

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

H.L., Appellant)

and)

DEPARTMENT OF LABOR, OFFICE OF)
WORKERS' COMPENSATION PROGRAMS,)
Washington, DC, Employer)

Docket No. 12-510
Issued: August 15, 2012

Appearances:
Appellant, pro se
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 January 10, 2012 appellant filed a timely appeal from a September 30, 2011 Office of Workers' Compensation Programs' (OWCP) schedule award decision. 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 merits of her claim for a schedule award.

ISSUE

The issue is whether appellant has impairment caused by her accepted lumbar condition that would entitle her to a schedule award.

FACTUAL HISTORY

On August 6, 2009 appellant, then a 43-year-old workers' compensation specialist, filed an occupational disease claim for an aggravation of a preexisting herniated disc of the low back

¹ 5 U.S.C. § 8101 *et seq.*

and pain in the neck, shoulders and both arms and legs. She did not stop work. OWCP accepted the claim for aggravation of lumbosacral radiculitis, aggravation of displacement of lumbar intervertebral disc without myelopathy L5-S1, aggravation of cervical radiculitis C6-7, aggravation of degeneration of cervical intervertebral disc C6-7 and aggravation of cervical facet syndrome. It paid appropriate compensation benefits.

An August 5, 2009 x-ray read by Dr. Maya Reiser, a Board-certified diagnostic radiologist, revealed a transitional lumbosacral vertebral body and narrowing of the L5-S1 disc space. A rotator levoscoliosis of the spine was noted and no spondylolisthesis was seen. Dr. Reiser diagnosed levoscoliosis and degenerative disc disease at L5-S1.

On October 20, 2010 appellant filed a claim for a schedule award.

By letter dated October 26, 2010, OWCP advised appellant that it was unable to process her claim for a schedule award. It advised her to submit medical evidence in support of her claim based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (6th ed. 2008). Appellant was also advised that the medical evidence did not establish that her condition had reached maximum medical improvement.

In a December 12, 2010 report, Dr. Victor E. Herry, an internist, noted that appellant presented for a follow-up evaluation with complaints of chronic joint pain and noted that this was a chronic condition aggravated by her work-related activities. He diagnosed degenerative disc disease and indicated that appellant “may have reached a plateau of maximum medical improvement.” Dr. Herry noted that he would continue to treat and monitor her condition in an effort to alleviate pain and maintain her current level of health.

By letter dated March 22, 2011, OWCP advised appellant that the medical evidence was insufficient to establish her claim for a schedule award as Dr. Herry had not provided an opinion on permanent impairment. It advised her of the requirements for obtaining a schedule award.

In a March 27, 2011 report, an OWCP medical adviser explained that he was unable to provide an impairment rating as the medical evidence did not contain any physical findings by which an impairment rating could be made.

In a letter dated April 20, 2011, appellant advised OWCP that her physician was unable to provide an impairment rating as he was unfamiliar with the rating process. She requested that OWCP schedule an appointment for her examination.

By letter dated April 25, 2011, OWCP referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Willie Thompson, a Board-certified orthopedic surgeon.

In a report dated May 10, 2011, Dr. Thompson described appellant’s history of injury and medical treatment. He found a full range of motion of the cervical spine. There was no tenderness, no paraspinous muscle spasm, no palpable cervical nodes and no masses. Appellant had full range of motion of the arms with no wasting or atrophy. Dr. Thompson also determined that she had full range of motion of the lumbar spine with no tenderness and no paraspinous muscle spasms. He determined that appellant was capable of heel and toe walking with no

difficulty. Furthermore, appellant's straight leg raising was negative bilaterally and there were no motor or sensory deficits in the lower extremities. Dr. Thompson reviewed the August 5, 2009 lumbar spine x-ray and noted that she had mild scoliosis and degenerative disc disease at L5-S1 with no evidence of disc herniation or spinal stenosis. He found no evidence of any radiculopathy. Dr. Thompson explained that appellant underwent electromyography for possible cervical radiculopathy but it was not supported based on testing or on physical examination. He advised that the neurological examination was completely within normal limits. Dr. Thompson opined that "[i]n fact, there are no objective findings whatsoever." He explained that according to the A.M.A., *Guides* there was no basis for a rating of permanency. Dr. Thompson indicated that appellant reached maximum medical improvement on December 22, 2010.

By decision dated May 26, 2011, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record did not support any permanent impairment to a scheduled member or function of the body.

By letter dated August 5, 2011, appellant requested reconsideration. In an August 2, 2011 report, Dr. Robert W. Macht, a Board-certified surgeon, noted her history and findings. On examination, appellant had decreased sensation to light touch about the left great toe, pain with motion of her left leg and straight leg raising was positive on the left at 20 degrees. There was no atrophy and her legs were nontender. Appellant had minimal weakness of flexion and extension of the left ankle. The left elbow had pain with motion. Dr. Macht found moderate weakness of both hand grips and mild weakness of the intrinsic muscles of both hands. Range of motion of the arms was intact with no atrophy and a negative Tinel's sign. Appellant had slight pain with flexion of her back and had limited motion of the neck and back. Dr. Macht diagnosed occupational injury to the neck and back region with radiculopathy. He noted that appellant had nerve studies of the lower extremities in April 2011, which revealed evidence of moderate acute left L5 radiculopathy. Nerve conduction studies (NCS) of the upper extremities in January 2010 revealed evidence of moderate acute right C6 and C7 radiculopathy.² Dr. Macht referred to the sixth edition of the A.M.A., *Guides* and stated that a patient in appellant's condition without nerve study evidence of radiculopathy would have class 1 impairment of the cervical and lumbar region. But because of her documented radiculopathy, she qualified for class 3 cervical impairment and class 2 lumbar impairment. Appellant's *QuickDash* questionnaire for right arm was 59 out of 100 and 78 on the left. Under Table 15-7,³ she qualified as a grade modifier 2 for functional history for the right arm and grade modifier 3 for the left arm. Based on this, Dr. Macht opined that the default position was proper for the radiculopathy finding of her arms. He explained that her class 3 impairment was based on Table 17-2⁴ and opined that she had "19 percent impairment of the whole person for a class 1 impairment" and also that she had "six percent whole person impairment." Dr. Macht explained that the difference between these two ratings was 13 percent whole person impairment. For the lumbar spine regional grid, he

² The record contains January 14, 2010 NCS that indicated evidence of moderate acute C6 and C7 radiculopathy on the right. Dr. Macht also referenced April 11, 2011 NCS, which revealed evidence of moderate acute L5 radiculopathy on the left.

³ A.M.A., *Guides* 406 (sixth edition).

⁴ *Id* at 570.

determined that appellant had a class 1 impairment based on her history without nerve study findings and opined that she had a class 2 impairment based on the nerve study. Dr. Macht noted that she filled out the lower limb questionnaires and scored 43 out of 100 on the right and 71 on the left, which qualified for grade modifier 2 for the right leg and grade modifier 3 for the left leg based on Table 16-6.⁵ He selected the D column for the current lumbar spine impairment, class 2 according to Table 17-4.⁶ Dr. Macht opined that appellant had 13 percent whole person impairment due to her back condition and radiculopathy under that table. He advised that, if there was no evidence of radiculopathy, she would have a seven percent rating under Table 17-4.

Dr. Macht advised that the A.M.A., *Guides* conversion tables converted 13 percent whole person impairment to 21 percent impairment of the right arm while six percent whole person impairment translated to 15 percent impairment of the left leg. He also noted that, despite appellant's complaints, the nerve studies did not show evidence of radiculopathy in right leg and left arm and that she had no ratable impairment for either of those extremities. Dr. Macht referred to Table 3-1 on page 40 of the A.M.A., *Guides* and advised that there was a moderate degree of pain-related impairment of the right leg and a severe degree of pain-related impairment of the left arm based on her questionnaires and functional history scores. He opined that appellant had three percent permanent impairment of the left arm and two percent impairment of her right leg. Dr. Macht advised that she reached maximum medical improvement on June 30, 2011.

In an August 30, 2011 report, an OWCP medical adviser stated that Dr. Macht's report did not include a detailed history or physical as discussed on pages 28 to 30 of the A.M.A., *Guides*. He explained that, absent a detailed history and physical examination findings, an impairment rating could not be processed. The medical adviser noted that Dr. Macht advised that his ratings for radicular symptoms and/or signs were derivable for the upper and lower extremities utilizing the tables from Chapter 17; but the ratings from Chapter 17 were applicable for axial skeletal conditions and there was "no way that an upper or lower extremity impairment rating could be derived using any table in Chapter 17 which all contain body as a whole ratings." He opined that the impairment ratings provided by Dr. Macht were not sufficient to establish upper or lower extremity impairment conforming to the standards of OWCP.

By decision dated September 30, 2011, OWCP denied modification of its May 26, 2011 decision.

LEGAL PRECEDENT

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.⁷

⁵ *Id.* at 516.

⁶ *Id.* at 570.

⁷ *Veronica Williams*, 56 ECAB 367 (2005).

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.⁸ 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.⁹ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹⁰ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.¹¹

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.¹² 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.¹³

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.¹⁴ OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.¹⁵

ANALYSIS

The Board finds that the evidence of record is insufficient to establish that appellant sustained permanent impairment of either her upper or lower extremities in accordance with the sixth edition of the A.M.A., *Guides*. OWCP accepted her claim for aggravation of lumbosacral radiculitis, aggravation of displacement of lumbar intervertebral disc without myelopathy L5-S1,

⁸ 5 U.S.C. § 8107.

⁹ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁰ 20 C.F.R. § 10.404.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹² *Pamela J. Darling*, 49 ECAB 286 (1998).

¹³ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁴ *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

¹⁵ *Supra* note 11 at Chapter 3.700, Exhibit 4 (January 2010).

aggravation of cervical radiculitis C6-7, aggravation of degeneration of cervical intervertebral disc C6-7 and aggravation of cervical facet syndrome.

The medical evidence from Dr. Macht is of reduced probative value or the issue of permanent impairment to appellant's arms or legs as he did not follow the A.M.A., *Guides* in rating permanent impairment. The report from him referred to Tables 15-7, 17-2 and 17-4 of the A.M.A., *Guides* and assigned a 13 percent whole person impairment rating for acute right C6 and 7 radiculopathy affecting both arms. FECA does not authorize schedule awards for loss of use of the spine or the body as a whole.¹⁶ The Board also finds that he failed to rate appellant's impairment using the A.M.A., *Guides Newsletter* standard for spinal nerve root injuries involving the extremities. OWCP's procedures provide that *The Guides Newsletter* is the appropriate method of determining impairment in this case. *The Guides Newsletter* provides a specific method for determining impairments for conditions such as radiculopathy from a spinal nerve injury. It explains that, in the sixth edition, impairment for radiculopathy is reflected in the diagnosis-based impairment for the spinal region. In developing an alternative approach to rating isolated radiculopathy, it is important to provide consistency in impairment ratings between the chapters.¹⁷ Dr. Macht did not discuss the July/August 2009 *Guides Newsletter*. Furthermore, it is unclear how he arrived at the finds of radiculopathy in light of the earlier findings from Dr. Thompson, the second opinion physician, who explained that findings on examination did not support evidence of radiculopathy that would support an impairment rating. Dr. Thompson explained that the electromyogram and nerve conduction testing was not supported by his findings upon physical examination. Dr. Macht rated pain under Table 3-1 on page 40 of the A.M.A., *Guides* which quantifies whole person impairment based on pain disability questionnaire scores. As noted, FECA does not authorize schedule awards for permanent impairment of the whole person. Dr. Macht failed to rate impairment to appellant's arms or legs.

Board precedent is well settled, that when an attending physician's report gives an estimate of permanent impairment and mentions the A.M.A., *Guides*, but does not base that estimate upon correct application of the identifiable sections, grading schemes, tables or figures, OWCP may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.¹⁸

An OWCP medical adviser explained that Dr. Macht did not provide a detailed history or physical findings. He noted ratings from Chapter 17 were applicable for axial skeletal conditions and there was "no way that an upper or lower extremity impairment rating could be derived using any table in Chapter 17 which all contain body as a whole ratings." The medical adviser concluded that the impairment ratings provided by Dr. Macht did not conform to OWCP protocols. As noted FECA does not authorize schedule awards for loss of use of the spine or the body as a whole.¹⁹ Appellant did not submit any other medical evidence to support that she was

¹⁶ D.A., Docket No. 10-2172 (issued August 3, 2011); *J.Q.*, 59 ECAB 366 (2008).

¹⁷ See *supra* notes 13-14.

¹⁸ See *Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

¹⁹ See *supra* note 17.

entitled to a schedule award, under the sixth edition of the A.M.A., *Guides*, for a scheduled member of the body under FECA. The Board finds that she has not permanent impairment to her legs due to her accepted cervical or lumbar conditions.

On appeal, appellant contented that Dr. Macht's report contained documentation of a detailed history and physical finding and that he was familiar with the A.M.A., *Guides*. As noted Dr. Macht's report did not comport with the A.M.A., *Guides* and OWCP's procedures and is insufficient to establish the extent of permanent impairment.

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 not met her burden of proof to establish that she has an impairment caused by her accepted employment injuries that would entitle her to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2012
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