United States Department of Labor
Employees' Compensation Appeals Board

B.W., Appellant	)	
and	)	**Docket No. 12-133**
	)	**Issued: June 12, 2012**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Brooklyn, NY, Employer	)	

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2011 appellant, through her attorney, timely appealed the September 6, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her claim for a schedule award. 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 a ratable impairment of the upper extremities due to her accepted cervical condition.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, a 52-year-old recreation specialist, sustained an injury in the performance of duty on July 12, 2004. She was injured while opening and closing a hospital door that had very heavy wind suction. OWCP accepted appellant's claim for aggravation of cervical strain.[2]

On October 23, 2006 appellant filed a claim for a schedule award (Form CA-7). Dr. David Weiss, a Board-certified orthopedist, submitted a July 27, 2006 impairment rating. He stated that appellant's July 12, 2004 injury involved both the cervical and lumbar spines. Appellant's then-current diagnoses included chronic post-traumatic cervical and lumbosacral strain and sprain, bulging discs at L4-5 and L5-S1, aggravation of preexisting osteoarthritis of the cervical and lumbar spine, right L4-5 radiculopathy, left L5-S1 radiculopathy and left upper extremity radiculitis. Dr. Weiss found 11 percent impairment of the left lower extremity due to calf atrophy (8 percent) and pain (3 percent). He also found a three percent pain-related impairment of the left upper extremity.[3] Dr. Weiss indicated that appellant reached maximum medical improvement (MMI) as of July 27, 2006.

In a November 5, 2006 report, Dr. Andrew Merola, a district medical adviser Board-certified in orthopedic surgery, found no (zero percent) permanent impairment of the upper extremities. He noted a normal upper extremity examination and found that there were no sensory or motor deficits of the upper extremities relative to the accepted cervical sprain.[4]

OWCP found a conflict in medical opinion and referred appellant to an impartial medical examiner (IME). It specifically requested that the physician determine the extent of permanent impairment of appellant's left upper extremity under the sixth edition of the A.M.A., *Guides* (2008). The referral package included worksheets for rating impairment of the shoulder, elbow, wrist, hand and fingers.

Dr. Sanford R. Wert, a Board-certified orthopedic surgeon selected as the impartial medical specialist, examined appellant on May 11, 2009. He diagnosed cervical spine sprain/strain -- resolved, lumbosacral spine sprain/strain -- resolved, and aggravation of prior injuries to the cervical and lumbosacral spines -- resolved. Dr. Wert noted that appellant exhibited significant symptom magnification during examination, thus calling into question the active range of motion measurements reported. He further commented that the examination provided no objective evidence of any permanency. Dr. Wert found that appellant reached MMI and no further orthopedic treatment, diagnostic testing or physical therapy was medically necessary.

On July 9, 2009 OWCP asked Dr. Wert for a supplemental report specifically addressing whether there was permanent impairment of the left upper extremity. In an addendum dated

[2] Appellant also has an accepted traumatic injury claim for left ankle sprain, chest wall contusion and lumbosacral radiculitis, which arose on June 27, 2002 (xxxxxx859).

[3] Dr. Weiss rated appellant under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

[4] Dr. Merola did not comment on Dr. Weiss' left lower extremity impairment rating.

January 12, 2010, Dr. Wert found five percent whole person impairment under Table 17-2, Cervical Spine Regional Grid, A.M.A., *Guides* 564-66 (6th ed. 2008). Despite his earlier remarks about symptom magnification on active range of motion testing, he found 31 percent left upper extremity impairment due to loss of shoulder motion and five percent left upper extremity impairment based on decreased motion of the elbow under Table 15-33, Table 15-4, Table 15-35 and Table 15-26, A.M.A., *Guides* 474-77 (6th ed. 2008).[5]

In a report dated February 20, 2010, Dr. Merola noted that Dr. Wert's whole person impairment rating based on the cervical spine was not appropriate under FECA. He explained that the rating should instead be based on upper/lower extremity neurological deficits.[6] Dr. Merola noted that based on Dr. Wert's May 11, 2009 physical examination there were no reported peripheral nerve root or neurological deficits or radicular involvement that would justify a schedule award. He did not comment on Dr. Wert's left upper extremity motion deficits, but instead advised OWCP to ask the IME to comment on Dr. Weiss' left lower extremity impairment rating.

OWCP referred the case back to Dr. Wert and asked that he comment on Dr. Merola's recent report, as well as Dr. Weiss' July 27, 2006 left lower extremity rating based on calf muscle atrophy and pain.

Dr. Wert submitted an April 21, 2010 addendum. He noted that he had been asked to comment on "'neurological deficits' as they pertain to the lumbar spine...." Dr. Wert quoted his earlier remarks about "significant symptom magnification" and the absence of "objective evidence of any permanency." He also noted that his May 11, 2009 physical examination showed no appreciable evidence of left calf atrophy. Dr. Wert indicated that his examination revealed no clinical evidence of any neurological deficits, and thus, he was unable to compare and provide an opinion on any atrophy or neurological deficits as documented in Dr. Weiss' July 27, 2006 report.

OWCP referred the case back to Dr. Merola for further review regarding the extent of any upper extremity impairment under the A.M.A., *Guides* (6th ed. 2008). In a report dated August 10, 2010, Dr. Merola found no impairment of the lower extremities. As to the left upper extremity, he found a combined 34 percent impairment based on loss of motion in the shoulder (31 percent) and elbow (5 percent). Dr. Merola relied on the active range of motion measurements documented by Dr. Wert in his May 11, 2009 report.

By decision dated August 23, 2010, OWCP found that the evidence was insufficient to establish permanent impairment of the left and right lower extremities. It based its determination on Dr. Merola August 10, 2010 report. The August 23, 2010 decision noted that appellant would "receive a separate decision pertaining to [her] ... left upper extremity impairment."

[5] Dr. Wert's January 12, 2010 addendum appears incomplete. The first page ends with an incomplete discussion of his diagnostic impression and the subsequent page begins at some point in his analysis of appellant's cervical spine whole person impairment.

[6] Dr. Merola noted that the claim had been accepted for aggravation of cervical sprain "as well as lumbar radiculopathy, left ankle sprain and chest wall contusion." While these latter conditions were accepted under claim number xxxxxx859, they were not part of appellant's July 12, 2004 employment injury.

On August 30, 2010 counsel requested reconsideration of the August 23, 2010 decision. He also asked that OWCP issue an award for the left upper extremity impairment as noted by Dr. Wert.

In a decision dated September 17, 2010, OWCP denied appellant's August 30, 2010 request for reconsideration.

OWCP referred the case to Dr. Merola for a third time and asked him to revisit Dr. Wert's April 21, 2010 addendum. It highlighted portions of his addendum regarding evidence of "permanency" and "symptom magnification," and specifically asked Dr. Merola if the quoted passages changed his earlier opinion that appellant had 34 percent impairment of the left upper extremity. In a report dated October 3, 2010, Dr. Merola indicated that there was no evidence of neurological or peripheral nerve root involvement, therefore, no loss of use based on peripheral nerve root impairment. He further noted that the only loss of use due to permanent impairment was based on the range of motion deficits documented by Dr. Wert. Dr. Merola found that the loss remained at 34 percent as per Dr. Wert's findings.

On October 8, 2010 counsel reminded OWCP that its August 23, 2010 decision indicated a separate decision would be forthcoming regarding appellant's left upper extremity impairment.

Counsel again requested reconsideration on June 8, 2011. He noted that OWCP had not responded to his previous correspondence. Counsel referenced Dr. Wert's findings regarding appellant's left shoulder and elbow and Dr. Merola's agreement that she had a 34 percent impairment of the left upper extremity. Given the concurrence among Dr. Wert and Dr. Merola, counsel reiterated his October 8, 2010 request that OWCP issue a decision regarding impairment of the left upper extremity.

In a merit decision dated September 6, 2011, OWCP denied modification of the prior decision dated August 23, 2010. It found that appellant sustained a minor injury on July 12, 2004, which was accepted for aggravation of cervical sprain. Based on Dr. Wert's May 11, 2009 report, OWCP concluded that appellant's condition had resolved. Given his finding that appellant's condition had resolved, it questioned why the case was ever forwarded to Dr. Merola for review. OWCP concluded that, because appellant's accepted condition had resolved, he did not have a permanent impairment of the left upper extremity.

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.[7] 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

[7] 5 U.S.C. § 8107(c).

evaluating schedule losses.[8] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).[9]

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or the implementing regulations.[10] Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[11] However, a schedule award is permissible where the employment-related back condition affects the upper and/or lower extremities.[12]

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.[13] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[14] 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.[15]

ANALYSIS

The Board finds that the case is not in posture for decision. OWCP accepted appellant's claim for aggravation of cervical sprain.

Dr. Wert and Dr. Merola found impairment of the left upper extremity due to loss of motion in the shoulder (31 percent) and elbow (5 percent). OWCP essentially ignored his January 12, 2010 addendum, choosing instead to rely on his initial May 11, 2009 report, wherein he noted that appellant's cervical spine sprain/strain had resolved. Dr. Wert also noted at the time that his examination provided no objective evidence of any "permanency" and that appellant exhibited "significant symptom magnification," particularly with respect to her active range of motion.

[8] 20 C.F.R. § 10.404.

[9] *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).

[10] *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

[11] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a(3) (January 2010). For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2). A total loss of use of an arm warrants 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[13] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). Dr. Merola acting on behalf of OWCP may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

[14] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[15] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

Despite his initial finding that appellant's accepted cervical condition had resolved, Dr. Wert later found cervical-related whole person impairment. As noted, he also found a left upper extremity loss of motion impairment based on range of motion measurements he had previously questioned. While Dr. Wert's reports are not consistent on the issue of the extent of any cervical-related impairment of the upper extremities.[16]

The sixth edition of the A.M.A., *Guides* (2008) provides a specific methodology for rating spinal nerve extremity impairment.[17] It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine.[18] The impairment is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[19] Although several of Dr. Merola's reports mentioned neurological, peripheral nerve root and radicular involvement and the lack of associated impairment, OWCP never directly posed this question to Dr. Wert. Dr. Wert received worksheets for rating impairment of the shoulder, elbow, wrist, hand and fingers, but OWCP did not alert him to the proper methodology for rating spinal nerve extremity impairment.

When OWCP refers a case to an IME, the report must be one to resolve the conflict in medical opinion.[20] If the IME's report is vague, speculative, incomplete or not rationalized, it is OWCP's responsibility to secure a supplemental report from the IME to correct any perceived defects.[21] When the IME does not respond, or does not provide a sufficient response, OWCP should then request a new referee examination.[22] The Board finds that Dr. Wert's reports did not properly resolve the issue of whether appellant has any spinal nerve extremity impairment associated with her July 12, 2004 accepted injury of aggravation of cervical sprain. Thus, OWCP should return the case to Dr. Wert for clarification. Consequently, the case shall be remanded for further medical development.[23] After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The case is not in posture for decision.

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[16] Dr. Merola complicated matters by erroneously incorporating appellant's June 27, 2002 accepted injuries under claim number xxxxxx859 and requesting clarification from Dr. Wert regarding unrelated lower extremity impairment.

[17] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4. (January 2010).

[18] *Id.*

[19] *Id*.

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing & Evaluating Medical Evidence*, Chapter 2.810.11d(2) (September 2010).

[21] *Id.*

[22] *Id.* at Chapter 2.810.11e.

[23] On remand, OWCP should also attempt to secure a complete copy of Dr. Wert's January 12, 2010 addendum.

ORDER

IT IS HEREBY ORDERED THAT the September 6, 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: June 12, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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