

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

P.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dodge City, KS, Employer**

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**Docket No. 12-99
Issued: May 16, 2012**

Appearances:
Appellant, pro se
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 October 24, 2011 appellant filed a timely appeal from an August 23, 2011 merit decision of an Office of Workers' Compensation Programs' (OWCP) hearing representative that affirmed 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 the schedule award decision.

ISSUE

The issue is whether appellant met her burden of proof to establish more than a 13 percent impairment of the right lower extremity for which she received a schedule award.

On appeal, appellant asserts that she is entitled to a schedule award for the accepted herniated disc at L4-5 and that an April 25, 1997 loss of wage-earning capacity decision was in error.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 22, 1996 OWCP accepted that appellant, then a 43-year-old distribution clerk, sustained an employment-related herniated disc at L4-5 and authorized a lumbar laminectomy performed by Dr. Guillermo Garcia, an orthopedic surgeon, on July 17, 1996. She returned to modified duty on September 19, 1996. By decision dated April 25, 1997, OWCP found that appellant's actual wages as a postal clerk fairly and reasonably represented her wage-earning capacity with zero loss. By decisions dated September 14, 2009 and January 15, 2010, it denied modification of the April 25, 1997 wage-earning capacity decision.

On June 16, 2010 appellant filed a schedule award claim. In a July 13, 2010 letter, OWCP informed her that the most recent medical evidence of record was a January 19, 2007 report from Dr. Garcia. It asked that appellant provide an impairment evaluation in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² Appellant submitted a June 24, 2010 report, in which Sally Greger, a nurse practitioner, provided physical findings regarding appellant's neck and upper extremities and diagnosed a disc protrusion at C5-6. She retired effective August 27, 2010.³

OWCP referred appellant to Dr. Michael J. Johnson, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a December 15, 2010 report, Dr. Johnson reviewed the medical record and statement of accepted facts. He listed appellant's complaint of low back pain radiating into her right thigh with occasional numbness. On physical examination of the lumbar spine there was no evidence of spasm, swelling, mass or tenderness to palpation and no evidence of lower extremity atrophy. Straight-leg raising was positive on the right. Dr. Johnson diagnosed L4-5 herniated disc with discectomy/laminectomy on July 17, 1996 and advised that, under Table 17-4 of the A.M.A., *Guides*, appellant had a five percent lower extremity impairment. In an addendum report, he advised that her date of maximum medical improvement was September 19, 1996 when she was released to return to work with restrictions. Regarding appellant's impairment rating, Dr. Johnson found that, under Table 16-12, she was class 1 with a default grade of C. He then applied the net adjustment formula, finding a grade of E. Dr. Johnson concluded that appellant had a mild motor weakness and loss of reflexes for a 9 percent lower extremity impairment of the tibial nerve and 13 percent impairment of the sciatic nerve which, when combined, yielded a 21 percent lower extremity impairment.

On January 27, 2011 Dr. Daniel D. Zimmerman, an OWCP medical adviser, reviewed Dr. Johnson's rating. He advised that Dr. Johnson's date of maximum medical improvement could not be accepted because he did not reference the relevant history or examination findings from that period. Dr. Zimmerman further advised that Dr. Johnson erred by not following

² A.M.A., *Guides* (6th ed. 2008).

³ On August 24, 2010 appellant filed a recurrence claim, asserting that she sustained a recurrence of disability on June 6, 2009 based on the national reassessment process. By letter dated September 14, 2010, OWCP informed her to follow the appeal rights found in the September 14, 2009 and January 15, 2010 decisions. On September 20, 2010 appellant asked that her wage-earning capacity decision be modified, asserting that the position on which it was based was odd-lot and make-shift, designed for her particular medical needs and not available in the general labor market. Matters regarding her wage-earning capacity are not before the Board on the present appeal.

instructions found on page 496 of the A.M.A., *Guides* which state that, if multiple diagnoses are being rated, the examiner should consider the relative contribution of each and only the limb impairment with the highest rating should be considered. The medical adviser noted that the only neurologic abnormality reported in the right lower extremity was decreased knee and ankle reflexes. He agreed with Dr. Johnson's findings regarding the sciatic nerve, concluding that, under Table 16-12, appellant had a motor deficit of 9 percent and a sensory deficit of 4 percent, for a total right lower extremity impairment of 13 percent. In a February 4, 2011 report, he advised that the date of maximum medical improvement was December 15, 2010, the date of Dr. Johnson's report.

By decision dated February 18, 2011, appellant was granted a schedule award for 13 percent of the right leg or a total of 37.44 weeks, to run from December 15, 2010 to September 3, 2011.

Appellant timely requested a hearing, that was held on June 28, 2011. At the hearing she asserted that she did not agree with the amount or period of the schedule award. The hearing representative explained the schedule award process and advised appellant that she could file for a new schedule award based on medical evidence showing increased impairment.

In an August 23, 2011 decision, the hearing representative affirmed the February 18, 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, it 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 after February 1, 2001, 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 is to 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

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 (January 2010).

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009).

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

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, as the schedule award provisions of FECA include the extremities, 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.¹⁰

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.¹¹ 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.¹² Specifically, it will address lower extremity impairments originating in the spine through Table 16-11¹³ and upper extremity impairments originating in the spine through Table 15-14.¹⁴

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, 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) and if electrodiagnostic testing were done, Clinical Studies (GMCS).¹⁵ The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).¹⁶

ANALYSIS

The Board finds that appellant has 13 percent impairment of the right leg. OWCP accepted that she sustained an employment-related herniated disc at L4-5. The weight of the medical evidence regarding appellant's right lower extremity impairment rests with the opinions of Dr. Johnson, an OWCP referral physician, and Dr. Zimmerman, an OWCP medical adviser. They are the only impairment evaluations of record that comport with the sixth edition of the A.M.A., *Guides*.¹⁷

In December 15, 2010 addendum report, Dr. Johnson advised that, under Table 16-12, peripheral nerve impairment, appellant had a class 1 impairment which had a default grade of C which, after applying the net adjustment formula, yielded a grade of E which, for the sciatic

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

¹¹ *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹² FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, *supra* note 7.

¹³ A.M.A., *Guides*, *supra* note 2 at 533.

¹⁴ *Id.* at 425.

¹⁵ *Id.* at 533.

¹⁶ *Id.* at 521.

¹⁷ See *I.F.*, Docket No. 08-2321 (issued May 21, 2009) (an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of diminished probative value in determining the extent of permanent impairment).

nerve yielded a 13 percent impairment and for the tibial nerve yielded a 9 percent impairment.¹⁸ Dr. Zimmerman reviewed Dr. Johnson's report and agreed with his conclusion that appellant had a 13 percent right lower extremity impairment based on the sciatic nerve. The medical adviser also properly noted that the A.M.A., *Guides* provide that, if multiple diagnoses are being rated, the examiner should consider the relative contribution of each and the limb impairment with the highest rating should be considered.¹⁹ Dr. Johnson rated the sciatic nerve at 13 percent and the tibial nerve at 9 percent.

The medical evidence of record thus supports that appellant has a 13 percent impairment of the right lower extremity. There is no rationalized medical evidence to support that she has greater impairment under the protocols of the A.M.A., *Guides*.

Regarding appellant's arguments on appeal, a schedule award is not payable under FECA for an injury to the spine.²⁰ As the schedule award provisions of FECA include the extremities, as in this case, 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.²¹ Such is the award appellant received in this case. With regard to her assertion that, the April 25, 1997 wage-earning capacity determination should be modified, OWCP has not issued a final decision of her September 20, 2010 request for modification of the April 25, 1997 decision.²² The Board's jurisdiction is limited to reviewing final decisions of OWCP.²³ It is not an issue presently on appeal.

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

CONCLUSION

The Board finds that appellant did not establish that she has more than a 13 percent impairment of the right lower extremity.

¹⁸ A.M.A., *Guides*, *supra* note 2 at 534-36.

¹⁹ *Id.* at 496.

²⁰ *Pamela J. Darling*, *supra* note 9.

²¹ *Thomas J. Engelhart*, *supra* note 10.

²² *Supra* note 3.

²³ 20 C.F.R. § 501.2(c); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 16, 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