United States Department of Labor
Employees' Compensation Appeals Board

P.B., Appellant	)	
and	)	**Docket No. 12-1393**
	)	**Issued: December 18, 2012**
SOCIAL SECURITY ADMINISTRATION, Plainfield, 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, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 4, 2012 appellant, through counsel, filed a timely appeal from a February 15, 2012 schedule award decision of the Office of Workers' Compensation Programs (OWCP). 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 claim.

ISSUE

The issue is whether appellant has more than 10 percent impairment of the right arm.

FACTUAL HISTORY

This case was previously before the Board.[2] Appellant, a 51-year-old service representative, injured herself in an employment-related fall on May 24, 2000. OWCP accepted

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 10-2250 (issued August 12, 2011).

her traumatic injury claim for left wrist sprain, aggravation of lumbosacral sprain, bilateral knee and ankle sprains, bilateral medial meniscus tear and cervical myelopathy. It granted schedule awards for 12 percent impairment of the left and right legs and 10 percent impairment of the left and right arms.

In an October 23, 2008 decision, OWCP found 10 percent right arm impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001). That decision was subsequently set aside and the case remanded to OWCP for further medical development. On remand, OWCP found a conflict in medical opinion and referred appellant to an impartial medical examiner.[3] In a report dated May 27, 2009, Dr. William K. Fleming, a Board-certified orthopedic surgeon selected as the impartial specialist, found no permanent impairment of the right upper extremity under the A.M.A., *Guides* (5th ed. 2001). By decision dated November 16, 2009, OWCP denied appellant's claim for a schedule award based on Dr. Fleming's opinion. In a decision dated June 1, 2010, the Branch of Hearings & Review found the record insufficient to establish that appellant had more than 10 percent impairment as previously awarded.

In an August 12, 2011 order, the Board found that the case was not in posture for decision as the impairment ratings had been made under the fifth edition of the A.M.A., *Guides* (2001), which was no longer applicable. The Board noted that the sixth edition of the A.M.A., *Guides* became applicable as of May 1, 2009. Accordingly, the case was set aside and remanded to OWCP for further medical development.

On remand, OWCP referred appellant to Dr. Wylie D. Lowery, Jr., a Board-certified orthopedic surgeon selected as the impartial medical specialist. In a January 31, 2012 report, Dr. Lowery found that appellant did not sustain any permanent impairment of the right upper extremity as a result of her May 24, 2000 employment injury. He provided a review of the medical records, noting that when examined on June 5, 2000 there was no mention of any right upper extremity pain. The initial diagnosis pertained to the lumbar spine. Diagnostic testing was obtained on July 27, 2000 that revealed no evidence of cervical radiculopathy with borderline delay of the right median nerve not consistent with her symptoms. A February 24, 2001 MRI scan revealed some cervical disc bulging but no evidence of any intrinsic cord abnormality or foraminal encroachment. In August 2003, an MRI scan showed a herniated disc for which appellant underwent surgery. In August 2005, a prior examining physician did not relate appellant's shoulder or neck complaints to her fall in 2000. Dr. Lowery noted the impairment rating by Dr. Weiss secondary to median nerve sensory deficit but stated that the exact mechanism for this rating was unclear. He noted that the medical adviser did relate carpal tunnel syndrome, diagnosed three years after injury, to the fall in 2000.

Dr. Lowery provided findings on physical examination and stated that appellant's complaints of diffuse pain in her head, neck, both arms and upper extremities were inconsistent and did not fit any neurologic distribution. He stated that there was no atrophy within the neck, shoulder girdle or upper extremities and no palpable muscle spasm. Appellant demonstrated a full range of motion with equal reflexes through the upper extremity musculature. Dr. Lowery

[3] OWCP found a conflict between appellant's physician, Dr. David O. Weiss, who rated 28 percent impairment of the right arm, and Dr. Willie E. Thompson, a medical adviser, who rated 10 percent impairment.

described a disproportionate pain experience to gentle touch of the skin that was nonanatomic and did not appear localized. He found that appellant had reached maximum medical improvement as of May 24, 2001 without any permanent impairment of her right arm due to the accepted 2000 injury. Dr. Lowery found no basis to rate right upper extremity impairment.

By decision dated February 15, 2012, OWCP found that appellant had no impairment of the right arm under the A.M.A., *Guides* (6th ed. 2008). It based its finding on Dr. Lowery's January 31, 2012 report.

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]

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[7] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[8] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS

OWCP previously granted a schedule award for 10 percent impairment of the right upper extremity under the fifth edition of the A.M.A., *Guides* (2001). In an August 12, 2011 order, the

[4] For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[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); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

[7] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The medical adviser, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

[8] *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[9] *Gary R. Sieber*, 46 ECAB 215 (1994).

Board remanded the case for further medical development concerning the extent of impairment to the right arm under the sixth edition of the A.M.A., *Guides*.

In a January 31, 2012 report, Dr. Lowery, the impartial medical specialist, found no impairment of the right arm attributable to appellant's May 24, 2000 employment injury. He addressed the medical records and noted that, when examined on June 5, 2000, there was no mention of any right upper extremity pain. The diagnostic testing of July 27, 2000 revealed no evidence of cervical radiculopathy with a borderline delay of the right median nerve not consistent with appellant's symptoms. In 2003, an MRI scan showed a herniated disc of the cervical spine for which appellant underwent surgery. Dr. Lowery noted that the evaluation by Dr. Weiss in 2006 assigned right upper extremity impairment based on median nerve sensory deficits of 28 percent. He stated that the mechanism for this impairment rating was unclear. Dr. Lowery also noted that the medical adviser did not relate appellant's carpal tunnel syndrome, diagnosed three years after the fall, to the 2000 injury. He provided findings on physical examination, noting appellant's complaint of diffuse pain in her head, neck, both arms. Dr. Lowery found no evidence of muscle atrophy within the neck, shoulder girdle or upper extremities and no palpable muscle spasm. He noted a full range of motion of the shoulders with equal reflexes of the biceps, brachioradialis and triceps. Dr. Lowery stated that appellant's complaint of pain did not fit any neurologic distribution, with nonanatomic deep tenderness over both upper extremities that did not appear localized. He concluded that appellant did not sustain any permanent impairment to her right upper extremity as a result of the 2000 injury. The Board finds that the report of Dr. Lowery provided a thorough review of the medical records, the statement of accepted facts and presented a cogent explanation for his finding of no permanent impairment to appellant's right arm due to the 2000 injury accepted in this case. Dr. Lowery's report represents the special weight of medical opinion.[10]

On appeal, counsel argued that OWCP's February 15, 2012 decision should be set aside and the case remanded for further medical development. He stated that the record did not establish that Dr. Lowery was properly selected under the Physician Directory System (PDS). Counsel also noted that it was unclear what, if any, effort was made to obtain clarification from the Dr. Fleming. With respect to this latter argument, there is no indication that OWCP sought clarification from Dr. Fleming; nor did the Board specifically instruct OWCP to obtain clarification from the prior impartial specialist. Given that Dr. Fleming's evaluation was more than two years old when the Board remanded the case, it was prudent of OWCP to obtain an updated physical evaluation.

Based on the conflict in medical opinion, OWCP referred appellant to Dr. Lowery for an impartial medical evaluation. As noted, counsel argued that the record did not establish whether he was properly selected under the PDS. The Board notes that OWCP no longer utilizes the PDS for scheduling impartial medical evaluations. At the time the Board previously remanded the case in August 2011, OWCP had implemented its iFECS-based Medical Management

[10] *Rose V. Ford*, 55 ECAB 449 (2004); *Charles E. Burke*, 47 ECAB 185 (1995).

application.[11] In *R.C.*,[12] the Board recently reviewed the Director's delegated discretion in appointing physicians to perform medical examinations in situations in which a conflict in opinion arises under section 8123 of FECA. Under the new procedures, a medical scheduler puts the claim number into the application, from which appellant's home zip code is loaded. The scheduler chooses the type of examination to be performed and the applicable medical specialty. The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. If the physician agrees to the appointment, the date and time are entered. Upon entry of this information, the application prompts the Form ME023.

The record includes an imaged copy of an October 14, 2011 "iFECS Report: ME023 -- Appointment Schedule Notification" which FECA procedure manual provides is documentation that the medical management application was used that day to select Dr. Lowery as the impartial specialist.[13]

The record also includes CA-110 notes from October 5, 2011 which establish that the medical scheduler first attempted to schedule an impartial medical examination on that date but was unsuccessful. The scheduler noted that she made contact with several doctors who did not accept referrals from the Department of Labor. She also called other doctors not enrolled in ACS, were retired, no longer with a practice, the telephone number was disconnected and not in service and for whom there were missing numbers. The scheduler closed the medical scheduling attempt that evening.

Based on the evidence of record, the Board finds that OWCP properly utilized the medical management application to refer appellant to Dr. Lowery for examination. Dr. Lowery's report constitutes the weight of medical opinion on the issue of the extent of impairment to appellant's right arm.

CONCLUSION

The Board finds that appellant has no permanent impairment to her right arm due to residuals of her 2000 employment injury.

[11] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (July 2011). The application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.

[12] Docket No. 12-468 (October 5, 2012).

[13] "The ME023 report can only be generated through the Medical Management application and serves as documentary evidence that the referee appointment was scheduled through the use of the rotational system in the Medical Management application." *Id.* at Chapter 3.500.5g. The FECA Procedure Manual further provides that the "medical scheduler should image a copy of the ME023 into the case file to substantiate that the rotational system was used to select the physician." *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2012
Washington, DC

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

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

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