United States Department of Labor
Employees' Compensation Appeals Board

L.T., Appellant	)	
	)	**Docket No. 12-495**
and	)	**Issued: July 5, 2012**
DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, OK, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 10, 2012 appellant filed a timely appeal of the August 18, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her 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 this case.

ISSUE

The issue is whether appellant is entitled to a schedule award.

On appeal, appellant contends that the medical opinion of an attending physician is sufficient to establish her entitlement to a schedule award for 24 percent impairment to each lower extremity. She further contends that the medical opinion of an OWCP referral physician is not entitled to the weight of the medical evidence as the physician did not review her medical records and failed to provide an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A.,

[1] 5 U.S.C. § 8101 *et seq.*

Guides). Appellant also contends that OWCP improperly relied on the medical opinion of an OWCP medical adviser based on Board precedent and OWCP regulations and procedures as his opinion was arbitrary and without rationale in arriving at a different impairment rating while using the same table as her attending physician. She stated that he never physically examined her. Alternatively, appellant contends that there is an unresolved conflict in the medical opinion evidence regarding the extent of her permanent impairment between OWCP's referral physician and her attending physician and, thus, the Board should remand the case to OWCP for her referral to an impartial medical specialist.

FACTUAL HISTORY

OWCP accepted that on December 5, 2000 appellant, then a 50-year-old financial manager, sustained displacement of the lumbar intervertebral disc without myelopathy, spinal stenosis of the lumbar region, degeneration of the lumbar or lumbosacral intervertebral disc and thoracic or lumbosacral neuritis or radiculitis not otherwise specified when she slipped and fell on ice in a parking lot at work.[2] On May 2, 2006 appellant underwent a fusion of the L5-S1.

On September 3, 2010 appellant filed a claim for a schedule award.

In an August 5, 2010 medical report, Dr. J. Arden Blough, an attending family practitioner, noted the history of injury, his review of the medical record and set forth his examination findings which included grade 4 weakness against resistance in the lumbar and bilateral hip, knee and ankle flexors and extensors and moderate decreased sensation in the L5 and S1 dermatomes. He opined that appellant reached maximum medical improvement. Dr. Blough opined that she had 24 percent to each lower extremity. For the right leg, he noted net adjustments and found 3 percent impairment due to a moderate sensory deficit and 13 percent impairment due to a moderate motor deficit of the L5 spinal nerve; 2 percent impairment due to a moderate sensory deficit and 8 percent impairment due to a moderate motor deficit of the S1 spinal nerve. Dr. Blough showed his calculations under proposed Table 2 set forth in *The Guides Newsletter* July/August 2009 Newsletter Spinal Nerve Lower Extremity Impairment and combined the right leg impairments to find 24 percent total impairment to the right leg. For the left leg, he noted net adjustments and found appellant had 3 percent impairment due to moderate sensory deficit and 13 percent impairment due to moderate motor deficit of the L5 nerve; 2 percent for a moderate sensory deficit and 8 percent for a moderate motor deficit of the S1 nerve. Dr. Blough showed his calculations under proposed Table 2 of the A.M.A., *Guides* and combined the left leg impairments to find 24 percent total impairment to the left leg. He further opined that appellant's impairment was causally related to her work-related injuries.

On October 28, 2010 Dr. Michael M. Katz, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed appellant's medical record, including Dr. Blough's August 5, 2010 findings. He noted his physical examination finding of weakness against resistance in appellant's bilateral hip, knee and ankle flexors and extensors and moderate decreased sensation in the L5 and S1 dermatomes. Dr. Katz further noted that the record contained a February 3, 2010 report from Dr. Stephen W. Dinger, a Board-certified physiatrist, who found on

[2] On January 5, 2008 appellant retired on disability from the employing establishment.

neurological examination that continued positive straight leg raise produced back pain bilaterally and otherwise normal strength and sensation. He stated that Dr. Dinger also documented normal strength and sensation during examinations in 2009 and on May 3, 2010. Dr. Katz advised that there was conflicting information in the case record and recommended that OWCP refer appellant to a second opinion physician to determine the extent of her permanent impairment based on the sixth edition of the A.M.A., *Guides*.

By letter dated May 24, 2011, OWCP referred appellant, together with a statement of accepted facts and the case record, to Dr. Sofia M. Weigel, a Board-certified physiatrist, for a second opinion. In a July 1, 2011 report, Dr. Weigel noted the history of injury, a review of the medical records and her examination findings. Appellant had essentially normal findings on neurological examination with the exception of sharp versus dull sensation which was abnormal in the bilateral lower extremities in a stocking distribution and symmetrically suppressed reflexes for the bilateral patella and Achilles tendons. The motor examination was abnormal in all muscle groups throughout the bilateral lower extremities with fluctuating rates of motor strength demonstrated between 2/5 on direct evaluation to 4/5 with indirect evaluation. Appellant's gait was independent with use of a cane. On musculoskeletal examination, Dr. Weigel found no spasms in the lumbar paraspinal muscle region. Appellant reported significant pain over the bilateral sacral iliac joint and bilateral greater trochanteric bursa and with axial loading and rotation of the spine and pelvis en bloc to the bilateral sides. Dr. Weigel further reported moderate pain with palpation of the paraspinal muscles and in all areas examined including, the scattered soft tissue areas throughout the lateral legs, hips and lumbar region. Lastly, she reported a positive bilateral Faber maneuver with minimal rotation of the leg. Dr. Weigel opined that appellant reached maximum medical improvement on August 5, 2010. She noted that FECA did not allow a schedule award for impairment of the spine, but that a diagnosed injury originating in the spine may be considered only to the extent that it resulted in permanent impairment of the extremities. Dr. Weigel advised that there was no evidence of focal spinal nerve involvement. She utilized proposed Table 2 of the A.M.A., *Guides* and found no focal objective motor or sensory deficits of the L4-S1 nerves. Dr. Weigel opined that appellant had no impairment to these nerves. She noted that The American Association of Orthopedic Surgeons (AAOS) lower limb outcome scale had a standardized mean of 17 and a normative score of -4.

On August 2, 2011 Dr. R. Meador, a Board-certified internist and OWCP medical adviser, reviewed appellant's case record, including Dr. Weigel's July 1, 2011 findings. Dr. Meador stated that her finding that appellant had no impairment of the L4 and S1 spinal nerves was in accordance with *The Guides Newsletter* July/August 2009 as she found no focal objective motor or sensory deficits for these nerves. He advised that appellant reached maximum medical improvement on August 5, 2010. Dr. Meador concluded that she had no permanent impairment to her lower extremities due to her accepted December 5, 2000 employment injuries under the sixth edition of the A.M.A., *Guides*.

In an August 18, 2011 decision, OWCP denied appellant's claim for a schedule award. It found that the medical opinions of Dr. Weigel and Dr. Meador constituted the weight of the medical opinion evidence in establishing that she had no permanent impairment to either lower extremity.

LEGAL PRECEDENT

The schedule award provision of FECA,[3] and its implementing federal 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, functions and organs of the body. 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.[5] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides*[7] as the appropriate edition for all awards issued after that date.[8]

The sixth edition requires identifying 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).[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10]

ANALYSIS

OWCP accepted that appellant had work-related displacement of the lumbar intervertebral disc without myelopathy, spinal stenosis of the lumbar region, degeneration of the lumbar or lumbosacral intervertebral disc and thoracic or lumbosacral neuritis or radiculitis not otherwise specified. Appellant underwent a fusion of the L5-S1 nerve on May 2, 2006. On September 3, 2010 she requested a schedule award. OWCP denied appellant's claim based on the opinion of the second opinion examiner, Dr. Weigel and the review of this report by its medical adviser, Dr. Meador.

The Board finds that the case is not in posture for decision due to a conflict in medical opinion necessitating a referral to an impartial medical specialist.[11]

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Ausbon N. Johnson*, 50 ECAB 304 (1999).

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

[7] A.M.A., *Guides* (6th ed. 2009).

[8] Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

[9] A.M.A., *Guides* 494-531.

[10] *Id.* at 521.

[11] 5 U.S.C. § 8123(a); *see Paul J. Navarette*, Docket No. 05-895 (issued July 11, 2005).

In his August 5, 2010 report, Dr. Blough opined that appellant has 24 percent to each lower extremity due to motor and sensory impairments of the L5 and S1 nerve roots from the accepted work injuries. He utilized the A.M.A., *Guides* rating scheme under proposed Table 2 and provided calculations for his impairment determinations.

Dr. Weigel opined in her July 1, 2011 report that appellant had no impairment to either lower extremity based on the A.M.A., *Guides* rating scheme under proposed Table 2 as there were no focal objective motor or sensory deficits of the L4-S1 nerves. OWCP's medical adviser reviewed the medical record and agreed with Dr. Weigel's impairment rating.

The Board finds that a conflict in medical opinion exists between Dr. Blough and Dr. Weigel, as to the extent of permanent impairment to appellant's lower extremities.[12] If there is a conflict in medical opinion between the employee's physician and the physician making the examination for the United States, OWCP shall appoint a third physician, known as a referee physician or impartial medical specialist, to make what is called a referee examination.[13] To resolve the present matter, the Board shall remand the case for OWCP to refer appellant for a referee examination, together with the medical record and a statement of accepted facts to obtain a rationalized medical opinion regarding whether for impairment rating purposes appellant, has any work-related impairment of her lower extremities. After conducting such further development as it may find necessary, OWCP shall render an appropriate merit decision.

On appeal, appellant expressed her disagreement as to why Dr. Weigel's evaluation was used over that of her physician, Dr. Blough, and why she was not provided a schedule award for her bilateral lower extremities. As explained, the Board finds that the case is not in posture for decision due to a conflict in the medical evidence and must be remanded to an appropriate specialist to resolve the medical conflict.

CONCLUSION

The Board finds that the case is not in posture for decision.

[12] *See Paul J. Navarette*, *supra* note 11.

[13] *See* 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321. *See also R.A.*, Docket No. 09-552 (issued November 13, 2009).

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 5, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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