

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

N.C., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
BARKSDALE AIR FORCE BASE, LA,)
Employer)

**Docket No. 14-1882
Issued: March 3, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 25, 2014 appellant filed a timely appeal from the February 26, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 schedule award determination.²

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment due to her accepted conditions.

¹ 5 U.S.C. § 8101 *et seq.*

² On appeal, appellant asserted that she should receive a schedule award and provided additional evidence in support of her claim. However, the Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

FACTUAL HISTORY

On August 10, 1971 appellant, then a 42-year-old secretary, was injured when her right shoe heel got caught in her dress, causing her to fall at work. She noted that she fell and bruised her right hand, left leg at the ankle, and twisted her right arm, shoulder, neck, entire back, and left leg. Appellant did not initially stop work. OWCP accepted her claim for neck and low back strain. It also accepted the claim for displacement of cervical intervertebral disc without myelopathy, intervertebral disc disorder with myelopathy, lumbar region, and degeneration of lumbar intervertebral disc. Additionally, as a result of lumbar traction, OWCP accepted injury to the teeth and a dental restoration cost.³ Appellant received appropriate compensation benefits.⁴

In a January 8, 2013 report, Dr. Austin Gleason, III, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment and provided an impairment rating utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (hereinafter A.M.A., *Guides*). For the cervical spine, Dr. Gleason referred to page 564, under motion segment lesions, for single level herniated disc and fusion, and diagnosed a class 2 impairment, or 11 percent to the total body. Regarding the lumbar spine, he referred to Table 17-4,⁵ under motion segment lesions, for a two level spinal stenosis requiring decompression and diagnosed a class 3 impairments which gave her 19 percent impairment to the total body. Dr. Gleason used the Combined Values Chart to combine the 11 percent for the cervical spine with the 19 percent for the lumbar spine to equal 28 percent impairment to the total body.⁶

On April 18, 2013 appellant filed a claim for a schedule award.

In a May 9, 2013 report, OWCP medical adviser noted that Dr. Gleason's report was insufficient, as the A.M.A., *Guides* did not allow for a schedule award to the spine. He explained that a diagnosed injury originating in the spine could be considered only to the extent that it resulted in permanent impairment of the extremities as manifested through spinal nerve impairment and was best determined using the method discussed in the July/August 2009 issue of *The Guides Newsletter*.⁷ OWCP medical adviser opined that Dr. Gleason's report was not

³ The record reflects that appellant had preexisting conditions to include: bilateral carpal tunnel syndrome; bilateral total knee replacements; rheumatoid arthritis; restless leg syndrome; and fibromyalgia. On February 5, 1980, appellant underwent excision of right calcific sebdeltoid bursitis, excision bilateral bunions, excision tailor's bunions, and excision bilateral neurofibromas.

⁴ Appellant stopped work on January 13, 1972 and underwent surgery on March 23, 1972 for excision of a herniated disc. The record reflects that on September 5, 1983 she was involved in an off-duty automobile accident in which she sustained right shoulder, right arm, neck, and low back and left leg pain. On December 1, 1980 OWCP terminated appellant's wage-loss compensation. On November 6, 2001 it accepted a March 21, 2001 claim for a recurrence. Appellant subsequently retired.

⁵ A.M.A., *Guides* 570.

⁶ *Id.* at 542, Table 17-8.

⁷ Rating Spinal Nerve Extremity Impairment Using the Sixth Edition, *The Guides Newsletter* (A.M.A., Chicago, IL), July/August 2009.

sufficiently rationalized and advised that a second opinion should be obtained to determine the extent of impairment.

By letter dated May 24, 2013, OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. John Sklar, a Board-certified internist.

In a July 11, 2013 report, Dr. Sklar reported his examination of appellant on July 3, 2013 and described appellant's history of injury and treatment. He found that, as appellant was unable to stand or ambulate, he was unable to conduct an examination. Dr. Sklar examined her and determined that the findings were consistent with the diagnoses of chronic nonspecific upper and lower back pain, which was a "symptom more of [appellant's] fibromyalgia than it would be of her work injury many years ago." He noted that spinal imaging revealed multiple level degenerative disease in the cervical and lumbar region, without any specific evidence of a lesion, which could be connected to appellant's complaints. Dr. Sklar determined that electrodiagnostic testing was repeatedly negative for any evidence of radiculopathy and he found no evidence of radiculopathy affecting the upper or lower extremities related to her cervical and lumbar conditions. He advised that there was no evidence of peripheral neuropathy and that electrodiagnostic testing failed to demonstrate evidence of radiculopathy. Dr. Sklar concluded that under the A.M.A., *Guides* appellant had zero percent impairment for each upper and lower extremity.

OWCP referred the record to an OWCP medical adviser. In an October 28, 2013 report, OWCP medical adviser reviewed the record and the statement of accepted facts. He determined that the date of maximum medical improvement was July 3, 2013, the date of Dr. Sklar's evaluation. OWCP medical adviser agreed with Dr. Sklar's finding of zero percent impairment of the upper and lower extremities.

In an October 30, 2013 decision, OWCP denied appellant's claim for a schedule award. Although there was no request for reconsideration of the schedule award decision, on February 26, 2014 it reiterated the denial of the schedule award. OWCP found that the medical evidence did not demonstrate a measurable impairment and the requirements were not met for entitlement to a schedule award.

LEGAL PRECEDENT

Section 8107 of FECA⁸ sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.⁹ 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.¹⁰ The A.M.A., *Guides* has been adopted by the implementing regulations as the

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Id.* at § 8107.

¹⁰ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

appropriate standard for evaluating schedule losses.¹¹ For decisions issued after May 1, 2009, the sixth edition will be used.¹²

In addressing upper and lower extremity impairments, the sixth edition requires identifying the impairment for the Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).¹³ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹⁴

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology.¹⁵ OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.¹⁶

ANALYSIS

The evidence of record is insufficient to establish that appellant is entitled to a schedule award in accordance with the sixth edition of the A.M.A., *Guides*.

In support of her claim for a schedule award, appellant submitted a January 8, 2013 report from Dr. Gleason, who opined that she had 28 percent impairment to the total body. FECA, however, does not provide for a schedule award based on whole person impairment.¹⁷ As Dr. Gleason did not provide an impairment rating in accordance with the requirements of FECA, his report is of limited probative value.

On May 24, 2013 OWCP referred appellant for a second opinion examination, along with a statement of accepted facts, a set of questions and the medical record to Dr. Sklar, a Board-certified internist. In his July 11, 2013 report, Dr. Sklar determined that the findings were consistent with the diagnoses of chronic nonspecific upper and lower back pain, which was a “symptom more of [appellant’s] fibromyalgia than it would be of her work injury many years ago.” Dr. Sklar explained that spinal imaging revealed multiple level degenerative disease in the

¹¹ 20 C.F.R. § 10.404.

¹² FECA (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013).

¹³ A.M.A., *Guides* 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹⁴ *Id.* at 521.

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

¹⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹⁷ *See Tania R. Keka*, 55 ECAB 354 (2004); *James E. Mills*, 43 ECAB 215 (1991) (neither FECA, nor its implementing regulations provide for a schedule award for impairment to the body as a whole).

cervical and lumbar region, without any specific lesion which could be connected with appellant's complaints. He determined that, as repeat electrodiagnostic testing was negative for any evidence of radiculopathy affecting the upper or lower extremities related to her cervical and lumbar conditions, appellant had zero percent impairment for each upper extremity and lower extremity.

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*.¹⁸

In an October 28, 2013 report, OWCP medical adviser noted appellant's history and reviewed Dr. Sklar's report. He concurred with Dr. Sklar and concluded that there was no basis to rate any impairment to a scheduled body member.

The evidence of record at the time of OWCP's February 26, 2014 decision is insufficient to establish ratable impairment to a scheduled body member as a result of appellant's accepted conditions.

CONCLUSION

The Board finds that OWCP properly denied appellant's claim for a schedule award.

¹⁸ *Supra* note 12 at Chapter 2.808.6(d) (August 2002).

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 3, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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