

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

C.T., Appellant)

and)

**DEPARTMENT OF DEFENSE, STEVENS)
ELEMENTARY SCHOOL, Fort Benning, GA,)
Employer)**

**Docket No. 12-295
Issued: June 11, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 28, 2011 appellant, through her attorney, filed a timely appeal from the October 18, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for a schedule award. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that she sustained permanent impairment to a scheduled member due to her accepted back conditions.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated November 1, 2010, the Board affirmed OWCP's October 29, 2009 decision terminating appellant's compensation

¹ 5 U.S.C. § 8101 *et seq.*

benefits on the grounds that she was no longer disabled due to her accepted injury. The facts and law contained in that decision are incorporated herein by reference.² Relevant facts are detailed below.

OWCP accepted appellant's November 12, 2003 traumatic injury claim for lumbar subluxation, sacroiliitis and lumbar disc disorder without myelopathy. Appellant underwent approved lumbar surgery in 2006. On October 29, 2009 OWCP terminated her compensation benefits based upon the March 14, 2008 referee report of Dr. Graham Howarth, a Board-certified orthopedic surgeon, who opined that she was no longer disabled due to her accepted conditions.

On February 25, 2011 appellant submitted a schedule award claim. By letter dated March 4, 2009, OWCP informed her that she should provide a physician's rating of impairment to the lower extremities, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).³ Appellant did not submit any additional medical evidence within the 30-day period.

By decision dated April 14, 2011, OWCP denied appellant's claim for a schedule award, finding that she had not provided the requested medical evidence.

On April 20, 2011 appellant, through her attorney, requested a telephonic hearing. In a June 30, 2011 report, Dr. Gary Dawson, a Board-certified psychiatrist, found decreased cervical range of motion and limited active lumbar range of motion. Pain was elicited with back extension and tenderness with palpation. Dr. Dawson opined that appellant would experience pain indefinitely and was totally disabled from working in any capacity.

The record contains a July 7, 2011 magnetic resonance imaging (MRI) scan of the lumbar spine. The report revealed degenerative end-plate marrow changes anteriorly from T9 to S1 and throughout the end-plates at L4-5 and L5-S1; disc bulges at T9 to T12-L1; degenerative facet disease bilaterally at T12-L1; and a mild broad-based disc bulge at L1 -2. At L2-3 there was a mild broad-based disc bulge; degenerative facet disease bilaterally; and mild-to-moderate effacement of the thecal sac with mild-to-moderate central canal stenosis. At L3-4 there was a mild broad-based disc protrusion extending to the foramina asymmetrically more prominent within the left foramen; degenerative facet disease; and mild central canal stenosis. At L4-5 the report reflected approximately 0.8 cm. anterior spondylolisthesis; right foraminal stenosis; right foraminal osteophytes; and intervertebral graft. At L5-S1, there was approximately 0.1 to 0.2 cm. anterior spondylolisthesis of L5 on L1; a mild disc bulge; and small foraminal osteophytes bilaterally. The report contained an impression of right foraminal stenosis at L4-5; mild-to-moderate central canal stenosis at L2-3; and additional multilevel findings as noted.

At the August 9, 2011 hearing, counsel contended that the medical evidence, which included a July 5, 2011 report from Dr. Dawson, was sufficient to establish that appellant sustained a permanent impairment of her left lower extremity. OWCP's hearing representative

² Docket No. 10-513 (issued November 1, 2010).

³ A.M.A., *Guides* (6th ed. 2009).

informed counsel that the record did not contain a copy of Dr. Dawson's July 5, 2011 report and left the record open for 30 days for submission.

Appellant submitted the July 5, 2011 report from Dr. Dawson, who stated that she reached maximum medical improvement on June 29, 2011. On examination, extension was 0 degrees, active flexion was 40 degrees and rotation was 5 degrees. There was some muscle atrophy of the paraspinal muscles. Appellant had a positive left straight leg maneuver and sensory deficits in the left L5 dermatome. Dr. Dawson stated that she had constant lumbar and left radicular pain. There was stiffness, leg weakness and pain with standing, sitting, walking and lifting. He opined that appellant had a 50 percent left lower extremity impairment and a 25 percent whole body impairment.

By decision dated October 18, 2011, OWCP's hearing representative found the medical evidence insufficient to establish a compensable permanent impairment and affirmed the April 14, 2011 decision.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing federal regulations⁵ 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. 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.⁶ For decisions from February 1, 2001 through April 30, 2009, the fifth edition of the A.M.A., *Guides* was used to calculate schedule awards.⁷ For decisions issued after May 1, 2009, the sixth edition will be used.⁸

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.⁹ In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine.¹⁰ In determining the amount of the

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009); *see also id.* at Chapter 3.700, Exhibit 1 (January 2010).

⁹ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹⁰ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included in the evaluation of permanent impairment.¹¹ FECA does not authorize schedule awards for permanent impairment of the whole person.¹²

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the district 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.¹³

ANALYSIS

The Board finds this case is not in posture for decision. Dr. Dawson's July 5, 2011 report included an impairment rating for appellant's left lower extremity, as well as a whole person impairment. As noted, a schedule award is not payable under FECA for injury to the spine,¹⁴ and FECA does not authorize schedule awards for permanent impairment of the whole person.¹⁵ Dr. Dawson provided physical examination findings including positive left straight leg maneuver and sensory deficits in the left L5 dermatome. He noted that appellant had constant lumbar and left radicular pain, as well as stiffness, leg weakness and pain with standing, sitting, walking and lifting. A claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.¹⁶

In this case, OWCP's hearing representative found that the record did not support permanent impairment. OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the district medical adviser for an opinion concerning the nature and percentage of any impairment in accordance with the A.M.A., *Guides*.¹⁷ In this case, none of the medical evidence was forwarded to the district medical adviser for review. For these reasons, the October 18, 2011 decision will be set aside and the case remanded to OWCP for review of the medical record by the district medical adviser. Following such development as OWCP deems necessary, it shall issue an appropriate merit decision.

CONCLUSION

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

¹¹ *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

¹² *D.J.*, 59 ECAB 620 (2008).

¹³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

¹⁴ *Supra* note 9.

¹⁵ *Supra* note 12.

¹⁶ *Supra* note 10.

¹⁷ *Supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2011 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: June 11, 2012
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board