

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

_____)	
J.F., Appellant)	
)	
and)	Docket No. 24-0568
)	Issued: September 18, 2024
DEPARTMENT OF THE ARMY, TANK- AUTOMOTIVE AND ARMAMENTS COMMAND, ANNISTON ARMY DEPOT, Anniston, AL, 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
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 6, 2024 appellant filed a timely appeal from a January 4, 2024 merit decision and an April 29, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.2(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). The Board in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can be adequately 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish permanent impairment of a scheduled member, warranting a schedule award; and (2) whether OWCP properly denied appellant's request for oral argument before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On March 31, 2021 appellant, then a 60-year-old heavy mobile equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that on March 15, 2021 he injured his lower back and legs while in the performance of duty.³ He indicated that he was scraping painted numbers from a container when he felt pain in his lower back with tingling and numbness down both of his legs into his feet. Appellant stopped work on March 19, 2021 and returned to work on March 29, 2021.⁴ OWCP accepted the claim for sprain of ligaments of the lumbar spine.

A July 27, 2021 computerized tomography (CT) scan of the lumbar spine revealed disc bulging at L2-3, L4-5, and L5-S1 and anterior spurring and a posterior herniation of intervertebral disc with bilateral neural foraminal stenosis, right greater than left, at L3-4.

A March 18, 2022 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated mild disc space narrowing, disc desiccation, and diffuse disc bulging at L3-4 contributing to moderate bilateral neural foraminal compromise.

On November 9, 2022 appellant underwent OWCP-authorized surgery to his lower back performed by Dr. R. Cem Cezayirli, a Board-certified neurosurgeon, including far lateral partial hemilaminectomy at L3-4 with removal of herniated disc and microdissection with operating microscope.

On August 24, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a development letter dated August 29, 2023, OWCP requested that appellant submit an impairment evaluation from his attending physician addressing whether he had obtained maximum medical improvement (MMI) and providing a permanent impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ It afforded him 30 days to submit the necessary evidence. No response was received within the allotted time frame.

³ OWCP assigned the present claim OWCP File No. xxxxxx596. Appellant has a previously accepted traumatic injury claim for an October 30, 2006 aggravation of sprain of back lumbar region under OWCP File No. xxxxxx629. OWCP has not administratively combined OWCP File Nos. xxxxxx596 and xxxxxx629.

⁴ Appellant retired from federal service, effective January 9, 2023.

⁵ A.M.A., *Guides* (6th ed. 2009).

On November 15, 2023 OWCP referred appellant, a statement of accepted facts (SOAF), the medical record, and a series of questions, to Dr. Alexander Doman, a Board-certified orthopedic surgeon, for a second opinion examination and impairment rating evaluation.

In a December 5, 2023 report, Dr. Doman noted that the claim was accepted for a sprain of the lumbar spine and that appellant had a prior history of low back issues since 2006. He reviewed the medical record and SOAF and performed a physical examination, which revealed a well-healed surgical scar and equal deep tendon reflexes bilaterally, negative straight leg raise bilaterally, no atrophy, normal strength in the various muscle groups of the lower extremities, and normal strength of dorsiflexion and plantar flexion of both ankles. Dr. Doman indicated that he performed sensory testing of the lower extremities and found no dermatomal sensory loss. He noted that appellant claimed to have increased back pain with light pressure over the subcutaneous tissue of the lumbar spine and with mild axial compression and minimal pelvis rotation, which he indicated was evidence of subjective symptom magnification. Dr. Doman opined that appellant reached MMI on December 5, 2023, the date of his evaluation. He referenced the sixth edition of the A.M.A., *Guides*, and given his clinical examination of the lower extremities, he did not find a ratable impairment of the lower extremities.

By decision dated January 4, 2024, OWCP denied appellant's schedule award claim, finding that he had not met his burden of proof to establish permanent impairment of a scheduled member or function of the body. It noted that Dr. Doman concluded that permanent impairment did not exist, because no ratable condition was discerned in the clinical examination of both lower extremities.

By decision dated March 22, 2024, OWCP expanded its acceptance of the claim to include intervertebral disc disorders and other spondylosis with radiculopathy of the lumbar region, generalized muscle weakness, and muscle spasm of the back.

On April 22, 2024 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review with respect to OWCP's January 4, 2024 decision.

By decision dated April 29, 2024, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence not previously considered which would establish that he sustained a permanent impairment of a scheduled member due to his accepted employment injury.

LEGAL PRECEDENT -- ISSUE 1

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.⁶

⁶ 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).

The schedule award provisions of FECA⁷ and its implementing regulations⁸ 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. OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

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.¹⁰ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹¹ The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. 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.¹²

In addressing lower extremity impairment due to peripheral or spinal nerve root involvement, the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* require identifying the class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).¹³ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁴

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.¹⁵

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ 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).

¹⁰ 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).

¹¹ *Supra* note 9 at Chapter 2.808.5c(3) (March 2017).

¹² *Supra* note 9 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).

¹³ A.M.A., *Guides* 494-531; *see R.V.*, Docket No. 20-0005 (issued December 8, 2020); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹⁴ A.M.A., *Guides* 521.

¹⁵ *Supra* note 9 at Chapter 2.808.6f (March 2017). *See also P.W.*, Docket No. 19-1493 (issued August 12, 2020); *Frantz Ghassan*, 57 ECAB 349 (2006).

ANALYSIS -- ISSUE 1

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

OWCP referred appellant to Dr. Doman for a second opinion evaluation regarding permanent impairment due to his accepted March 15, 2021 employment injury in accordance with the sixth edition of the A.M.A., *Guides*. In a December 5, 2023 report, Dr. Doman noted his review of the record and examination findings. He referenced the sixth edition of the A.M.A., *Guides*, and did not find a ratable impairment of the lower extremities.

As noted above, 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*, including rationale for the percentage of impairment specified.¹⁶ Upon receipt of the December 5, 2023 report of Dr. Doman, however, OWCP did not route the file to an OWCP medical adviser. The Board has held that, while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁷ Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁸

Accordingly, the case must be remanded for further development. On remand, OWCP shall refer the case record, including the December 5, 2023 report by Dr. Doman, and SOAF, to an OWCP medical adviser for an opinion as to whether the accepted employment conditions resulted in any permanent impairment of a scheduled member according to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*). After this and other such further proceedings as deemed necessary, OWCP shall issue a *de novo* decision.¹⁹

CONCLUSION

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

¹⁶ *Id.*

¹⁷ *See D.V.*, Docket No. 17-1590 (issued December 12, 2018); *Russell F. Polhemus*, 32 ECAB 1066 (1981).

¹⁸ *See A.K.*, Docket No. 18-0462 (issued June 19, 2018); *Robert F. Hart*, 36 ECAB 186 (1984).

¹⁹ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the January 4, 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: September 18, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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