

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

D.O., Appellant	)	
	)	
and	)	<b>Docket No. 12-415</b>
	)	<b>Issued: July 12, 2012</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Rahway, 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:  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 21, 2011 appellant's counsel timely appealed the October 5, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the denial of a schedule award. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award claim.

**ISSUE**

The issue is whether appellant has a ratable impairment of the left upper extremity due to her accepted cervical condition.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

Appellant, a 56-year-old former letter carrier, has an accepted claim for cervical and lumbar sprains, which arose on August 18, 1997.<sup>2</sup> On November 2, 2009 she filed a claim for a schedule award (Form CA-7). In a report dated August 10, 2009, Dr. Arthur F. Becan, Jr., an orthopedic surgeon, found 25 percent impairment of the left upper extremity pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008).<sup>3</sup> The district medical adviser (DMA) reviewed the case on January 21, 2010 and disagreed with Dr. Becan's impairment rating. The DMA did not find evidence of residual sensory or motor deficits attributable to cervical or lumbar radiculopathy.<sup>4</sup>

By decision dated January 28, 2010, OWCP denied the schedule award claim.

In a June 15, 2010 supplemental report, Dr. Becan reaffirmed his original impairment rating, noting that his finding was supported by an electrodiagnostic study, a cervical magnetic resonance imaging (MRI) scan and recent physical examination findings.

In a January 28, 2010 decision, the Branch of Hearings and Review set aside the January 28, 2010 decision. The hearing representative found the DMA's January 21, 2010 report insufficient to outweigh or create a conflict with Dr. Becan's impairment rating.<sup>5</sup> Accordingly, he remanded the case and instructed OWCP to refer appellant for a second-opinion examination.

Dr. Peter A. Feinstein, a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant on August 27, 2010. He found that her lumbar condition had resolved. Appellant had made a full and complete recovery. With respect to her cervical condition, Dr. Feinstein noted that she had an area of muscle spasm in the right trapezius and cervical musculature junction, which was her only significant positive finding. As such, appellant did not qualify for an impairment of the cervical spine. Dr. Feinstein found zero percent whole body impairment.

OWCP issued a September 7, 2010 decision denying appellant's claim for a schedule award.

By decision dated February 10, 2011, the Branch of Hearings and Review set aside the September 7, 2010 decision. The hearing representative found Dr. Feinstein's report deficient.

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<sup>2</sup> Appellant was operating a postal service long life vehicle (LLV) when another motorist rear-ended her vehicle. She had previously fractured her right (distal) fibula in an October 22, 1996 employment incident (xxxxxx781).

<sup>3</sup> Dr. Becan referenced Table 15-21, Peripheral Nerve Impairment (UEI), A.M.A., *Guides* 436-44 (6<sup>th</sup> ed. 2008). His rating was based on motor/strength deficits affecting the left biceps, triceps and deltoid muscles. Dr. Becan also found 13 percent impairment of the right lower extremity. However, the lower extremity impairment stemmed from appellant's 1996 right ankle fracture (xx-xxxx781), and was not the result of her August 18, 1997 lumbar sprain (xxxxxx959).

<sup>4</sup> Dr. Becan noted that an August 23, 2001 electromyography (EMG) revealed left-sided cervical radiculopathy at C6-7 and right-sided lower cervical radiculitis. The DMA, however, was not persuaded by this study.

<sup>5</sup> The hearing representative specifically noted that, while the DMA pointed out inconsistencies in the physical findings, he failed to supply measurements, citations or calculations to support his opinion.

She noted that Dr. Feinstein had not specifically addressed whether appellant's cervical muscle spasms were employment related and whether the spasms caused any upper extremity impairment under the A.M.A., *Guides* (6<sup>th</sup> ed. 2008).

In a February 21, 2011 supplemental report, Dr. Feinstein stated that there was no category under the A.M.A., *Guides* (6<sup>th</sup> ed. 2008) referable to disability ratings for a single isolated muscle spasm. He further noted that appellant's loss of range of motion (ROM) in the cervical spine was not a ratable condition, but simply a subjective response on her part when asked to raise her arm. Dr. Feinstein also indicated that her muscle spasm and her change in ROM with lifting overhead were not residuals of her accepted injury, but were degenerative changes and age related.

In a report dated March 14, 2011, Dr. Christopher R. Brigham, an OWCP medical adviser, noted that Dr. Feinstein was correct that there was no specific diagnosis category relative to cervical muscle spasm that would warrant assignment of impairment. His colleague at Impairment Resources, Dr. Craig M. Uejo, previously served as DMA. Dr. Uejo authored the January 21, 2010 report the hearing representative found deficient, thus, precipitating the referral to Dr. Feinstein. Dr. Brigham further noted that consideration of the cervical spine as it relates to upper extremity impairment should be based on neurological compromise but in this instance there was no evidence to support such a rating. He concluded there was no impairment relative to the cervical spine condition.

On March 15, 2011 OWCP issued a decision denying appellant's schedule award claim. The Branch of Hearings and Review affirmed the denial by decision dated October 5, 2011.

### **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.<sup>6</sup> 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.<sup>7</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).<sup>8</sup>

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or the implementing regulations.<sup>9</sup> Neither FECA nor the regulations provide

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<sup>6</sup> 5 U.S.C. § 8107(c).

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> 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).

<sup>9</sup> *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.<sup>10</sup> However, a schedule award is permissible where the employment-related back condition affects the upper and/or lower extremities.<sup>11</sup>

FECA provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>12</sup> For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>13</sup> Where OWCP has referred the employee 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.<sup>14</sup>

### ANALYSIS

On appeal, counsel argued that there is a conflict in medical opinion and the case should be remanded for referral to an impartial medical examiner. The Board finds that currently there is an unresolved conflict in medical opinion. Appellant's physician, Dr. Becan, found that she had left upper extremity impairment attributable to her August 18, 1997 cervical injury. Dr. Feinstein, an OWCP referral physician, found no evidence of impairment. Dr. Becan supported his August 10, 2009 impairment rating by reference to his physical examination, as well as prior cervical MRI scan findings and an August 23, 2001 EMG that revealed cervical radiculopathy. Dr. Feinstein noted the 2001 EMG results and characterized appellant's July 1, 2001 cervical MRI scan as "essentially normal." Based on his August 27, 2010 physical examination, he noted that the only positive finding relative to appellant's cervical spine was muscle spasm. Dr. Feinstein explained that a muscle spasm by itself did not represent a ratable impairment under the A.M.A., *Guides* (6<sup>th</sup> ed. 2008). Dr. Brigham concurred that appellant did not have impairment attributable to her cervical and lumbar spine injuries. Accordingly, the Board finds there is an unresolved conflict in medical opinion regarding the existence and extent of any upper extremity impairment attributable to her cervical sprain.

The sixth edition of the A.M.A., *Guides* (2008) provides a specific methodology for rating spinal nerve extremity impairment.<sup>15</sup> It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the

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<sup>10</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a(3).

<sup>12</sup> 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The DMA, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

<sup>13</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>14</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4.

spine.<sup>16</sup> The impairment is premised on evidence of radiculopathy affecting the upper and/or lower extremities.<sup>17</sup>

On remand, OWCP should refer appellant to an impartial medical examiner for evaluation and an impairment rating consistent with the above-noted methodology for determining spinal nerve extremity impairment under FECA. After such further medical development as OWCP deems necessary, a *de novo* decision shall be issued.

**CONCLUSION**

The case is not in posture for a decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 5, 2011 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: July 12, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*