United States Department of Labor
Employees' Compensation Appeals Board

E.T., Appellant	)	
and	)	**Docket No. 11-1239**
	)	**Issued: December 6, 2011**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Raleigh, NC, Employer	)	

Appearances:
Alan J. Shapiro, 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, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 26, 2011 appellant, through her representative, timely appealed the March 23, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the denial of her claim for a schedule award. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. §§ 8101-8193.

[2] The record on appeal includes evidence received after the Branch of Hearings & Review issued its March 23, 2011 decision. The Board's appellate review is limited to evidence that was in the case record at the time OWCP issued its final decision. 20 C.F.R. § 501.2(c)(1) (2011). Accordingly, any new evidence received after the March 23, 2011 decision will not be considered on appeal, but can be submitted to OWCP along with a request for reconsideration.

ISSUE

The issue is whether appellant has a ratable impairment of the lower extremities due to her accepted lumbar condition.

FACTUAL HISTORY

Appellant, a 61-year-old retired distribution clerk, injured her lower back in the performance of duty on January 19, 2007. OWCP initially accepted her claim for displaced lumbar disc L4-5 without myelopathy. In April 2010, it expanded the claim to include lower extremities radicular syndrome as an accepted condition.[3]

On May 24, 2010 counsel filed a claim for a schedule award on appellant's behalf. He, however, did not submit an impairment rating from her personal physician. OWCP subsequently forwarded the case file to its district medical adviser (DMA) for review.

In a report dated June 23, 2010, the DMA, Dr. Howard "H.P." Hogshead, a Board-certified orthopedic surgeon, reviewed the record, including the results of appellant's most recent physical examination dated March 18, 2010. He noted, *inter alia*, that the latest examination revealed "'no radiating pain past the buttocks.'" The March 18, 2010 second opinion examination also revealed "no notable decrease in sensation." Although there was a reported loss of motor strength on the right (4+/5), it was noted that "[s]trength [was] limited by subjective discomfort." Based on his review, the DMA explained that there was no demonstrated objective evidence of radiculopathy. As such, he found zero impairment of either lower extremity.

On August 10, 2010 OWCP forwarded a copy of the DMA's report to appellant and advised her to submit the report to her treating physician for his review and comment regarding the extent of any lower extremity impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2008).

OWCP subsequently received August 23, 2010 treatment notes from appellant's physician, Dr. Dwayne E. Patterson, a Board-certified physiatrist, who reported that she was seen for routine follow-up regarding her work-related chronic low back pain. Appellant was there to obtain refills of her pain medications, which included hydrocodone and Relafen. Dr. Patterson's "[impression]" was "[c]hronic low back pain with lower extremity radicular syndrome with stenosis, spondylolisthesis." He refilled appellant's prescriptions and encouraged her to provide him copies of her lab work from her primary care physician. Dr. Patterson indicated that she should continue taking Relafen, and he advised her to schedule another follow-up in six to nine months.

[3] OWCP expanded the claim based on the March 18, 2010 report of Dr. Stephen G. Struble, a Board-certified orthopedic surgeon and its referral physician, who diagnosed L4-5 disc herniation. Dr. Patterson also noted residual radiculopathy, right greater than left, buttock pain with prolonged periods of sitting and difficulty lifting objects. He stated that appellant's lower extremity radicular syndrome was work related.

In a decision dated August 10, 2010, OWCP denied appellant's claim for a schedule award.

Counsel requested a hearing, which was held on January 14, 2011. Pursuant to his request, OWCP's hearing representative held the record open for at least 30 days posthearing so that counsel could submit an impairment rating under the A.M.A., *Guides* (6th ed. 2008). However, OWCP did not receive any additional medical evidence within the allotted timeframe.

By decision dated March 23, 2011, the Branch of Hearings & Review affirmed OWCP's August 10, 2010 decision denying appellant's claim for a schedule award.

LEGAL PRECEDENT

Section 8107 of FECA 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.[4] 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[5] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).[6]

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or the implementing regulations.[7] Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.[8]

ANALYSIS

The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment.[9] It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine.[10] The impairment is premised on evidence of radiculopathy affecting the upper and/or lower

[4] For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

[5] 20 C.F.R. § 10.404.

[6] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *Id*. at, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

[7] *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

[8] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

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

[10] *Id.*

extremities.[11] The DMA reviewed Dr. Struble's March 18, 2010 report and specifically noted his finding of "'[n]o radiation past the buttock.'" Appellant's pain was reportedly limited to the bilateral buttock area, right greater than left. Additionally, she had no lower extremity sensory deficit. Appellant also had full motor strength in her left lower extremity. As to the right lower extremity, Dr. Struble reported 4+/5 motor strength. However, he commented that appellant's "[s]trength [was] limited by subjective discomfort." The DMA concluded that there was "no demonstrated objective evidence of a radiculopathy." As such, he correctly found that appellant did not have a ratable lower extremity impairment under the A.M.A., *Guides* (6th ed. 2008).

Appellant bears the burden of establishing entitlement to benefits under FECA.[12] OWCP attempted to assist her in securing a lower extremity impairment rating from her physician, but Dr. Patterson did not provide an appropriate rating. While his August 23, 2010 treatment records noted an impression of "[c]hronic low back pain with lower extremity radicular syndrome...." Dr. Patterson did not provide specific physical or neurological findings that might otherwise support his diagnoses.[13] In this instance, the DMA properly utilized Dr. Struble's March 18, 2010 report and determined that appellant's latest examination findings did not demonstrate any lower extremity impairment. The Board finds that the DMA's June 23, 2010 impairment rating conforms to the A.M.A., *Guides* (6th ed. 2008), and thus, represents the weight of the medical evidence regarding the extent of appellant's lower extremity impairment.

Appellant may request a schedule award or increased schedule award at anytime 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

Appellant has not established that she has a ratable impairment of the lower extremities.

[11] *Id*.

[12] *E.g.*, *G.T.*, 59 ECAB 447, 450-51 (2008).

[13] The attending physician should describe the impairment in sufficient detail to permit clear visualization of the impairment and the restrictions and limitations which have resulted. The description should include the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, disturbance of sensation or other pertinent description of the impairment. Under the sixth edition of the A.M.A., *Guides* (2008), clinical history is also important in the diagnosis-based grid that ranks impairment within classes of severity. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3a(2).

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board