United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 12-472**
	)	**Issued: December 27, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Hartford, CT, Employer	)	

Appearances:
John J. Flanagan, Esq., for the appellant
No appearance, for the Director

Oral Argument November 27, 2012

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 3, 2012 appellant, through her attorney, filed a timely appeal of the July 7, 2011 schedule award 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 schedule award case.

ISSUE

The issue is whether appellant has more than nine percent impairment of the left lower extremity, for which she received a schedule award.

On appeal, counsel contends that appellant is entitled to an additional schedule award based on a worsening of her condition, two additional surgeries that she underwent in 2003 and 2004 and the medical opinion of Dr. William F. Brennan, an attending Board-certified orthopedic surgeon, that she has 32 percent impairment of the left lower extremity and 12

[1] 5 U.S.C. § 8101 *et seq.*

percent whole person impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

FACTUAL HISTORY

OWCP accepted that on January 23, 1997 appellant, then a 37-year-old distribution window clerk, sustained displacement of the lumbar intervertebral disc without myelopathy, sciatica and lumbar strain while in the performance of duty. It authorized a laminectomy and discectomy at L5-S1 which was performed on July 15, 1997 and May 19, 1998 and a scar revision which was performed on June 9, 1999.

In a June 11, 2001 decision, OWCP granted appellant a schedule award for nine percent impairment to the left leg.[2]

OWCP authorized a revision laminectomy and discectomy at L5-S1 which appellant underwent on September 16, 2003.

On January 24, 2010 appellant filed a claim for an additional schedule award. In a February 24, 2010 medical report, Dr. Brennan indicated that he had treated appellant's lumbar disc herniation since 2009. She had undergone multiple lumbar fusion and decompression procedures. Dr. Brennan advised that appellant had reached maximum medical improvement. She had weakness in the left lower extremity, ankle dorsiflexion and plantar flexion. Appellant also had numbness in the left foot. Positive straight leg raise on the left was 60 degrees. Appellant had a spasm in the lumbar spine with limited mobility on the extremes of motion. Dr. Brennan determined that she had 12 percent impairment of the whole person under the fifth edition of the A.M.A., *Guides*.

By letter dated April 6, 2010, OWCP advised Dr. Brennan that a schedule award could not be paid for impairment to the back or whole body. It noted that a schedule award was payable for impairment to the lower extremities. OWCP requested that Dr. Brennan conduct a medical evaluation to determine the extent of impairment to the lower extremities under the sixth edition of the A.M.A., *Guides*. He was also requested to provide a date of maximum medical improvement.

In an April 28, 2010 report, Dr. Brennan provided a history of appellant's medical treatment and noted her continued pain in the lower back and left leg and weakness and numbness in the leg. He reviewed a lumbar magnetic resonance imaging (MRI) scan which showed degenerative disc disease with neurofibrosis at L5-Sl. On physical examination, Dr. Brennan found persistent left leg and foot numbness with weakness in the left leg. The lumbar spine spam had limited mobility. Dr. Brennan advised that appellant's current condition remained disc disease status post laminectomy and failed back syndrome with radicular features

[2] OWCP subsequently accepted that appellant sustained a recurrence of disability on August 28, 2002 and June 24, 2004. Appellant returned to modified-duty work on several occasions. On October 23, 2006 she accepted the employing establishment's job offer for a modified sales service and distribution associate. In a May 30, 2007 decision, OWCP reduced her compensation effective May 13, 2007 based on its determination that her actual earnings as a modified sales service and distribution associate fairly and reasonably represented her wage-earning capacity.

into the left leg. She could work four hours a day, five days a week with restrictions.[3] Dr. Brennan, therefore, stated that appellant was unable to work at a retail service window. He advised that she reached maximum medical improvement in the beginning of 2009. Dr. Brennan determined that appellant had 32 percent impairment of the left lower extremity and 12 percent whole person impairment under the sixth edition of the A.M.A., *Guides*.

In a February 8, 2011 report, Dr. Christopher R. Brigham, Board-certified in occupational medicine and an OWCP medical adviser, noted appellant's history and reviewed the medical record, including Dr. Brennan's findings. He utilized the A.M.A., *Guides* and determined that appellant reached maximum medical improvement on January 5, 2009, the date determined by Dr. Brennan.[4] Dr. Brigham explained that Dr. Brennan's objective findings did not support his impairment rating. He noted that his findings did not substantially comply with the A.M.A., *Guides*. Dr. Brigham further noted that Dr. Brennan did not provide any rationale to support his impairment rating. For motor deficit, he referred to Proposed Table 2, Spinal Nerve Impairment: Lower Extremity Impairments set forth in *The Guides Newsletter* July/August 2009. Dr. Brigham determined that appellant had a class 1 impairment for mild motor deficit related to the 4/5 weakness in the S1 distribution with a default impairment of three percent of the leg. He referred to section 16.3a, Adjustment Grid -- Functional History and Table 16-6, Functional History Adjustment -- Lower Extremities, and determined that, appellant was assigned a grade modifier 1 based on reported complaints but no need for an assistive device.[5] He referred to section 16.3b, Adjustment Grid -- Physical Examination, and advised that physical examination adjustment was excluded since this factor was used to place in the correct diagnostic class.[6] Dr. Brigham referred to section 17.3c, Adjustment Grid -- Clinical Studies, and Table 16-8, Clinical Studies Adjustment -- Spine, and advised that appellant was assigned a grade modifier 2, based on imaging studies confirming mild pathology with disc injury and S1 nerve pathology.[7] Dr. Brigham determined that net adjustment compared to diagnosis class 1 equated to +1, which warranted a grade D and translated into four percent left leg impairment for motor deficit.

For sensory deficit, Dr. Brigham referred to Proposed Table 2, Spinal Nerve Impairment, and found a class 1 rating for mild sensory deficit related to the diminished sensation in the S1 distribution which translated to a default impairment of one percent left leg impairment. He referred to section 16.3a, Adjustment Grid - Functional History, and Table 16-6, Functional History Adjustment -- Lower Extremities[8] and advised that appellant was not assigned a grade modifier as this was used in the motor adjustment. Regarding, section 16.3b, Adjustment Grid --

[3] Appellant retired from the employing establishment on disability effective April 14, 2011.

[4] In a January 5, 2009 report, Dr. Brennan noted appellant's continuing low back and left foot symptoms. He did not expect much change in her condition. Dr. Brennan concluded that appellant could continue working part time with her same restrictions.

[5] A.M.A., *Guides* 516.

[6] *Id.* at 517.

[7] *Id.* at 518, 519.

[8] *Id.* at 516.

Physical Examination,[9] Dr. Brigham noted that physical examination adjustment was excluded as this was used to place in the correct diagnostic class. He referred to section 17.3c, Adjustment Grid -- Clinical Studies and Table 16-8, Clinical Studies Adjustment -- Spine, and advised that appellant was assigned grade modifier 2, based on imaging studies confirming mild pathology with disc injury and S1 nerve pathology.[10] Dr. Brigham determined that the net adjustment compared to diagnosis class 1 was +1, which was equivalent to a grade D and translated into one percent lower extremity impairment. He combined the four percent impairment for motor deficit and one percent for sensory deficit on the left to calculate a five percent left leg impairment.[11]

In a February 9, 2011 decision, OWCP denied appellant's claim for an additional schedule award based on Dr. Brigham's February 8, 2011 opinion.

On February 17, 2011 appellant, requested an oral hearing before an OWCP hearing representative.

By letters dated March 18 and May 2, 2011, Dr. Brennan reiterated his prior opinion that appellant had 32 percent impairment of the left lower extremity due to pain and weakness under the sixth edition of the A.M.A., *Guides*. In the March 18, 2011 letter, he stated that "I am not familiar with how to work out the permanent impairment worksheet. This [is] something I have never done and I am not willing to do it."

In a July 7, 2011 decision, an OWCP hearing representative affirmed the February 9, 2011 decision, finding that the evidence submitted was insufficient to outweigh the weight accorded to Dr. Brigham's opinion.

LEGAL PRECEDENT

The schedule award provision of FECA,[12] and its implementing federal regulations,[13] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions and organs of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[14] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[15] Effective May 1, 2009,

[9] *Id.* at 517.

[10] *Id.* at 518, 519.

[11] *Id.* at 604.

[12] 5 U.S.C. § 8107.

[13] 20 C.F.R. § 10.404.

[14] *Ausbon N. Johnson*, 50 ECAB 304 (1999).

[15] 20 C.F.R. § 10.404; *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

FECA adopted the sixth edition of the A.M.A., *Guides*[16] as the appropriate edition for all awards issued after that date.[17]

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.[18] Neither FECA nor the implementing regulations authorize the payment of a schedule award for the permanent loss of use of the back or spine.[19] The Board has recognized that a claimant may be entitled to a schedule award for a permanent impairment to an extremity even though the cause of the impairment originates in the back or spine.[20]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.[21] OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures.[22]

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[23] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[24]

ANALYSIS

OWCP accepted appellant's claim for displacement of the lumbar intervertebral disc without myelopathy, sciatic and lumbar strain. On June 11, 2011 appellant received a schedule award for nine percent impairment of the left lower extremity. The Board finds that she did not meet her burden of proof to establish greater impairment.

On April 28, 2010 appellant's attending physician, Dr. Brennan, opined that appellant reached maximum medical improvement in the beginning of 2009. He based his opinion on findings of numbness and weakness of the left lower extremity and limited mobility of the lumbar spine. Without supporting documentation, Dr. Brennan determined that appellant had 32

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

[17] Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[18] *William Edwin Muir*, 27 ECAB 579 (1976); *C.E.*, Docket No. 11-637 (issued October 14, 2011).

[19] FECA specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

[20] *F.W.*, Docket No. 11-191 (issued October 17, 2011); *see also Thomas J. Englehart*, 50 ECAB 319 (1999).

[21] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[22] FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, *supra* note 11.

[23] A.M.A., *Guides* at 494-531.

[24] *Id.* at 521.

percent impairment of the left lower extremity and 12 percent impairment of the whole person under the sixth edition of the A.M.A., *Guides*. He concluded that she could continue to work four hours a day, five days a week with her current restrictions. In letters dated March 18 and May 2, 2011, Dr. Brennan reiterated his opinion that appellant had 32 percent impairment of the left lower extremity. The Board notes that in his March 18, 2011 letter, Dr. Brennan stated that he did not know how to use an impairment worksheet and refused to use it to rate appellant's impairment. The Board finds that the summary report and letters are insufficient to constitute the weight of the medical opinion evidence for schedule award purposes as Dr. Brennan did not explain his finding with reference to tables in the sixth edition of the A.M.A., *Guides*. Further, the Board notes that FECA does not authorize schedule awards for loss of use of the body as a whole.[25]

It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment and OWCP may rely on the opinion of its OWCP medical adviser to apply the A.M.A., *Guides* to the findings of the attending physician.[26] Dr. Brigham, the medical adviser, reviewed the medical record and found that appellant had five percent impairment of the left lower extremity.[27] He also found that appellant reached maximum medical improvement on January 5, 2009. Dr. Brigham correctly stated that Dr. Brennan's findings did not comport with the A.M.A., *Guides* and that he failed to provide an explanation for his opinion that appellant had 32 percent impairment of the left lower extremity.

For motor deficit, Dr. Brigham referred to Proposed Table 2, Spinal Nerve Impairment: Lower Extremity Impairments. He noted that appellant had a class 1 impairment for mild motor deficit related to the 4/5 weakness in the S1 distribution with a default impairment of three percent of the leg. Dr. Brigham referred to section 16.3a, Adjustment Grid -- Functional History and Table 16-6, Functional History Adjustment -- Lower Extremities, and assessed a grade modifier 1 based on reported complaints but no need for an assistive device.[28] He referred to section 16.3b, Adjustment Grid -- Physical Examination and advised that physical examination adjustment was excluded since this factor was used to place in the correct diagnostic class.[29] Dr. Brigham referred to section 17.3c, Adjustment Grid -- Clinical Studies, and Table 16.8, Clinical Studies Adjustment -- Spine, and assessed a grade modifier 2, based on imaging studies confirming mild pathology with disc injury and S1 nerve pathology.[30] He determined that net adjustment for the above modifiers compared to diagnosis class 1 was +1, which warranted a grade D and translated into four percent left leg impairment for motor deficit.

[25] *D.A.*, Docket No. 10-2172 (issued August 3, 2011); *J.Q.*, 59 ECAB 366 (2008).

[26] *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[27] The Board notes that it is appropriate for an OWCP medical adviser to review the clinical findings of the treating physician to determine the permanent impairment. *See* Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 3.700.3.

[28] A.M.A., *Guides* 516.

[29] *Id.* at 517.

[30] *Id.* at 518, 519.

Regarding a sensory deficit, Dr. Brigham explained that in Proposed Table 2, Spinal Nerve Impairment, appellant had a class 1 rating for mild sensory deficit related to the diminished sensation in the S1 distribution, which translated to a default impairment of one percent left leg impairment. He referred to section 16.3a, Adjustment Grid -- Functional History, and Table 16-6, Functional History Adjustment -- Lower Extremities and advised that appellant was not assigned a grade modifier as this was used in the motor adjustment.[31] Regarding, section 16.3b, Adjustment Grid -- Physical Examination, Dr. Brigham noted that physical examination adjustment was excluded as this was used to place in the correct diagnostic class.[32] He referred to section 17.3c, Adjustment Grid -- Clinical Studies and Table 16.8, Clinical Studies Adjustment -- Spine, and advised that appellant was assigned grade modifier 2, based on imaging studies confirming mild pathology with disc injury and S1 nerve pathology.[33] Dr. Brigham determined that the net adjustment for the above modifiers compared to diagnosis class 1 was +1, which was equivalent to a grade D and translated into one percent lower extremity impairment. He combined the four percent impairment for motor deficit and one percent for sensory deficit to arrive at five percent left leg impairment.[34]

The Board finds that Dr. Brigham's February 8, 2011 report properly applied the findings of Dr. Brennan to the A.M.A., *Guides*, and establishes that appellant has no more than nine percent permanent impairment of his left lower extremity under the sixth edition of the A.M.A., *Guides*.

On appeal, appellant's attorney contended that appellant was entitled to an additional schedule award based on a worsening of her condition, two additional surgeries that she underwent in 2003 and 2004 and Dr. Brennan's opinion that she had 32 percent impairment of the left lower extremity and 12 percent whole person impairment under the sixth edition of the A.M.A., *Guides*. However, as stated, Dr. Brennan's report was found to be insufficiently rationalized to establish that appellant had more than nine percent impairment of the left lower extremity. He failed to provide an explanation for his 32 percent left lower extremity impairment rating under the sixth edition of the A.M.A., *Guides*. Further, as stated, the whole person impairment rating is not authorized for a schedule award under FECA.[35] Dr. Brigham provided a left lower extremity impairment rating in conformance with the A.M.A., *Guides* and based on Dr. Brennan's findings. His report is sufficient to establish that appellant had no more than nine percent impairment of the left lower extremity.

Also, on appeal, counsel submitted additional evidence. The Board does not have jurisdiction to consider evidence for the first time on appeal.[36]

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[31] *Id.* at 516.

[32] *Id.* at 517.

[33] *Id.* at 518, 519.

[34] *Id.* at 604.

[35] *See* cases cited, *supra* note 25.

[36] *See* 20 C.F.R. § 501(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has failed to establish that she has more than nine percent impairment of the left lower extremity, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 27, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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