2021 decision. It awarded appellant an additional 26 percent permanent impairment of the right lower extremity (leg), for total of 31 percent, and an additional 26 percent permanent impairment of the left lower extremity (leg), for a total of 31 percent. The period of the award was scheduled to run for 149.76 weeks from May 26, 2024 to April 9, 2027. OWCP accorded the weight of the medical evidence to the medical findings and to the opinion of Dr. Katz, the DMA.

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. 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

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

adoption.[12] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[13]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning, Disability and Health: A Contemporary Model of Disablement*.[14] Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the class of diagnosis (CDX), which is then adjusted by a GMFH, GMPE, and/or a GMCS.[15] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[16] The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.[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 that if there is a disagreement between the physician making the examination for the United States, and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical examiner (IME))

[12] *Id.* at § 10.404 (a); *see also J.C.*, Docket No. 21-0288 (issued July 1, 2021); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

[14] A.M.A., *Guides* 3, section 1.3.

[15] *Id.* at 383-492.

[16] *Id.* at 411.

[17] *J.C.*, Docket No. 21-0288 (issued July 1, 2021); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

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

[19] *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[20] *Supra* note 13 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

who shall make an examination.[21] For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.[22] When OWCP has referred the case 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.[23]

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 OWCP's medical adviser providing rationale for the percentage of impairment specified.[24]

ANALYSIS

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

By decision dated July 16, 2024, OWCP awarded appellant an additional 26 percent permanent impairment of the right lower extremity, for a total of 31 percent, and an additional 26 percent permanent impairment of the left lower extremity, for a total of 31 percent. The award ran for 149.76 weeks for the period May 26, 2024[25] to April 10, 2027. The amount of appellant's weekly compensation, his payment and continuing compensation payments were "to be determined." OWCP accorded the weight of the medical evidence to the medical findings of and opinion of Dr. Katz, who served as OWCP's DMA.

Following further development, OWCP referred appellant for a second opinion examination with Dr. Einbund, who opined, in a May 18, 2023 report, that appellant was entitled to an additional 16 percent impairment for his left lower extremity, for a total award of 47 percent impairment. Dr. Einbund determined that the right lower extremity remained at 31 percent as no additional impairment was found. OWCP subsequently found that a conflict in medical opinion existed between Dr. Ellis and Dr. Einbund and referred appellant to Dr. Ma for an impartial medical examination to provide an assessment of appellant's employment-related conditions and the extent of permanent impairment to the lower extremities. In a May 16, 2024 letter, OWCP notified both Dr. Ma and appellant that the examination would take place on July 24, 2024 at 10:00 a.m. in Riverside, California. However, on July 16, 2024 it issued a revised decision of its September 15, 2021 decision.

[21] 5 U.S.C. § 8123(a); *see A.P.*, Docket No. 22-1054 (issued January 6, 2023); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[22] *H.B.*, Docket No. 19-0926 (issued September 10, 2020); *C.H.*, Docket No. 18-1065 (issued November 29, 2018); *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006); *James P. Roberts*, 31 ECAB 1010 (1980).

[23] *S.S.*, Docket No. 19-0766 (issued December 13, 2019); *W.M.*, Docket No. 18-0957 (issued October 15, 2018); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[24] *See supra* note 13 at Chapter 2.808.6f (March 2017).

[25] The award period started on May 26, 2024 following the end of the award period in OWCP's June 22, 2021 schedule award decision.

The Board notes that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.[26] 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.[27] In this case, OWCP issued its July 16, 2024 decision denying appellant's claim for an additional schedule award prior to the impartial medical examination of appellant taking place. Thus, it was premature for OWCP to issue its July 16, 2024 decision. Therefore, the case must be remanded to OWCP for further development.[28]

On remand OWCP shall reschedule an impartial examination with a specialist in the appropriate field of medicine for an impartial medical examination and rationalized opinion on whether appellant has greater than the 31 percent permanent impairment of each lower extremity previously awarded. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[26] *See D.C.*, Docket Nos. 22-0020 and 22-0279 (issued April 25, 2023); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

[27] *Id.*; *see also S.A.*, Docket No. 18-1024 (issued March 12, 2020).

[28] *See F.A.*, Docket No. 22-0167 (issued December 16, 2022); *T.C.*, Docket No. 17-1906 (issued January 10, 2018); *X.Y.*, Docket No. 19-1290 (issued January 24, 2020); *K.G.*, Docket No. 17-0821 (issued May 9, 2018).

ORDER

IT IS HEREBY ORDERED THAT the July 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: November 26, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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