United States Department of Labor
Employees' Compensation Appeals Board

M.R., Appellant	)	
and	)	**Docket No. 13-1292**
	)	**Issued: January 10, 2014**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Orlando, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 7, 2013 appellant, through his attorney, filed a timely appeal from an April 4, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his 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 this case.[2]

ISSUE

The issue is whether appellant is entitled to a schedule award for impairment to a scheduled member.

On appeal, counsel contends that OWCP's decision was contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the April 4, 2013 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

OWCP accepted that appellant, then a 46-year-old federal air marshal, sustained a neck sprain and cervical bulging/displaced disc at C5-6 as a result of lifting exercise equipment in a gym on April 27, 2011 while in the performance of duty. He received continuation of pay and disability compensation for the period August 3 through 15, 2011. Appellant returned to full-time, light-duty work effective August 16, 2011.

On November 30, 2011 appellant, through his attorney, filed a claim for a schedule award. He submitted reports dated August 22 and 24, 2011 from Dr. Samuel A. Joseph, Jr., a Board-certified orthopedic surgeon, who diagnosed a herniated disc at C5-6. Dr. Joseph indicated that appellant's date of maximum medical improvement was August 22, 2011 and released him to regular duty, without restrictions effective August 23, 2011.

In a December 16, 2011 report, Dr. Joseph diagnosed post-traumatic cervical spine pain, resolved with cervical radiculopathy. Appellant presented with right upper extremity numbness and tingling that radiated out from the shoulder down through his biceps, down his forearm and sometimes into his fifth digit status postemployment injury after lifting at a gym. Dr. Joseph observed that appellant had very little to no neck pain, but more frequent numbness and tingling down his arm. Upon examination, he found "no tenderness to the cervical spine." Dr. Joseph placed appellant in class 1 of Table 17-2 (Cervical Spine Regional Grid -- Spine Impairments)[3] for intervertebral disc herniation and assigned grade modifier 1 for Functional History (GMFH), grade modifier 1 for Physical Examination (GMPE) and grade modifier 2 for Clinical Studies adjustment (GMCS). He stated that the total adjustment was one correlating with Grade D and concluded that appellant had a six percent whole person impairment based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).

On January 11, 2012 Dr. H.P. Hogshead, an OWCP medical adviser reviewed Dr. Joseph's December 16, 2011 report and found that appellant had no (zero percent) impairment of the right or left upper extremities based on the sixth edition of the A.M.A., *Guides*. He stated that appellant was neurologically intact and surgery for this cervical injury was not required. Dr. Hogshead noted that FECA did not provide for schedule awards due to spinal conditions.

By decision dated January 17, 2012, OWCP denied appellant's schedule award claim. It found that the medical evidence did not establish any ratable impairment of the upper extremities based on the accepted cervical condition.

On June 27, 2012 appellant, through his attorney, requested reconsideration and submitted a narrative statement and physical therapy notes dated July 27, 2011. In a June 30, 2011 report, Dr. Marc Weinstein, a Board-certified orthopedic surgeon, diagnosed displacement of a cervical intervertebral disc without myelopathy. He opined that appellant was capable of returning to full activity. Dr. Weinstein did not address the issue of permanent impairment.

[3] A.M.A., *Guides* (6th ed., 2009), pp.564-66.

On February 17, 2012 Dr. Joseph advised that he would provide a rating of the cervical spine and stated that appellant had an approximately 15 percent permanent impairment rating under Table 15-2 (Digit Regional Grid -- Digit Impairments),[4] page 392 and Table 15-5 (Shoulder Regional Grid -- Upper Extremity Impairments)[5] of the A.M.A., *Guides*. He explained that the impairment rating was based on appellant's C5-6 disc herniation with right radicular symptoms radiating with decreased sensation in the distribution of C5, C6 and C7 dermatomes. Appellant had clinically significant radiculopathy verified by a magnetic resonance imaging (MRI) scan study.

In a June 13, 2012 report, Dr. Rodney D. Rodrigo, a Board-certified physiatrist, reviewed appellant's medical history, conducted a physical examination and diagnosed cervical disc herniation at C5-6 and C6-7, right ulnar neuropathy at the elbow and paraesthesias in the right hand, mainly the fifth digit. Appellant presented with numbness and tingling in his right hand, mainly the fifth digit and his symptoms occurred on an intermittent basis with no specific aggravating or relieving factors. Regarding the right upper extremity symptoms, he appeared to be at maximum medical improvement. Appellant found that May 2, 2011 x-rays of the cervical spine and results showed mild osteophyte formation and mild listhesis on extension view, but the alignment was with normal limits on flexion and neutral lateral views. A May 24, 2011 MRI scan of the cervical spine revealed cervical herniated nucleus pulposus at C5-6 and C6-7. Appellant underwent an electromyogram and nerve conduction studies (EMG/NCS), which showed a right ulnar neuropathy at the elbow, mild in degree. Mild carpal tunnel syndrome on the right could not be ruled out. There was no evidence of cervical radiculopathy on the right side on EMG examination. Dr. Rodrigo concluded that "per the 1996 Florida Uniform Permanent Impairment Rating Schedule, [appellant had] a 10 [percent] upper extremity impairment due to his ulnar neuropathy at the elbow, which [was] mild in severity. This relates to a [six percent] whole person impairment."

On July 12, 2012 Dr. James W. Dyer, a medical adviser, reviewed the record. He noted that the EMG/NCS tests confirmed no evidence of cervical radiculopathy. Dr. Dyer found that the medical record did not support any ratable impairment of the right or left upper extremities related to appellant's accepted cervical conditions.

By decision dated July 31, 2012, OWCP denied modification of its January 17, 2012 decision.[6]

On March 20, 2013 appellant, through his attorney, requested reconsideration and submitted a February 8, 2013 report from Dr. William C. Daniels, a Board-certified orthopedic surgeon, who reviewed appellant's medical history and conducted a physical examination. Dr. Daniels found no evidence of radicular symptomatology. Examination of the shoulder, elbow, wrist, fingers and thumb revealed no loss of motion, with no complaint of discomfort at any of these levels. There was no obvious evidence of muscle atrophy in the neck, shoulder or

[4] A.M.A., *Guides* (6th ed., 2009), pp.391-94.

[5] *Id*. at pp. 401-05.

[6] On November 12, 2012 appellant, through his attorney, filed a second claim for a schedule award.

upper extremity musculature, bilaterally. Dr. Daniels concluded that appellant had no (zero percent) impairment of either upper extremity based on the sixth edition of the A.M.A., *Guides*. Although appellant had some evidence of ulnar nerve involvement, primarily sensory, it originated in the right elbow and did not correlate with cervical radiculopathy or cervical spine involvement as noted in the allowed conditions. There was some evidence of diminished sensation over the thumb and index finger, which was more consistent with a mild carpal tunnel source, rather than the cervical spine. Dr. Daniels stated that the EMG/NCS tests essentially confirmed the lack of any definite radicular problems originating from the cervical spine. He noted that appellant also did not have any significant clinical symptomatology due to carpal tunnel syndrome.

By decision dated April 4, 2013, OWCP denied modification of its July 31, 2012 decision.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim, including that he or she sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[7]

The schedule award provision of FECA[8] and its implementing regulations[9] 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.[10] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[11] It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent

[7] *See Bobbie F. Cowart*, 55 ECAB 476 (2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Id.*

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

impairment, preexisting impairments of the body are to be included.[12] A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.[13]

A schedule award is not payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.[14] As neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.[15] However, as FECA makes provision for the extremities, 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, if the medical evidence establishes impairment as a result of the employment injury.[16]

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[17]

ANALYSIS

The Board finds that the medical evidence fails to establish that appellant sustained any permanent impairment of either upper extremity. OWCP accepted his claim for neck sprain and cervical bulging/displaced disc at C5-6. Although appellant may not receive a schedule award for permanent impairment to his back or spine,[18] he may be entitled to a schedule award for impairment to his upper extremities, provided the medical evidence establishes such impairment.[19] The medical evidence of record does not establish that he sustained permanent impairment of his upper extremities due to the accepted cervical spine conditions.

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[12] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (September 1995). This portion of OWCP's procedures provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

[13] *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

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

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

[16] *See George E. Williams*, 44 ECAB 530 (1993). In 1966, amendments to FECA modified the schedule award provision 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.

[17] *See Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

[18] 5 U.S.C. § 8101(19); *Patricia J. Horney*, 56 ECAB 256 (2005).

[19] *See George E. Williams*, *supra* note 16.

On December 16, 2011 Dr. Joseph stated that appellant had six percent whole person impairment under Table 17-2 of the A.M.A., *Guides*. The Board notes that FECA does not authorize schedule awards for impairment of back or spine or the whole person.[20] Dr. Joseph thereafter found that appellant had approximately 15 percent permanent impairment under Table 15-2 and Table 15-5 of the A.M.A., *Guides*. On July 12, 2012 Dr. Hogshead reviewed the medical evidence of record and noted that the EMG/NCS studies confirmed no evidence of cervical radiculopathy. As the record did not support any ratable impairment of the right or left upper extremity related to appellant's accepted cervical conditions, the medical adviser properly concluded that there was no medical basis for impairment to the upper extremities.

The February 8, 2013 report of Dr. Daniels found no evidence of radicular symptomatology upon examination. Examination of the shoulder, elbow, wrist, fingers and thumb revealed no loss of motion. There was no complaint of discomfort at any of these levels. There was no obvious evidence of muscle atrophy in the neck, shoulder or upper extremity musculature, bilaterally. Dr. Daniels concluded that appellant had no impairment of the upper extremities based on the sixth edition of the A.M.A., *Guides*. He stated that although appellant had some evidence of ulnar nerve involvement, it originated in the right elbow and did not correlate with cervical radiculopathy or cervical spine involvement as related to the accepted conditions. There was some evidence of diminished sensation over the thumb and index finger, which was more consistent with a mild carpal tunnel source, rather than the cervical spine. The diagnostic studies confirmed the lack of any definite radicular problems originating from the cervical spine. Dr. Daniels noted that appellant also did not have any significant clinical symptomatology due to carpal tunnel syndrome. Thus, the Board finds that there was no ratable impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

As the reports from Drs. Weinstein and Rodrigo do not provide an impairment rating based on the sixth edition of the A.M.A., *Guides*, the Board finds that they are of reduced probative value and are insufficient to establish appellant's claim.

The July 27, 2011 physical therapy notes do not constitute medical evidence as they were not prepared by a physician.[21] Therefore, they are insufficient to establish a claim.

On appeal, counsel contends that OWCP's decision was contrary to fact and law.

Appellant has not submitted sufficient medical evidence based upon objective findings, which establishes that he sustained any permanent impairment to his upper extremities. The Board finds that he is not entitled to a schedule award as a result of his accepted cervical spine injury. OWCP's April 4, 2013 decision was proper under the facts of this case.[22]

[20] *See D.H.*, 58 ECAB 358 (2007). *See also Thomas Martinez*, 54 ECAB 623 (2003).

[21] Physical therapists are not physicians under FECA. *See* 5 U.S.C. § 8101(2).

[22] *See J.D.*, Docket No. 13-627 (issued July 17, 2013).

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 is not entitled to a schedule award for impairment to a scheduled member.

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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