United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 13-2129**
	)	**Issued: June 6, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Malvern, 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:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 17, 2013 appellant, through her attorney, filed a timely appeal from a June 26, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which granted appellant a 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 15 percent permanent impairment of the left lower extremity for which she received a schedule award.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board. In a November 25, 2008 decision, the Board affirmed OWCP decisions dated September 26, 2006 and March 2, 2007 decisions terminating appellant's compensation benefits. The Board found that OWCP met its burden of proof to terminate her benefits effective March 18, 2007.[2] The facts of the case are set forth in the Board's prior decision and are incorporated herein by reference.[3]

On April 9, 2009 appellant claimed a schedule award. In an April 16, 2009 letter, OWCP requested that she submit a report from her treating physician evaluating the permanent impairment of her legs under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[4] (A.M.A., *Guides*). No additional evidence was submitted. In a May 18, 2009 decision, OWCP denied appellant's schedule award claim.

Appellant requested an oral hearing which was held on September 8, 2009. She submitted a February 17, 2009 report from Dr. Arthur Becan, a Board-certified orthopedist, who provided an impairment rating under the fifth edition of the A.M.A., *Guides*. Dr. Becan found that appellant had 19 percent permanent impairment of the left arm and 51 percent left leg impairment due to sensory deficits of the left L5 and S1 nerve roots, motor deficit at L5 and range of motion deficits of the left hip.

In a November 3, 2009 decision, an OWCP hearing representative affirmed the May 18, 2009 decision. Appellant appealed to the Board and, in a January 26, 2011 order remanding case, the Board set aside the November 3, 2009 decision and remanded the matter to OWCP for further medical development.[5] The Board determined that OWCP failed to refer the matter to an OWCP medical adviser for an opinion on whether appellant had any permanent impairment due to the 2001 employment injury pursuant to the A.M.A., *Guides.*

On February 18, 2011 OWCP referred appellant to an OWCP medical adviser. In a March 3, 2011 report, the medical adviser noted that Dr. Becan did not utilize the sixth edition of the A.M.A., *Guides.* He noted that appellant had electromyogram evidence of injury to the sciatic nerve, which would be rated at 13 percent motor impairment of the left leg and 6 percent impairment for sensory deficit for 18 percent left leg impairment. However, the medical adviser noted that the compression on the sciatic nerve was related to an old fracture unrelated to the February 2001 work injury and was not accepted as work related. He further found that the sensory and motor deficits ascribed by Dr. Becan were not consistently documented in the medical records and therefore were unreliable.

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[2] Docket No. 08-1072 (issued November 25, 2008).

[3] On February 28, 2001 appellant, a rural carrier, was injured when she fell while delivering mail. OWCP accepted the claim for a left hip contusion, lumbosacral strain/sprain and progressive myositis ossificans. It authorized a left hip replacement.

[4] A.M.A., *Guides* (6th ed. 2008).

[5] Docket No. 10-868 (issued January 26, 2011).

On March 11, 2011 OWCP referred appellant to Dr. Steve J. Valentino, an osteopath, for a second opinion regarding whether she had permanent impairment due to her work-related condition. The statement of accepted facts noted left hip contusion and lumbosacral sprain/strain as accepted conditions. Appellant did not attend the scheduled April 5, 2011 appointment. On April 11, 2011 OWCP advised her that under 5 U.S.C. § 8123(d) she had 14 days to explain why she did not attend the scheduled examination. In an April 27, 2011 decision, it denied appellant's schedule award claim. Appellant requested an oral hearing.

In a June 16, 2011 decision, an OWCP hearing representative set aside the April 27, 2011 decision and directed appellant's referral for a second opinion. He noted that the statement of accepted facts did not note accepted conditions of progressive myositis ossificans and preexisting conditions including old avulsion fracture of the left ischial tuberosity. The hearing representative advised that the referral physician should also address whether the diagnosed lumbar disc bulge and chronic left hip bursitis were employment related.

OWCP prepared an updated statement of accepted facts and on June 30, 2011 referred appellant to Dr. Valentino for a second opinion. In an August 9, 2011 report, Dr. Valentino noted findings of full range of motion of the lumbar, cervical and thoracic regions, no spasm, trigger points or subluxation. Examination of the spinous process, facets, iliolumbar ligaments, sacroiliac joints and ischial tuberosity region was normal. Deep tendon reflexes were intact and motor and sensory examination were normal. Appellant had full range of motion of the hips, knees, ankles and feet. Knee and ankle examination was normal without synovitis, effusion or internal derangement. Dr. Valentino opined that examination of all four extremities was normal. He diagnosed resolved aggravation of myositis and deformity of the left hip, resolved contusion of the left hip and resolved lumbosacral strain and sprain. Dr. Valentino opined that, based on the evaluation, records and diagnostic studies of the ischial tuberosity fracture was old and not related to the work injury. He further opined that the work injury did not result in sciatica or lumbar radiculitis and any sciatic compression related to the ischial tuberosity was old and unrelated to the work injury. Dr. Valentino noted that any aggravation of myositis or deformity of the left hip was temporary and fully resolved based on a September 11, 2001 unremarkable magnetic resonance imaging (MRI) scan. He noted that appellant reached maximum medical improvement and had no impairment of the lower extremity. Dr. Valentino stated that injuries of this type would resolve in three to six months after the original injury and opined that she had findings consistent with symptom embellishment.

OWCP referred Dr. Valentino's report and the case record to the medical adviser who, in a report dated August 31, 2011, opined that appellant had no impairment of the left leg. The medical adviser opined that Dr. Valentino's evaluation was correct and was based on a more current examination than that of Dr. Becan. He noted that, while he previously found 16 percent left leg impairment using the peripheral nerve rating system, the new information from Dr. Valentino noted intact deep tendon reflexes and a normal motor and sensory examination. The medical adviser noted that because Dr. Valentino's examination was performed 18 months after Dr. Becan's it should be relied upon for rating purposes. As there was no functional loss to the left lower extremity which would yield ratable impairment Dr. Valentino's rating of zero percent impairment was appropriate.

In a September 1, 2011 decision, OWCP denied appellant's schedule award claim. It based its finding on the report of Dr. Valentino and the medical adviser. On September 7, 2011 appellant requested an oral hearing.

In a decision dated December 7, 2011, an OWCP hearing representative set aside the September 1, 2011 decision and remanded the matter for further medical development. The hearing representative found that a conflict of medical opinion existed between Dr. Becan, appellant's treating physician, and Dr. Valentino regarding the degree of permanent impairment of the left leg.

In a December 13, 2011 letter, appellant's counsel asked to participate in selecting the referee physician and requested documentation showing that the physician was properly selected. OWCP provided screen shots for physician's that were bypassed in the selection of an impartial medical specialist. Specifically, Dr. Richard I. Zamarin was bypassed due to a conflict because he treated appellant and Dr. Karl Rosenfeld was bypassed because of a conflict as appellant saw his partner Dr. Zamarin.

On January 3, 2012 OWCP referred appellant to Dr. Andrew J. Gelman, an osteopath and Board-certified orthopedic surgeon, to resolve the medical conflict. Dr. Gelman indicated in a January 19, 2012 report that he reviewed the record and examined her. He noted a history of appellant's work injury and advised that she had reached maximum medical improvement. Dr. Gelman noted findings of nontender low back along the paravertebral musculature, no pain over the sacroiliac joints, negative Lachman's and McMurray's test, no distal quadriceps tenderness, no discomfort over the pes bursa, no atrophy of the calf areas and normal left ankle. Left ankle dorsiflexion lacked 10 degrees, light touch and pinprick sensation throughout the left leg was intact and symmetric. The patella and achilles reflexes were present and symmetric. February 28, 2001 pelvic x-rays revealed a well-rounded osseous fragment between the ischium and trochanteric area with features of acute pathology. A March 30, 2001 pelvic MRI scan showed no soft tissue signal abnormality. A March 26, 2007 MRI scan showed no disc signal abnormalities, nerve root or spinal cord compromise but subtle mild degenerative disease.

For the hip contusion, pursuant to Table 16-4, page 512, Hip Regional Grid, Lower Extremity Impairment, appellant was a class 0, with no problems based on the x-ray and MRI scan studies in 2001, which did not identify any acute pathology. Dr. Gelman opined that the ossification appreciated on February 28, 2001 was of a chronic nature. He opined that the hip contusion yielded no permanent impairment of the left leg.

With regard to the hip myositis, Dr. Gelman noted pursuant to Table 16-4, page 512, Hip Regional Grid, Lower Extremity Impairment, appellant was a class 1, grade C with a default impairment of one percent. Pursuant to Table 16-7, page 517, for physical examination, appellant was a grade modifier four for subjective complaints. For functional history, Table 16-6, page 516, she was a grade 1, for a mild problem; and for clinical studies, Table 16-8, page 519, she was a grade modifier one. Applying the net adjustment formula at page 521 of the A.M.A., *Guides*, Dr. Gelman found a net adjustment of +2 which changed the impairment rating to two percent for the left lower extremity. He noted that the lumbar spine was addressed in Table 17-4, Lumbar Spine Regional Grid and appellant was a class zero for zero percent impairment.

In a February 21, 2012 report, an OWCP medical adviser reviewed the record and concurred with Dr. Gelman's findings. He indicated that Dr. Gelman properly applied the sixth edition of the A.M.A., *Guides* to find two percent left leg impairment.

On February 27, 2012 OWCP granted appellant a schedule award for two percent impairment for the left leg.[6]

Appellant requested an oral hearing which was held on June 13, 2012. She submitted a June 8, 2012 report from Dr. Becan, who opined that she had 44 percent impairment of the left leg. Dr. Becan noted that he did not reexamine appellant but revised his prior February 17, 2009 report to reflect the sixth edition of the A.M.A., *Guides.* He reviewed Dr. Gelman's report and noted that the physician did not consider the computerized tomography scan of the pelvis dated April 11, 2001, which revealed a bone fragment off the left ischium from an old fracture, an MRI scan of the left lower extremity dated September 11, 2001, which revealed an old avulsion fracture of the left ischial tuberosity or an electromyogram, which revealed left sciatic neuropathy and denervation. Dr. Becan noted that Dr. Gelman did not indicate that he uses Semmes-Weinstein Monofilament testing pursuant to the A.M.A., *Guides*. He advised that Dr. Gelman found deficits in strength testing in ankle dorsiflexion and great toe extensor flexion but failed to rate them.

In an August 21, 2012 decision, an OWCP hearing representative set aside the February 27 and June 13, 2012 decisions and remanded the matter for further medical development. She noted that Dr. Gelman did not explain whether appellant had additional impairment related to sciatic nerve injury due to a preexisting avulsion fracture. The hearing representative instructed OWCP to get a supplemental report from Dr. Gelman addressing any additional impairment.

On September 10, 2012 OWCP requested Dr. Gelman to provide a supplemental report. In a September 19, 2012 report, Dr. Gelman noted left ankle and great toe weakness, intact sensory testing of the left lower extremity and advised that electrodiagnostic testing identified sciatica nerve irritability. He utilized the peripheral nerve section of the A.M.A., *Guides,* Table 16-11 and 16-12, page 534, recognizing normal sensory assessment and severe motor deficit found that appellant was a class 1, which equates to a default impairment of 10 percent. Dr. Gelman applied the adjustment grid parameters in Table 16-6 and 16-8, which yielded a grade modifier of +2 for an 11 percent impairment of the left lower extremity.

In a December 14, 2012 report, an OWCP medical adviser reviewed the medical record and advised that OWCP recognized only extremity impairment resulting from spinal nerve root deficit which are published in *The Guides Newsletter*, July/August 2009. The medical adviser noted that Dr. Gelman and Dr. Becan both documented motor loss related to the L5 nerve root as Dr. Becan found 3/5 weakness in the left great toe extensor halluces longus and Dr. Gelman found 0/5 weakness in this structure and 2/5 weakness in the left ankle dorsiflexion. He noted that Dr. Gelman did not observe sensory loss in the left lower extremity whereas Dr. Becan did. The medical adviser indicated that Dr. Gelman used the peripheral nerve section of the A.M.A.,

[6] In a June 13, 2012 decision, OWCP issued a corrected decision and noted that the February 27, 2012 decision noted an incorrect award period. It stated that the award period was February 17 to March 29, 2009.

Guides, Table 16-12, page 535, sciatic nerve to provide the final rating calculations. However, he believed that the appropriate rating method was *The Guides Newsletter*, July/August 2009. He utilized Table 2, Spinal Nerve Impairment, Lower Extremity found in *The Guides Newsletter*. In rating the left L5 lumbar nerve root injury, appellant had intact sensation to light touch and pinprick testing according to Dr. Gelman's report with a severity of zero. For normal sensory testing she was a class 0 with a final impairment of zero percent of the left lower extremity. With regard to motor deficits, for the left L5 injury, appellant had a class 1 moderate, severe or very severe motor deficit for 13 percent impairment of the left lower extremity. Dr. Gelman noted that Dr. Becan found motor deficit of 3/5. He found a grade modifier for functional history of one, a grade modifier for clinical studies of two, for a net grade modifier adjustment score of +1 for a grade D for 13 percent impairment of the left lower extremity for motor deficit at L5. The medical adviser opined that appellant sustained a 13 percent impairment of the left lower extremity for L5 motor deficit.

In a December 21, 2012 decision, OWCP granted appellant a schedule award for 13 percent additional impairment of the left leg. It noted that this was in addition to the two percent left leg impairment previously granted. The period of the award was from March 30 to December 17, 2009.

On January 3, 2013 appellant requested an oral hearing, which was held on April 11, 2013. She submitted a March 18, 2013 report from Dr. Becan, who opined that she had 31 percent impairment of the left leg under the A.M.A., *Guides.* Dr. Becan did not reexamine appellant but applied the sixth edition of the A.M.A., *Guides* and the July/August 2009 edition of *The Guides Newsletter*, Table 2, to his February 17, 2009 examination findings. He found 3 percent impairment for the left arm, 8 percent impairment of the left leg for sensory deficit at L5, 5 percent impairment for S1 nerve root, 13 percent impairment for motor strength deficit of the left gastrocnemius and 9 percent impairment for left hip trochanteric bursitis for a combined 31 percent left leg impairment. Dr. Becan argued that this report was sufficient to create a new conflict.

In a decision dated June 26, 2013, an OWCP hearing representative affirmed the decision dated December 21, 2012.

LEGAL PRECEDENT

Section 8107 of FECA[7] and its implementing federal regulations,[8] 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

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

uniform standard applicable to all claimants.[9] For decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[10]

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.[11] 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.[12]

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.[13] 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 which memorializes proposed tables outlined in the July/August 2009 issue of *The Guides Newsletter*.[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

Appellant's claim was accepted by OWCP for a left hip contusion, lumbosacral strain/sprain and progressive myositis ossificans and it authorized a left hip replacement. On April 9, 2009 she filed a claim for a schedule award. Appellant submitted evidence from her physician, Dr. Becan, who opined that she had work-related impairment of the left leg due to sensory and motor deficits, as well as range of motion deficits of the left hip. However, Dr. Valentino, an OWCP referral physician, found normal strength and no sensory deficits on

[9] *Id.* at § 10.404(a).

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

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

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

[13] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[14] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

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

[16] *Id.* at 521.

examination. He related his findings and concluded that appellant had no left leg permanent impairment that was employment related. Consequently, OWCP found that a conflict existed in the medical evidence regarding whether she had permanent impairment of the left leg due to her work injury and referred her to Dr. Gelman to resolve the conflict.

Dr. Gelman reviewed appellant's history and reported examination findings. He explained that, with regard to the hip contusion, she was class 0 under Table 16-4, page 512, Hip Regional Grid, based on the x-ray and MRI scan studies in 2001, which did not identify any acute pathology. Dr. Gelman opined that the ossification appreciated on February 28, 2001 was chronic and opined that the hip contusion equated to a zero percent rating with regard to the left lower extremity. With regard to the hip myositis, he noted pursuant to Table 16-4, page 512, Hip Regional Grid, Lower Extremity Impairment, appellant was a class 1, a grade C with a default impairment of one percent. Dr. Gelman found that, pursuant to Table 16-7, page 517, for physical examination, she was a grade modifier four; for functional history, Table 16-6, page 516, she was a grade modifier one for a mild problem; and for clinical studies appellant was a grade modifier one, pursuant to Table 16-8, page 519. Applying the net adjustment formula at page 521 of the A.M.A., *Guides*, he found a net adjustment of +2 which resulted in two percent impairment of the left lower extremity. The medical adviser concurred with Dr. Gelman's findings.

On September 19, 2012 Dr. Gelman provided a supplemental report and addressed impairment of the left lower extremity related to the sciatic nerve injury due to the preexisting avulsion fracture. He utilized the peripheral nerve section of the A.M.A., *Guides*, Table 16-12, page 535, sciatic nerve, to find 11 percent additional impairment. OWCP's medical adviser reviewed Dr. Gelman's findings and advised that it was more appropriate to use the methodology set forth in the July/August 2009 issue of *The Guides Newsletter*.[17] As noted, OWCP has adopted *The Guides Newsletter* for rating impairment of the upper or lower extremities caused by a spinal injury. Thus, the Board finds that OWCP's medical adviser properly applied the findings noted by Dr. Gelman to procedures in *The Guides Newsletter* to determine impairment.[18] The medical adviser noted that he documented motor loss related to the L5 nerve root but did not observe sensory loss in the left lower extremity. The medical adviser referenced *The Guides Newsletter*, July/August 2009 and utilized Table 2, Spinal Nerve Impairment, Lower Extremity. With regard to motor deficits for the left L5 injury, appellant had a class 1 severe motor deficit for 13 percent impairment of the left lower extremity. Dr. Gelman noted a grade modifier for functional history of one, a grade modifier for clinical studies of two, for a net grade modifier adjustment score of +1 for a grade D, which also yielded 13 percent impairment of the left leg for L5 motor deficit. The Board finds that the opinion of Dr. Gelman resolves conflict in the medical evidence and that application of his findings to A.M.A., *Guides* and *The Guides Newsletter* resulted in a total left leg impairment of 15 percent impairment for which she received a schedule award.

[17] *See supra* note 14.

[18] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards*, Chapter 2.808.6(g) (February 2013) (contemplates that the medical adviser review the report of the impartial specialist in a schedule award case).

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[19]

The Board finds that, under the circumstances of this case, the opinion of Dr. Gelman is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant sustained 15 percent impairment of the left lower extremity causally related to the February 28, 2001 work injury.

Counsel argued that Dr. Becan's March 18, 2013 impairment rating was sufficient to establish appellant's impairment or to create a new medical conflict. While Dr. Becan's March 18, 2013 report used the July/August 2009 issue of *The Guides Newsletter* and the sixth edition of the A.M.A., *Guides,* he based his rating on the findings from February 17, 2009, over four years earlier. As this report is not based on current findings, it is of diminished probative value and insufficient to create a conflict in medical evidence.[20] Counsel also asserted that Dr. Gelman was not selected properly from the Physicians Directory System as OWCP did not provide screen shot proof of a referee physician's selection. The Board notes that this argument is without merit. OWCP provided screen shots from the Integrated Federal Employees' System, which bypass physicians and specifically, noted that Dr. Zamarin was bypassed due to conflict as appellant was his patient and Dr. Rosenfeld was bypassed due to a conflict of interest as she was treated by his associate Dr. Zamarin. It properly documented why each physician was bypassed in screen shots and there no evidence that Dr. Gelman was not properly selected.

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 has no more than 15 percent impairment of the left lower extremity for which she received a schedule award.

[19] *Aubrey Belnavis*, 37 ECAB 206 (1985). *See* 5 U.S.C. § 8123(a).

[20] *See J.K.*, Docket No. 11-1765 (issued April 12, 2012) (where the Board found that a physician's 2011 report was of diminished probative value where its impairment rating was based on 2006 examination findings).

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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