United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Wilmington, DE, Employer**	**Docket No. 13-1855** **Issued: July 22, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 6, 2013 appellant filed a timely appeal from a July 1, 2013 decision of the Office of Workers' Compensation Programs (OWCP) which denied her claim for an additional schedule award. 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 case.

ISSUE

The issue is whether appellant has more than 20 percent of the right lower extremity for which she received a schedule award and whether appellant has more than 52 percent impairment of the bladder, or of the uterus/cervix and vulva/vagina, for which she received a schedule award.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On November 28, 1979 appellant, then a 24-year-old mail handler, injured her low back when she was lifting sacks of mail. OWCP accepted an acute lumbosacral strain, displacement of a lumbar intervertebral disc without myelopathy, other urinary incontinence, mononeuritis of the lower limb, decubitus ulcer bilaterally, atony of the bladder, cauda equine syndrome with neurogenic bladder. It authorized surgery and on February 26, 1986 appellant underwent a left hemilaminectomy at L4-5 with excision of nucleus pulposus fragment and on June 12, 1987 she underwent a total laminectomy, L3-4 with removal of right L3-4 herniated disc fragment. Appellant worked intermittently thereafter.

On November 19, 1993 appellant requested a schedule award. On July 18, 1994 an OWCP medical adviser opined that, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment,*[2] appellant had 20 percent impairment to the right leg for severe S1 nerve injury resulting in loss of function due to strength deficit, and 37 percent impairment to the left leg for severe and significant damage to the L5 nerve resulting in motor deficit.

In a decision dated October 31, 1994, OWCP granted her a schedule award for 57 percent impairment to both legs for the period March 16, 1994 to May 8, 1997.

Appellant came under the treatment of Dr. Howard C. Beane, a Board-certified urologist, from September 7, 1989 to July 22, 1994 for a bladder disorder, urge incontinence, secondary to a disc problem in 1987. Dr. Beane diagnosed paralysis and neurogenic bladder secondary to surgery for a ruptured disc in 1987 occurring after unloading mail.

In a June 14, 1995 decision, OWCP granted appellant a schedule award for 52 percent impairment of the bladder and vulva/vagina. The award ran from May 8, 1997 to May 24, 1999.

On May 5, 2010 appellant filed a claim for an additional schedule award. On May 17, 2010 OWCP requested that she submit a report from her treating physician in accordance with the sixth edition of the A.M.A., *Guides*.[3]

Appellant submitted reports from Dr. Jay J. Cho, a Board-certified physiatrist, who treated her for a work-related spinal cord injury. On October 30, 2010 Dr. Cho noted findings of L5-S1, L4 and S1 sensory absence, reduced muscle strength on ankle dorsiflexion was 1/5, plantar flexion was 1/5, hip girdle muscle shows abduction of 4/5, and extension of 4/5, with neurogenic bowel and bladder dysfunction (cauda equine syndrome) which was permanent, flail ankle bilaterally and required medication for her bladder and a urinary bladder catheter. He noted that appellant reached maximum medical improvement from the spinal cord injury and had 56 percent whole body impairment under the sixth edition of the A.M.A., *Guides.* He incorporated a physical therapist's functional capacity evaluation. In an August 12, 2010 report, a physical therapist noted, for lumbar and cauda equine syndrome, appellant was class 3, with a

[2] A.M.A., *Guides* (4th ed. 1993).

[3] *Id.* at (6th ed. 2008).

grade modifier for functional history of 3, the grade modifier for physical examination of 4 for a net adjustment to class E for 33 percent impairment. He noted neurogenic bladder was rated at 20 percent impairment, neurogenic bowel was rated at 10 percent impairment, neurogenic sexual dysfunction was rated at 10 percent for a combined 56 percent whole person impairment.

In a January 13, 2011 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed Dr. Cho's October 30, 2010 report. He noted that FECA did not permit schedule awards for impairment of the spine; but the condition could be considered if it results in impairment to an extremity or other scheduled member. The medical adviser noted that an award may not be made for whole person impairment. Dr. Berman noted that spinal nerve injury could be the basis of impairment awards of an extremity using the July/August 2009 "*The Guides Newsletter*." He referenced the proposed Table 2, Spinal Nerve Impairments, Lower Extremity Impairments, and noted appellant had moderate-to-severe motor deficit of both the right and left lower extremities in the L5 and S1 nerve roots. Appellant had a class 1, grade C of the L5 nerve root with 13 percent impairment of the right lower extremity and 13 percent impairment of the left lower extremity. For the S1 nerve root, she had a class 1, grade C, severe to very severe motor deficit with 13 percent impairment of the right lower extremity and 13 percent impairment of the left lower extremity. Dr. Berman concluded that appellant had 26 percent impairment of the left lower extremity and 26 percent impairment of the right lower extremity or a total impairment of 52 percent.

In a February 16, 2011 decision, OWCP denied appellant's claim for an additional schedule award.

On July 5, 2011 appellant requested reconsideration. She submitted a July 1, 2011 report from Dr. Cho, who noted that the August 12, 2010 physical therapist's report had stated miscalculations. In an April 26, 2011 functional capacity evaluation addendum, the physical therapist noted that the revised impairment calculation for the lumbar spine with cauda equine syndrome was class 4 with grade modifiers for functional history of 3, physical examination of 4 and clinical studies of 4 for a net adjustment value and assigned grade modifier was class E for lumbar impairment of 33 percent. The neurogenic bladder warranted 20 percent impairment, neurogenic bowel 20 percent impairment, sexual dysfunction 10 percent impairment, and dysthetic pain 10 percent impairment. The physical therapist combined these values to find that appellant had 65 percent whole person impairment.

In a decision dated September 7, 2011, OWCP denied modification of the February 16, 2011 decision.

On October 1, 2011 appellant requested reconsideration. She submitted an October 1, 2011 report from Dr. Cho who treated her for paralysis of both ankle muscles, hip girdle muscle weakness, neurogenic bowel and bladder dysfunction also known as cauda equine syndrome. Appellant required bladder medication and a urinary catheter. Dr. Cho noted findings of limited lumbar spine mobility, bilateral foot drop, atrophy below the knees and feet with discoloration, muscle strength in the ankle was 1/5, muscle strength in the hip flexor was 4/5, a practically flail left ankle. Appellant had significant impairment in the pinprick examination in the foot and buttocks due to the spinal cord injury. Dr. Cho noted his 2007 impairment rating of 57 percent

impairment under the fifth edition of the A.M.A., *Guides.* He increased this rating to 65 percent impairment under the sixth edition of the A.M.A., *Guides*. Dr. Cho noted that appellant's condition had progressively deteriorated due to permanent spinal nerve damage causing decreased muscle strength in the ankle and leg and neurological symptoms in the bladder.

In a report dated October 21, 2011, Dr. Berman stated that Dr. Cho's ratings were not consistent with OWCP guidelines, specifically that a whole person impairment was not allowed. He advised that the findings provided by Dr. Cho were no different than on prior examination and advised that the impairment rating was based upon Dr. Cho's physical examination of October 2011. Based on these physical examination findings Dr. Berman opined that appellant had 26 percent impairment to each leg due to moderate or very severe motor deficit of the L5 and S1 nerve roots. He opined that as appellant sustained 52 percent of both lower extremities, there was no evidence of greater impairment than the 57 percent previously awarded.

In a decision dated January 4, 2012, OWCP denied modification of the February 16, 2011 decision.

Appellant requested reconsideration and submitted reports from Dr. Cho dated December 13, 2011 to June 26, 2012. Dr. Cho opined that appellant was totally disabled and her spinal cord injury was permanent. An April 12, 2012 report from Dr. Hans Pinkert, a Board-certified internist, noted treatment for chronic bilateral foot pain and severe peripheral neuropathy. He advised that appellant's history was significant for ruptured discs and low back surgery.

In a July 10, 2012 decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review.

Appellant requested reconsideration. In a February 6, 2013 report, Dr. Cho addressed appellant's prior back surgeries and listed her medical conditions. These included permanent spinal cord injury resulting in cauda equine syndrome that caused pain with loss of sensation in the bladder and vagina; paralysis of the muscle in the ankles and hip girdle muscle requiring use of a brace; lack of feeling with development of neuralgia and continuous pain; and loss of nerve function causing poor muscle control and circulation in the legs. Appellant required mechanical or digital stimulation and a catheter for the bladder and bowel. She was not able to function sexually and had no sensation in the vaginal area. Appellant had recurrent urinary tract infections due to paralysis of the bladder with motor sensory paralysis in the legs, muscle weakness, sensory loss and limited ambulation. Based on an October 3, 2012 functional capacity evaluation, her impairment was rated based on pain, motor weakness, cauda equine syndrome, neurogenic bowel and bladder and sexual dysfunction. Dr. Cho reiterated the 67 percent whole person impairment rating under the A.M.A., *Guides.* The October 3, 2012 functional capacity evaluation report from the physical therapist noted decreased lumbar range of motion, decreased bilateral hip strength, absent bilateral ankle strength, and absent reflexes in the bilateral patella and Achilles tendons. The physical therapist noted increased edema and redness of the skin on both ankles, feet and toes. Appellant could not discriminate sharp/dull or hot/cold sensory input over either leg or feet. She had two open sores on a toe, with pain in the lumbar, left buttock and left foot. The physical therapist was unable to classify her physical demand level.

In a May 29, 2013 report, Dr. Berman reviewed Dr. Cho's February 6, 2013 report and determined that his impairment rating was again not consistent with OWCP guidelines. He stated that appellant would require continued use of medication to control pain and her bowel and bladder function, noting recurrent urinary infections. Upon consideration of the February 6, 2013 report from Dr. Cho the previously recommended 52 percent impairment to both extremities should stand as all operative factors had been considered. Dr. Berman noted that the 67 percent rating due to bowel and bladder problems was inappropriate because a specific organic basis was not verified for the urinary or bowel abnormalities. He stated that there was no current basis for an additional award but recommended that appellant be reevaluated after appropriate urologic testing.

In a decision dated July 1, 2013, OWCP denied appellant's claim for an additional schedule award. It found that OWCP's medical adviser determined that the evidence did not show greater permanent impairment than that previously paid. OWCP also noted that appellant was previously granted a schedule award for 52 percent of the bladder but no increased impairment had been shown.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing federal 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, 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.[6] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[7] For decisions issued after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8] For decisions issued after May 1, 2009, the sixth edition will be used.[9]

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).[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

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[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

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

[7] *Supra* note 5.

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

[9] FECA Bulletin No. 09-03 (issued March 15, 2009).

[10] A.M.A., *Guides* 494-531.

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.[11] FECA identifies members such as the arm, leg, hand, foot, thumb, finger and toes. It also specifies loss of hearing and vision, the loss of an eye and serious disfigurement of the face, head or neck.[12] Section 8107(c)(22) of FECA provides for the payment of compensation for permanent loss of any other important external or internal organ of the body as determined by the Secretary of Labor.[13] The Secretary of Labor has made such a determination, and pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix, vulva/vagina and skin to the compensation schedule.[14] There is no statutory basis for payment of a schedule award for impairment to the bladder, colon or rectum under FECA or in the regulations.[15]

ANALYSIS

Appellant's claim was accepted by OWCP for acute lumbosacral strain, displacement of lumbar intervertebral disc without myelopathy, other urinary incontinence, mononeuritis of the lower limb, decubitus ulcer bilaterally, atony of the bladder, cauda equine syndrome with neurogenic bladder. OWCP authorized surgery and on February 26, 1986 appellant underwent a left hemilaminectomy at L4-5 with excision of nucleus pulposus fragment and on June 12, 1987 a total laminectomy, L3-4 with removal of right L3-4 herniated disc fragment. It has accepted that she is permanently disabled. In its July 1, 2013 decision, OWCP found that appellant had established no greater impairment to her legs and bladder.

Regarding appellant's leg impairment, the Board notes that in 1993 appellant requested a schedule award based on her accepted lumbar conditions. On July 18, 1994 an OWCP medical adviser opined that, under the A.M.A., *Guides,*[16] appellant had 20 percent impairment to the right leg for severe S1 nerve injury resulting in loss of function due to strength deficit and 37 percent impairment to the left leg for severe and significant damage to the L5 nerve resulting in motor deficit. However, in its October 31, 1994 decision, OWCP improperly combined the impairment of each leg and granted appellant one award for 57 percent impairment to both lower extremities. OWCP failed to properly make awards in terms of impairment to each leg. FECA provides that "in case of loss of use of more than one member or parts of more than one member … the compensation is for loss of use for each member or part thereof, and the awards run

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[11] *See J.W.*, 59 ECAB 308 (2008); *Paul A. Zoltek*, 56 ECAB 325 (2005); *Leroy M. Terska*, 53 ECAB 247 (2001).

[12] 5 U.S.C. § 8107(c).

[13] *Id.* at § 8122(c)(22).

[14] 20 C.F.R. § 10.404(a); *Marilyn S. Freeland*, 57 ECAB 607 (2006).

[15] *Supra* note 11; *supra* notes 4 and 5. *D.J.,* Docket No. 11-1359 (issued February 24, 2012).

[16] A.M.A., *Guides* (4th ed. 1993).

consecutively."[17] This error by OWCP contributed to subsequent error by Dr. Berman in consideration of appellant's claim for additional impairment. In an October 21, 2011 report, he reviewed the physical examination findings provided by Dr. Cho to find that appellant had 26 percent impairment to each leg based on moderate or very severe motor deficit of the L5 and S1 nerve roots. Dr. Berman improperly added the impairment to each leg, 26 percent, to total 52 percent and found that this was less than the 57 percent previously awarded on October 31, 1994. Appellant was denied any further schedule award for her right leg. In 1994, appellant was rated with 20 percent impairment of the right leg. Dr. Berman's October 21, 2011 report determined that she had 26 percent impairment of the right leg, a 6 percent increase in impairment from 1994. Therefore, the Board finds that appellant has a total of 26 percent impairment to her right leg.[18]

Regarding impairment to appellant's bladder, or uterus/cervix and vulva/vagina, on June 14, 1995 appellant was granted a schedule award for 52 percent of her bladder and vulva/vagina. The Board notes that neither FECA nor OWCP's implementing regulations provide for a schedule award for the bladder or the bowel.[19] A schedule award is not payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.[20] FECA does not provide for OWCP to add organs or functions to the compensation schedule on a case-by-case basis and the Board does not have the power to enlarge the provisions of the statute or regulations.[21] Urinary incontinence may be assessed however as it relates to the organs specified as schedule members.

Of the internal organs added to the schedule for injuries sustained on or after September 7, 1974 are the uterus/cervix and vulva/vagina for which a total of 205 weeks of compensation is provided.[22] Appellant requested an additional schedule award for sexual dysfunction and submitted a February 6, 2013 report from Dr. Cho, who rated whole person impairment. As noted by Dr. Berman, there is no provision in FECA for a schedule award for permanent impairment of the whole person.[23] The Board notes that Dr. Berman did not address permanent impairment utilizing Chapter 7 of the A.M.A., *Guides* as it pertains to consideration of the urinary and reproductive systems. The A.M.A., *Guides* note that spinal cord injuries may

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[17] 5 U.S.C. § 8107(c)(20); *see R.B.*, Docket No. 13-904 (issued September 6, 2013) (FECA provides that lower extremity impairments are rated for each member; the two members are not totaled into one sum for lower extremity impairment); *Erma L. Moore*, Docket No. 99-1554 (issued September 25, 2000) (the fact that appellant established that she had a 10 percent impairment of the left arm in 1996 and was evaluated as having a 2 percent impairment of that arm in 1998 did not mean that OWCP could deny her claim for a permanent impairment of the right arm on the grounds that she received a greater total award than she would be entitled to for both arms).

[18] The medical evidence does not support greater than 37 percent impairment of the left leg, as previously awarded.

[19] *See supra* note 15.

[20] A.M.A., *Guides* 494-531; *see also L.W.,* Docket No. 13-715 (issued June 14, 2013).

[21] *Janet C. Anderson*, 54 ECAB 394 (2003).

[22] 20 C.F.R. § 10.404(b).

[23] *See Tania R. Keka*, 55 ECAB 354 (2004).

result in sexual dysfunction.[24] The medical adviser also noted that appellant's urological abnormalities had not been properly evaluated and suggested that appellant should be reevaluated after appropriate urologic testing. OWCP did not arrange for such evaluation or testing.

Proceedings under FECA are not adversary in nature nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, it shares responsibility in the development of the evidence. Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[25]

The Board will remand the case to OWCP for referral to an appropriate Board-certified physician(s) knowledgeable in the application of the sixth edition of the A.M.A., *Guides* to determine the extent of her permanent impairment. OWCP should provide an updated and accurate statement of accepted facts that lists each accepted condition and the percentage of impairment to each scheduled member. Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that appellant has an additional six percent impairment of her right leg. The medical evidence requires further development with regard to her permanent impairment to other scheduled members.

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[24] A.M.A., *Guides* 130.

[25] *John W. Butler,* 39 ECAB 852 (1988).

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed in part as modified, and set aside, in part. The case is remanded for further development in accordance with this decision of the Board.

Issued: July 22, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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