United States Department of Labor
Employees' Compensation Appeals Board

L.T., Appellant	)	
and	)	**Docket No. 13-1290**
	)	**Issued: December 18, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Coatesville, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 7, 2013 appellant, through her attorney, filed a timely appeal from a February 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding her schedule award claim. 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 the claim.

ISSUE

The issue is whether appellant has greater than four percent right lower extremity impairment, for which she received a schedule award.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On May 19, 2010 appellant, then a 49-year-old psychiatric practical nurse, filed a traumatic injury claim alleging that she injured her back on May 9, 2010 while transporting a patient from a chair to the bed. OWCP accepted the claim for herniated lumbar disc at L5-S1 and paid appropriate benefits, including a January 24, 2011 right-sided L5-S1 microdiscectomy. By decision dated May 9, 2012, it found appellant's position as a medical support assistant effective June 7, 2011 fairly and reasonably represented her wage-earning capacity and reduced her compensation accordingly. Appellant retired on August 31, 2012.

On May 29, 2012 appellant filed a Form CA-7 claim for a schedule award. In a February 15, 2012 report, Dr. David Weiss, an osteopath, noted the history of injury, appellant's medical course and his review of medical records provided. He utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2008) (A.M.A., *Guides*). Dr. Weiss found appellant's equinus gait was carried through with a modicum of difficulty and examination of the lumbosacral spine revealed paravertebral muscular spasms and tenderness over the posterior midline with bilateral posterior superior iliac spine tenderness. Examination revealed lumbar range of motion 80 degrees, backward extension 20/30 degrees, left lateral flexion 20/30 degrees, right lateral flexion 20/30 degrees, with positive straight leg raising test on the right of 80 degrees, 5/5 muscle strength and diminished sensibility over the L4, L5 and S1 dermatomes involving the right lower extremity. Dr. Weiss opined that the May 9, 2010 work-related injury was the cause of appellant's subjective and objective findings and maximum medical improvement was reached on February 16, 2012. He referred to Table 16-12, Peripheral Nerve Impairment.[2] For the right L4 femoral nerve root, Dr. Weiss found appellant had a class 1 sensory deficit. He applied the net adjustment formula and grade modifiers. Dr. Weiss referred to Table 17-6, page 575 and determined the grade modifier functional history was 4; and under Table 16-8, page 519, grade modifier clinical studies was 2. He utilized the net adjustment formula and found GMFH - CDX (3-1) plus GMCS - CDX (2-1) equaled a net adjustment of 3, which resulted in two percent sensory deficit right L4 femoral nerve. For the sensory deficit right L5 and S1 nerve root, Dr. Weiss found under Table 16-12, page 535 a class 1 sensory deficit or four percent. He found grade modifier functional history 3 and grade modifier clinical studies 2. Utilizing the net adjustment formula of GMFH - CDX (3-1) plus GMCS - CDX (3-1) equaled 3, for a net adjustment of three or nine percent.

In a July 15, 2012 report, an OWCP medical adviser noted the history of injury and his review of the medical records, including Dr. Weiss' February 15, 2012 report. He opined that Dr. Weiss' recommendation of 11 percent right lower extremity impairment, which was based upon 9 percent sensory deficit L5-S1 nerve root and 2 percent motor deficit, could not be utilized as the tables did not relate to nerve roots, but rather related only to the nerves that make up multiple nerve roots. The medical adviser explained Dr. Weiss quotes Table 16-12 page 53 and Table 17-6, page 575 in regard to his calculation; however, both tables relate to large nerves that are made up of multiple nerve roots and not the nerve roots themselves and therefore are not applicable. He utilized Dr. Weiss' examination findings and applied them to the *The Guides Newsletter*, July/August 2009. Under Proposed Table 2, page 6, the medical adviser found right

[2] A.M.A., *Guides* 534.

L5 nerve root compression with mild sensory deficit was class 1 with default value one percent. As applied to the grade modifiers, there is no change in the default value of one percent. In regard to mild motor loss, the medical adviser found right L5 nerve root compression with mild motor deficit was class 1 with five percent impairment. Based on the adjustment grid and the grade modifiers, he found an impairment rating of three percent. The medical adviser combined the one percent mild sensory deficit with the three percent L5 mild motor deficit and found four percent impairment of the right lower extremity. He opined that appellant reached maximum medical improvement on February 15, 2012, the date of Dr. Weiss' examination.

By decision dated August 2, 2012, OWCP awarded four percent right lower extremity impairment.

On August 7, 2012 appellant's attorney requested a hearing, which was held on November 29, 2012 by video conference.

In an August 20, 2012 report, Dr. Daniel Kane, a Board-certified physiatrist, performed an electrodiagnostic evaluation. He concluded all nerve conduction studies were excellent and the electromylogram (EMG) testing revealed some chronic L5 nerve root changes with no significant ongoing nerve root loss and no evidence of lumbosacral plexopathy, a peripheral neuropathy, a peroneal nerve injury or myopathy. Dr. Kane indicated that the EMG testing was similar to the testing done in December 2011. A copy of the August 20, 2012 EMG/nerve conduction test was also submitted.

Additionally, a December 16, 2012 follow-up report from Dr. Kenan Aksu was also submitted.[3] He indicated that her chronic radiculopathy worsens at night and experiences spasms of the lower extremity.

By decision dated February 19, 2013, an OWCP hearing representative affirmed the August 2, 2012 decision.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[5] 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] The claimant has the burden of proving

[3] Dr. Aksu's credentials are not of record.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

[6] *Id.*

that the condition for which a schedule award is sought is causally related to his or her employment.[7]

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.[8] 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, 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.[9]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/ August 2009) is to be applied.[10]

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).[11] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[12]

OWCP 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 an OWCP medical adviser providing rationale for the percentage of impairment specified.[13]

ANALYSIS

The Board finds that this case is not in posture for decision. Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the

[7] *Veronica Williams*, 56 ECAB 367, 370 (2005).

[8] *Pamela J. Darling*, 49 ECAB 286 (1998).

[9] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[10] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[11] A.M.A., *Guides* 533.

[12] *Id.* at 521.

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

burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[14]

OWCP accepted appellant's traumatic injury claim for L5-S1 disc herniation and granted a schedule award for four percent permanent impairment of the right lower extremity.

While Dr. Weiss cited various tables in the A.M.A., *Guides* and calculated an impairment rating of 11 percent for the right lower extremity, the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. OWCP has adopted the standard set forth in *The Guides Newsletter*.[15] Dr. Weiss did not utilize the standard set forth in *The Guides Newsletter* or explain why it is was not applicable. Thus, his impairment rating is of reduced probative value.[16]

The medical adviser utilized the standard set forth in *The Guides Newsletter*, but offered no explanation as to how the grade modifiers or net adjustment formula were determined and calculated. Furthermore, the medical adviser failed to explain the basis for his determination. Thus, the medical adviser's opinion is of reduced probative value.

As the medical evidence has not been properly correlated to the applicable provisions of the A.M.A., *Guides*, the case must be remanded for additional development of the medical evidence.[17]

On appeal, appellant's counsel contends several errors with OWCP's decision. However, due to the disposition of the case, counsel's arguments will not be addressed.

CONCLUSION

The Board finds that this case is not in posture for decision. On remand, OWCP should develop the medical evidence in accordance with the A.M.A., *Guides* to determine appellant's permanent impairment for schedule award purposes.

[14] *Horace L. Fuller,* 53 ECAB 775, 777 (2002).

[15] *See L.J.*, Docket No. 10-1263 (issued March 3, 2011).

[16] *James Kennedy, Jr.*, 40 ECAB 620, 627 (1989).

[17] *T.T.*, Docket No. 10-880 (issued November 9, 2010). The Board notes that the medical reports from Dr. Kane and Dr. Aksu are of no probative value with regard to the issue of permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2013 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: December 18, 2013
Washington, DC

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

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

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