United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 11-241**
	)	**Issued: September 22, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Camden, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 8, 2010 appellant filed a timely appeal from a July 22, 2010 schedule award decision of the Office of Workers' Compensation Programs (OWCP). 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 the schedule award decision.

ISSUE

The issue is whether appellant has more than a five percent impairment of the right lower extremity.

On appeal appellant's attorney asserts that the report of the referee physician is vague, speculative, incomplete and unrationalized, and that a new conflict in medical evidence has been established.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 4, 1996 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim, alleging that she injured her back, right hip and leg when she slipped on ice while delivering mail on January 3, 1996. The claim was accepted for low back strain with sciatica and herniated nucleus pulposus (HNP) at L3-4.

On January 7, 2002 appellant, through her attorney, requested a schedule award. In an October 19, 2001 report, Dr. David Weiss, an osteopath, advised that he examined appellant on October 1, 2001 when she reached maximum medical improvement. He provided an impairment rating, finding that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[2] appellant had a 19 percent impairment of the right lower extremity.

By decision dated January 23, 2002, OWCP denied the claim, and in a December 9, 2002 decision, an OWCP hearing representative set aside the January 23, 2002 decision and remanded the case for further development.

By decision dated April 1, 2003, appellant was granted a schedule award for a five percent impairment of the right lower extremity. In a January 30, 2004 decision, OWCP's hearing representative found that a conflict in medical opinion arose between Dr. Weiss and OWCP's medical adviser regarding the extent of permanent impairment and remanded the case for an impartial evaluation.

OWCP referred appellant to Dr. Norman H. Eckbold, a Board-certified orthopedic surgeon, for an impartial medical examination. In a May 13, 2004 report, Dr. Eckbold advised that appellant had no objective functional deficits on physical examination and, based on a diagnosis of an HNP at L3-4, under the A.M.A., *Guides*, she had a diagnosis-related estimate of lumbosacral impairment of five percent of the whole person. An OWCP medical adviser reviewed Dr. Eckbold's report and found no right lower extremity impairment.

In a May 26, 2004 decision, OWCP denied appellant's claim for an additional schedule award. By decision dated January 11, 2005, an OWCP hearing representative found Dr. Eckbold's conclusion deficient because he based his impairment on the spine and whole person. The case was remanded to obtain a supplementary report from the physician. In letters dated March 15, 2007 and June 30, 2009, OWCP requested a supplementary opinion from Dr. Eckbold but received no response.

Appellant was subsequently referred to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, for an impartial evaluation. On October 27, 2009 Dr. Glenn noted his review of the record, including a statement of accepted facts. He described appellant's complaints of constant deep pain in the right buttock with intermittent pain on the left, a stabbing pain behind the right knee, muscle spasms in the calf area, right foot numbness not associated with pain and back stiffening. Dr. Glenn noted appellant's report that she began a limited-duty position in 1998 but recently had begun delivering mail again, and advised that she walked about

[2] A.M.A., *Guides* (5th ed. 2001).

the examination room without difficulty, showing no evidence of limp, demonstrated a normal heel/toe reciprocal gait, and could easily heel and toe walk. Physical examination demonstrated no evidence of paralumbar muscle spasm and no tenderness on examination of the spinous processes from the base of the skull down to the L5 vertebra and into the lumbosacral joint or in the sacrum, coccyx, or sacroiliac region and no tenderness in the paravertebral musculature. Bending forward elicited back pain. Sitting, straight leg raising and hip flexion and rotation maneuvers were negative for pain. Appellant reported that supine straight leg raising caused severe pulling in the back part of the legs bilaterally but no pain. Thigh and calf circumferences were equal bilaterally, and sensory examination to gross touch, fine touch, and pinprick appeared intact, although appellant reported that she perceived an alteration in pinprick sensation involving the entire right lower extremity which, Dr. Glenn advised, did not follow any dermatomal distribution. Dr. Glenn could not find any sensory deficit involving the right L3, L4 or S1 distribution. He opined that appellant had reached maximum medical improvement in 2003, that her physical examination was basically normal, and that she showed nothing to substantiate the presence of a herniated disc with nerve root compromise. Dr. Glenn noted that the sixth edition of the A.M.A., *Guides* advised that a positive imaging study, in and of itself, did not make a diagnosis, and for imaging studies to be of diagnostic value, clinical symptoms and signs must be consistent with the imaging findings and that subjective complaints without physical findings or significant clinical abnormalities were generally assigned Class 0 and had no ratable impairment.[3] Dr. Glenn acknowledged that FECA did not accept spinal impairments, *per se*, but that purely as an exercise, he would utilize Table 17-4, Lumbar Spine Regional Grid, for a disc herniation, and found that appellant did not have an ratable impairment under Table 17-4.

On December 22, 2009 Dr. Morley Slutsky, OWCP's medical adviser Board-certified in occupational medicine, reviewed the medical record including Dr. Glenn's report. He identified October 27, 2009 as the date of maximum medical improvement. As neither Dr. Eckbold nor Dr. Glenn found lower extremity deficits related to the accepted low back condition, there was no basis for any lower extremity impairment.

By decision dated January 22, 2010, OWCP found that appellant was not entitled to an additional schedule award.

Appellant, through her attorney, timely requested a hearing. On May 15, 2010 she described constant pain and that she had adjusted her life and routine to deal with it. Appellant was not present at the hearing, held on May 18, 2010. Counsel contended that a conflict existed between Dr. Glenn's opinion and that of Dr. Weiss. Appellant thereafter submitted Dr. Weiss' October 19, 2001 report, revised on May 10, 2010 to comport with the sixth edition of the A.M.A., *Guides*. Dr. Weiss advised that, under Table 16-12 of the sixth edition, appellant had Class 1 sensory deficits of the right L3 and L4 (femoral) nerve root, and the right S1 (sciatic) nerve roots that yielded impairments of two percent and nine percent respectively. He further found that appellant also had a Class 1 motor strength deficit of right hip flexors under Table 15-12 for a nine percent impairment. Dr. Weiss then combined the three impairments, for a combined 18 percent impairment of the right lower extremity.

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

By decision dated July 22, 2010, OWCP's hearing representative found that the weight of the medical evidence rested with the opinion of Dr. Glenn, who provided an impartial evaluation, and affirmed the April 1, 2003 decision.

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 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 uniform standard applicable to all claimants.[6] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7] For decisions issued after May 1, 2009, the sixth edition will be used.[8]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[9] Under the sixth edition, for lower extremity impairments the evaluator identifies 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).[11] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[12]

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.[13] 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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*. at § 10.404(a).

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

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

[9] A.M.A., *Guides*, *supra* note 3 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[10] *Id*. at 494-531.

[11] *Id*. at 521.

[12] *Id*. at 23-28.

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

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.[14]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[15] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[16] OWCP procedures indicate that referral to OWCP's medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained. Where a medical conflict is present, to properly resolve the conflict, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides.* OWCP's medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.[17]

ANALYSIS

OWCP accepted that appellant sustained a low back sprain and HNP at L3-4 when she slipped on ice while delivering mail on January 3, 1996. By decision dated April 1, 2003, appellant was granted a schedule award for a five percent impairment of the right lower extremity. She was referred to Dr. Glenn for an impartial evaluation.

The Board finds that appellant has not established that she has greater than a five percent impairment of the right lower extremity. In a comprehensive report dated October 27, 2009, Dr. Glenn reviewed the record and noted that appellant walked without difficulty, demonstrated a normal gait and could easily heel and toe walk. He provided extensive physical findings on examination, noting that there was no evidence of paralumbar muscle spasm or tenderness, and no tenderness on examination of the spinous processes from the base of the skull down to L5 and including the lumbosacral joint, sacrum, coccyx and sacroiliac region. Thigh and calf circumferences were equal bilaterally, and Dr. Glenn advised that he could not demonstrate a sensory deficit involving the right L3, L4 or S1 distribution. He concluded that appellant's physical examination was basically normal. Dr. Glenn properly noted that a schedule award is not payable under FECA for injury to the spine,[18] and found no ratable impairment of the right lower extremity. Dr. Slutsky, OWCP's medical adviser, reviewed Dr. Glenn's report on

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

[15] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[16] *Manuel Gill*, 52 ECAB 282 (2001).

[17] *Thomas J. Fragale*, 55 ECAB 619 (2004).

[18] *Pamela J. Darling*, *supra* note 13.

December 22, 2009 and agreed with his conclusion that appellant had no ratable right lower extremity impairment.

While appellant submitted a report dated May 15, 2010 in which Dr. Weiss updated his October 19, 2001 report to comport with the sixth edition of the A.M.A., *Guides*, Dr. Weiss did not reexamine appellant and based his physical findings on an October 1, 2001 physical examination. His October 19, 2001 report created the conflict in medical evidence. An additional report from a claimant's physician, which essentially repeats earlier findings and conclusions, is insufficient to overcome the weight accorded to an impartial medical specialist's report.[19] Furthermore, Dr. Weiss' October 2001 physical examination findings constitute stale medical evidence.[20] His May 15, 2010 report is therefore insufficient to establish a new conflict in medical evidence.

Dr. Glenn provided examination findings and rationale for his opinions and conclusions that appellant had no right lower extremity impairment that would entitle her to an increased schedule award under the sixth edition of the A.M.A., *Guides*. Contrary to appellant's assertion on appeal, his report is entitled to the special weight accorded an impartial examiner and therefore constitutes the weight of the medical evidence.[21] Appellant therefore did not establish entitlement to a schedule award for her right lower extremity greater than the five percent previously awarded.

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 did not establish that she has more than a five percent impairment of the right lower extremity.

[19] *Roger G. Payne*, 55 ECAB 535 (2004).

[20] *See Keith Hanselman*, 42 ECAB 680 (1991).

[21] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 22, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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