United States Department of Labor
Employees' Compensation Appeals Board

E.M., Appellant	)	
and	)	**Docket No. 11-1373**
	)	**Issued: February 3, 2012**
U.S. POSTAL SERVICE, TRIBORO PERFORMANCE CLUSTER -- QUEENS, Brooklyn, NY, Employer	)	

Appearances:
Thomas R. Uliase, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 17, 2011 appellant filed a timely appeal from a January 11, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding his schedule award claim. 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 established entitlement to a schedule award.

FACTUAL HISTORY

The record reflects that appellant, a clerk, has several claims with OWCP. Under claim number xxxxxx111, appellant, then 29 years old, twisted his back on May 30, 1977 when the mail tray he was lifting slipped. OWCP accepted the claim for a lumbosacral strain. Under

[1] 5 U.S.C. §§ 8101-8193.

claim number xxxxxx627, appellant has an accepted lumbosacral strain for an August 2, 1979 injury and, under claim number xxxxxx957, an accepted lumbosacral strain for a March 31, 1980 injury. Under claim number xxxxx176, he has an accepted lumbosacral strain with sciatica for a January 30, 1981 injury. OWCP combined the claims, making the current, case number xxxxxx111 the master file.

On March 27, 2007 OWCP received a March 23, 2006 request from appellant for a schedule award. In a December 29, 2005 report, Dr. Nicholas Diamond, an attending osteopath, noted the history of injury and diagnosed failed low back syndrome L2 through S1 with bilateral lumbosacral radiculitis and chronic pain syndrome. He reported that appellant had 27 percent right lower extremity and 30 percent left lower extremity impairment based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On February 15, 2008 OWCP's medical adviser reviewed the medical evidence. He found that appellant reached maximum medical improvement on December 29, 2005 and that appellant had 12 percent impairment to the right lower extremity and 3 percent impairment to the left lower extremity under the fifth edition of the A.M.A., *Guides*.

OWCP determined a conflict in medical opinion arose and referred appellant to Dr. Daniel Primm, a Board-certified orthopedic surgeon, for an impartial medical examination as to permanent impairment. The record contains bypass forms for five other Board-certified orthopedic surgeons, noting that they were bypassed because of their subspecialty or because they did not accept Department of Labor patients.[2]

In a March 24, 2009 report, Dr. Primm reviewed a statement of accepted facts, appellant's medical record and set forth his examination findings. An impression of lumbar strains by history was provided. Based on his review of the medical records and his examination findings, Dr. Primm opined that appellant did not have a disc herniation or a true radiculopathy and the current examination showed no signs suggestive or radiculopathy or radiculitis. Appellant's examination showed, as his previous records indicated, that he reported nondermatonal patterns of diminished sensation in the right leg. However, there was no physical explanation of the pattern of numbness and it could not be associated with a history of lumbar strains. Dr. Primm suspected there was quite a bit of psychosocial overlay based on appellant's complaints, particularly with his subjective sensory loss reports. Dr. Primm indicated that there were no objective signs of impairment to either leg based on his objective examination and history. He advised that appellant's electromyogram (EMGs) were not diagnostic for radiculopathy. Under the fifth edition of the A.M.A., *Guides*, Dr. Primm opined that appellant had five percent impairment for a diagnosis-related estimate (DRE) Category II under Table 15-3, page 384. He further indicated that there was no basis for assessing impairment to both lower extremities as there was no measurable atrophy in the thighs or the calves and no real muscle weakness. Dr. Primm further opined that appellant's symptoms were disproportionate to his objective findings and his history of treatment.

[2] Drs. Steven Lawrence and Mark Linbecker were bypassed of their specialties. Drs. Scott Maifi, William Wheeler and Jeffrey Selby were bypassed because they did not accept Department of Labor patients.

On December 7, 2009 OWCP requested that Dr. Primm provide an addendum report addressing the sixth edition of the A.M.A., *Guides,* which became effective May 1, 2009. In a January 10, 2010 report, Dr. Primm determined that appellant reached maximum medical improvement and utilized his March 24, 2009 examination findings to find that appellant had no impairment under the sixth edition of the A.M.A., *Guides*. A completed permanent impairment worksheet was provided.

On April 18 and May 9, 2010 OWCP's medical adviser, Dr. Andrew Merola, concurred with Dr. Primm's impairment rating of the legs. In the May 9, 2010 report, he opined that appellant reached maximum medical improvement on March 24, 2009. The medical adviser indicated that he reviewed the statement of accepted facts, his prior review of April 18, 2010, Dr. Primm's documentation and the worksheets. He advised that Dr. Primm's physical findings and examination demonstrated no objective evidence of lumbosacral radiculopathy or musculoskeletal deficits upon which to base a total schedule loss of use. The medical adviser's primary impairing diagnosis was lumbar strain, which was made by history only. There are no neurological or peripheral nerve involvement appreciated for which deficits exist. The medical adviser opined, in the absence of any deficits of the musculoskeletal system or peripheral lower extremities, there was a zero percent schedule loss of use. He noted Dr. Primm's March 24, 2009 report was extensive and detailed and contained appropriate documentation for his findings.

By decision dated May 27, 2010, OWCP denied appellant's claim for a schedule award on the basis there was insufficient evidence to establish that appellant sustained permanent impairment to a scheduled member under FECA due to his work injuries.

On June 2, 2010 appellant requested a hearing before an OWCP representative, which was held on October 13, 2010.

By decision dated January 11, 2011, an OWCP hearing representative affirmed the May 27, 2010 OWCP decision. She found there was no evidence that OWCP inappropriately selected Dr. Primm. The hearing representative found that OWCP properly identified the accepted conditions in the case on the statement of accepted facts and that Dr. Primm provided sufficient information to support his sixth edition impairment rating.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations[4] 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. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.[5] For consistent results and to ensure equal justice under the law to all claimants, good administrative

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[8] 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.[9]

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.[10] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[11] In situations where there exist opposing medical reports of virtually equal weight and rationale and 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 upon a proper factual background, must be given special weight.[12]

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.[13] However, when the impartial specialist is unable to clarify or elaborate on the original report or if a supplemental report is also vague, speculative or lacking in rationale,

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[6] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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

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

[10] 5 U.S.C. § 8123(a).

[11] 20 C.F.R. § 10.321.

[12] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[13] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

OWCP must submit the case record and a detailed statement of accepted facts to another impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.[14]

It is well established that OWCP procedures provide that an impartial medical specialist must be selected from a rotational list of qualified Board-certified specialists, including those certified by the American Medical Association and American Osteopathic Association.[15] The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, OWCP has developed procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against the appearance that the selected physician's opinion was biased or prejudiced.[16] The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.[17] The Federal (FECA) Procedure Manual (the procedure manual) provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the Physicians Directory System (PDS) should be used for this purpose wherever possible.[18] The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.[19] The PDS database of physicians is obtained from the American Board of Medical Specialties which contains the names of physicians who are Board-certified in certain specialties. It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.[20]

ANALYSIS

OWCP accepted that appellant had work-related lumbosacral strains and sciatica for his several claims. Appellant requested a schedule award. Due to a conflict between appellant's physician, Dr. Diamond, and an OWCP medical adviser regarding permanent impairment, OWCP properly referred appellant to Dr. Primm, as the impartial medical specialist, to resolve the conflict in medical opinion.

On appeal, appellant's counsel argues that Dr. Primm was not properly selected from the PDS. Specifically counsel argues that Dr. Selby was selected from the PDS but no reason was

[14] *Nancy Keenan*, 56 ECAB 687 (2005); *Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996).

[15] *See LaDonna M. Andrews*, 55 ECAB 301 (2004); *A.R.*, Docket No. 09-1566 (issued June 2, 2010).

[16] *See Raymond J. Brown*, 52 ECAB 192 (2001); *A.R., supra* note 15.

[17] *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

[18] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003).

[19] *Id.* at Chapter 3.500.7 (September 1995, May 2003).

[20] *Gloria J. Godfrey*, *supra* note 12.

provided on the bypass as to why he could not conduct the referee medical examination. The record supports that Dr. Selby was selected from the PDS. Contrary to appellant's contention, the bypass note specifically excluded the physician on the basis he did not accept Department of Labor patients. OWCP provided a reasonable explanation for bypassing Dr. Selby. There is no evidence that Dr. Selby was improperly bypassed.

Dr. Primm examined appellant on March 24, 2009 and reviewed a statement of accepted facts and appellant's medical record. He provided a detailed physical examination wherein he indicated there was a significant amount of psychosocial overlay with nondermatonal patterns of sensory loss in the lower extremities. Dr. Primm found no objective signs of impairment to either leg based on objective examination, appellant's history and EMG results that were not diagnostic for a radiculopathy. He later used his March 24, 2009 findings to complete a permanent impairment worksheet on January 7, 2010 wherein he opined that appellant had zero percent impairment under the sixth edition of the A.M.A., *Guides*. As Dr. Primm provided a detailed discussion of his findings on examination and later applied them to the sixth edition of the A.M.A., *Guides*, the Board finds his opinion is entitled to special weight in resolving the extent of appellant's employment-related impairment. Furthermore, OWCP's medical adviser reviewed Dr. Primm's reports and determined that Dr. Primm's findings provided no basis for rating permanent impairment of the legs.

Appellant's counsel argues on appeal that Dr. Primm's opinion concerning the sixth edition rating cannot carry the weight of the medical evidence. He argues that Dr. Primm provides no narrative medical information or reasoned opinion in which he discusses the tables and charts of the sixth edition of the A.M.A., *Guides* to explain why appellant has zero percent impairment to the lower extremities. As noted, Dr. Primm provided a well-rationalized opinion based on a complete background, his review of the accepted facts and the medical record and his examination findings. He found no objective basis from examination or from diagnostic testing to rate impairment.[21]

Appellant may request an 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 established entitlement to a schedule award.

[21] While appellant's counsel on appeal contends that Dr. Diamond provided an addendum report of April 22, 2010 opining that appellant has 29 percent impairment to the right lower extremity under the sixth edition of the A.M.A., *Guides*, the record does not contain such a report.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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