

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

This case was previously before the Board on a different issue.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 26, 2019 appellant, then a 34-year-old forester, filed a traumatic injury claim (Form CA-1) alleging that on that date she strained her lower back when she twisted wrong as she attempted to sit in her desk chair while in the performance of duty.⁴ On December 10, 2019 OWCP initially accepted the claim for lumbar ligament sprain. It subsequently expanded acceptance of the claim to include lumbar intervertebral disc degeneration and lumbar spondylosis with myelopathy.

In a July 23, 2021 report, Dr. Robert R. Reppy, an osteopath, related appellant's history of falling from an ATV in September 2018 while in the performance of duty and experiencing low back pain on September 26, 2019 seating herself in her office chair. He diagnosed herniated intervertebral disc of the lumbar spine and torn annulus at L3-4 and attributed these diagnoses to the 2018 and 2019 employment incidents. On August 11, 2021 appellant underwent nerve conduction velocity (NCV) studies which demonstrated evidence of the presence of a bilateral L5 and left S1 multifocal entrapment and somatosensory evoked responses of the lower extremities which demonstrated evidence of left delayed latencies. She underwent additional studies on April 6, 2022 which suggested a left L5 entrapment, but also demonstrated normal somatosensory evoked response of the lower extremities.

In a series of reports dated September 10, 2021 through November 4, 2022, Dr. Reppy examined appellant due to burning low back pain and numbness in her left leg and feet. He reported spasticity in the paralumbar musculature, but no edema in the lower extremities. Dr. Reppy diagnosed bilateral L5 nerve entrapment syndrome, herniated lumbar disc, torn annulus at L3-4, lumbar stenosis, retrolisthesis of L3 upon L4 and L4 upon L5, and disc protrusions at L3-4 and L4-5.

Appellant submitted a November 17, 2022 impairment rating from Dr. Reppy. Dr. Reppy diagnosed herniated lumbar discs at L3-4 and L4-5 with bilateral L5 nerve root entrapment and

³ Docket No. 22-1376 (issued May 1, 2024).

⁴ Appellant previously filed a Form CA-1 on September 13, 2018 alleging that on August 6, 2018 during all-terrain vehicle (ATV) training she hit a sink hole and fell from her ATV injuring her lower back, elbow, and the back of her head while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx366. By decision dated October 30, 2019, it denied the claim, finding that the medical evidence submitted failed to provide a medical diagnosis in connection with the accepted employment incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA. It has not administratively combined appellant's claims.

lumbar stenosis. He referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ and utilized the diagnosis-based impairment (DBI) rating method to find that, under Proposed Table 2 Spinal Nerve Impairment: Lower Extremity Impairments of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), the class of diagnosis (CDX) for moderate sensory deficit in the L5 nerve root resulted in a Class 1 moderate impairment with a default value of three percent. Dr. Reppy assigned a grade modifier for functional history (GMFH) of 2 based on appellant's symptoms with normal activity, according to Table 17-6, page 575 (Adjustment Grid Summary). He assigned a grade modifier for clinical studies (GMCS) of 2 according to Table 17-9, page 581 (Clinical Studies Adjustment: Spine). Dr. Reppy utilized the net adjustment formula, $(GMFH - CDX) + (GMCS - CDX) = (2 - 1) + (2 - 1) = +2$, which resulted in five percent permanent impairment of the right lower extremity. He again referred to Proposed Table 2 to find a Class 1 mild impairment for motor deficit in the L5 nerve root, with a default value of five percent. Dr. Reppy assigned a GMCS of 2 according to Table 17-9. He applied the net adjustment formula, $(GMCS - CDX) + (GMCS - CDX) = (2 - 1) + (2 - 1) = +2$, which resulted in nine percent permanent impairment of the lower extremity. Dr. Reppy opined that appellant had attained maximum medical improvement on November 4, 2022. He concluded that she had 14 percent permanent impairment of the lower extremities.

On December 22, 2022 appellant underwent a lumbar magnetic resonance imaging (MRI) scan which demonstrated disc bulges at L4-5 and L3-4.

On January 6, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On February 3, 2023 Dr. Reppy provided three range of motion measurements of the spine including flexion of 25, 20, and 20 degrees, extension of 5, 0, and 5 degrees, left side bending of 20, 15, and 15 degrees, and right side bending of 15, 50, and 10 degrees. He repeated his previous diagnoses.

On May 3, 2023 OWCP referred appellant's case and a SOAF to Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon, serving as an OWCP district medical adviser (DMA), and requested that he provide an opinion regarding the appropriate percentage of permanent impairment. In a May 25, 2023 report, Dr. Ugokwe disagreed with Dr. Reppy. He determined that as on physical examination appellant was neurologically intact, with no noted motor or sensory deficit on neurological examination, she had no permanent impairment of the lower extremities originating in the spine.

In a June 9, 2023 report, Dr. Reppy recounted appellant's symptoms of back pain radiating to both legs with paresthesia extending down to her feet, worse on the left. He noted that she experienced pins and needles and tingling in her feet. On physical examination Dr. Reppy found that sensation to light touch was diminished on the lateral side of both lower extremities, but normal sensation on the medial side of her legs. He repeated his diagnoses of

⁵ A.M.A. *Guides* 6th ed. (2009).

bilateral L5 nerve entrapment syndrome, herniated lumbar disc, torn annulus at L3-4, lumbar stenosis, retrolisthesis of L3 upon L4 and L4 upon L5, and disc protrusions at L3-4 and L4-5.

On June 21, 2023 OWCP requested clarification from Dr. Ugokwe, the DMA. In his July 1, 2023 supplemental report, Dr. Ugokwe related that while appellant's MRI scan showed disc bulges at L4-5 and L5-S1, on physical examination she had no motor or sensory deficit. He reported that she had no range of motion deficits and determined that she had no permanent impairment of the lower extremities resulting from her accepted back injuries. Dr. Ugokwe determined that the A.M.A. *Guides* did not allow for use of the ROM methodology for the diagnosed conditions.

By decision dated July 13, 2023, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

Dr. Reppy completed reports on July 14 and 15, 2023 and disagreed with the DMA's finding that appellant was neurologically intact. He related that appellant exhibited leg weakness and buckling, reduced two-point discrimination in the L4 and L5 dermatomes, and significant chronic spasticity, repeating his previous diagnoses. Dr. Reppy reviewed appellant's December 22, 2022 MRI scan and found disc displacement at L3-4 and L4-5, with visible impingement and stenosis. He asserted that his finding of 14 percent permanent impairment of the lower extremities was correct.

On August 2, 2023 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. Following a preliminary review, by decision dated September 8, 2023, OWCP's hearing representative vacated OWCP's July 13, 2023 decision and remanded the case for further development of the medical evidence.

On September 21, 2023 OWCP referred appellant's case and a SOAF to Dr. Ugokwe serving as the DMA.

In an October 6, 2023 report, Dr. Reppy recounted appellant's symptoms of low back pain radiating down both legs down into her feet, occasional buckling every few weeks, but no recent falls. On physical examination, he found mild-to-moderate degree of paralumbar muscle spasticity with a normal gait. Dr. Reppy repeated his previous diagnoses of bilateral L5 nerve entrapment syndrome, herniated lumbar disc, torn annulus at L3-4, lumbar stenosis, retrolisthesis of L3 on L4 and L4 on L5, and disc protrusions at L3-4 and L4-5.

On October 13, 2023 Dr. Ugokwe, serving as the DMA determined that there was no appropriate or adequate neurologic examination in the record which specifically documented motor and sensory deficit. He noted that Dr. Reppy's February 3, 2023 examination did not qualify his findings of muscle weakness and spasticity and did not describe the reduced two-point discrimination at L4 and L5 dermatomes at either unilateral or bilateral. Dr. Ugokwe further related that Dr. Reppy's November 17, 2022 report did not include findings from a comprehensive physical examination and merely reported a moderate sensory deficit of L5 based on the NCV testing. He again determined that appellant had not established a permanent

impairment of the lower extremities due to her accepted lumbar spine conditions and that the A.M.A., *Guides* did not provide for ROM methodology for the diagnosed conditions.

By *de novo* decision dated November 6, 2023, OWCP denied appellant's schedule award claim. It found that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ and its implementing regulations⁷ 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.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

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.¹⁰

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.¹¹ Furthermore, the back is specifically excluded from the definition of organ under FECA.¹² 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

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at 10.404(a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ *Id.* at Chapter 2.808.6f (March 2017); *see D.J.*, Docket No. 19-0352 (issued July 24, 2020).

¹¹ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see B.M.*, Docket No. 19-1069 (issued November 21, 2019); *B.W.*, Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹² *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.¹³

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."¹⁴ 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.¹⁵

ANALYSIS

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

In a November 17, 2022 impairment evaluation, Dr. Reppy, appellant's attending physician, relied upon his previous examination findings of burning low back pain and numbness in her left leg and feet with spasticity in the paralumbar musculature and the April 6, 2022 NCV test results. Referencing *The Guides Newsletter*, he found 5 percent sensory deficit and 9 percent motor deficit at L5 bilaterally, for a total impairment of 14 percent.

Dr. Ugokwe, the DMA, disagreed with Dr. Reppy in his May 25, 2023 and October 13, 2023 reports determining that no motor or sensory deficit was explicitly listed on neurological examination and the medical evidence included only a moderate sensory deficit of L5 based on the NCV testing. He concluded that she had no ratable permanent impairment of the lower extremities originating in the spine.

On June 14 and 15, 2023 Dr. Reppy reviewed DMA's findings that appellant was neurologically intact, and again related that she exhibited leg weakness and buckling, reduced two-point discrimination in the L4 and L5 dermatomes, and significant chronic spasticity.

As the physicians' opinions are of equal weight regarding their interpretation of the A.M.A., *Guides*, the Board finds that a conflict exists between Dr. Reppy and the DMA, Dr. Ugokwe, regarding the extent of appellant's permanent impairment of the lower extremities due to her lumbar spine condition, necessitating referral to an impartial medical examiner (IME) for resolution of the conflict in accordance with 5 U.S.C. § 8123(a).¹⁶

On remand, OWCP shall refer appellant, along with an updated SOAF and the medical record, to a specialist in the appropriate field of medicine, to serve as an IME, for a reasoned

¹³ *Supra* note 9 at Chapter 3.700. *The Guides Newsletter* is included as Exhibit 4.

¹⁴ 5 U.S.C. § 8123(a).

¹⁵ 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).

¹⁶ 5 U.S.C. § 8123(a). *See also S.L.*, Docket No. 24-0522 (issued June 17, 2024); *S.G.*, Docket No. 24-0529 (issued June 12, 2024).

opinion regarding the extent of permanent impairment of her lower extremities.¹⁷ 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.

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2023 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: September 6, 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

¹⁷ See *S.W.*, Docket No. 22-0917 (issued October 26, 2022); *K.D.*, Docket No. 19-0281 (issued June 30, 2020).