

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

K.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pittsburgh, PA, Employer**

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**Docket No. 12-188
Issued: September 12, 2012**

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 2, 2011 appellant, through her attorney, filed a timely appeal from a September 22, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the denial of her schedule award claim. Pursuant to the Federal Employees' Compensation Act¹ (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 for lower extremity impairment related to her accepted left knee and back injuries.

On appeal, appellant's attorney contends that OWCP's decision was contrary to fact and law.

¹ 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on March 11, 2004 appellant, then a 37-year-old rural carrier sustained a lumbosacral sprain and contusions of the left knee and left low back as a result of a motor vehicle accident while in the performance of duty. It authorized sacroiliac joint injections.

On December 13, 2007 appellant, through her attorney, filed a claim for a schedule award.

In a December 17, 2007 letter, OWCP notified appellant of the deficiencies of her schedule award claim and allotted 30 days for the submission of additional medical evidence. Appellant did not respond.

By decision dated January 29, 2008, OWCP denied appellant's schedule award claim finding that no medical evidence established a ratable impairment of a scheduled member.

On January 31, 2008 appellant, through her attorney, requested an oral hearing by telephone before an OWCP hearing representative. She submitted an April 16, 2008 report by Dr. Todd S. Hochman, a Board-certified internist, who reviewed the history of injury, the objective findings on physical examination and utilized the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001) (hereinafter, A.M.A., *Guides*), citing Table 17-8. Appellant had a 44 percent permanent right lower extremity impairment and a 27 percent left lower extremity impairment as a direct result of the March 11, 2004 employment injury.

On May 15, 2008 an oral hearing was held before an OWCP hearing representative. By decision dated June 5, 2008, the hearing representative remanded the case for further medical development.

On July 13, 2008 an OWCP medical adviser, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon, found that no impairment determination could be made based on the evidence of record and recommended a second opinion evaluation. He noted that each of the accepted conditions would be expected to result in full recovery because they were soft tissue injuries and, for this reason, impairment would not be expected.

By decision dated July 18, 2008, OWCP denied appellant's schedule award claim finding that Dr. Berman's July 13, 2008 report constituted the weight of the medical evidence.

On July 23, 2008 appellant, through her attorney, requested a second oral hearing before an OWCP hearing representative, which was held on November 13, 2008.

By decision dated February 5, 2009, an OWCP hearing representative vacated the July 18, 2008 decision and remanded the case to OWCP to refer appellant for a second opinion examination by an appropriate specialist.

By letter dated February 5, 2009, OWCP referred appellant for a second opinion evaluation. Appellant did not attend.

By decision dated April 9, 2009, OWCP denied appellant's schedule award claim.

On April 13, 2009 appellant, through her attorney, requested a third oral hearing before an OWCP hearing representative. She also submitted a narrative statement explaining why she could not attend her scheduled second opinion examination.

By decision dated June 3, 2009, an OWCP hearing representative determined that the case was not in posture for a hearing as a new examination was warranted. The April 9, 2009 decision was vacated and the case remanded for scheduling an examination.

By letter dated July 30, 2009, OWCP referred appellant to Dr. Victoria Langa, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a September 1, 2009 report, Dr. Langa reviewed appellant's history of injury, medical records and provided findings from a physical examination. She diagnosed degenerative disc disease at L5-S1, by magnetic resonance imaging (MRI) scan report and chronic pain syndrome. Dr. Langa found no evidence of lower extremity radiculopathy on physical examination and noted that she had undergone normal lower extremity electromyogram (EMG) and nerve conduction studies. In the absence of evidence of lumbar radiculopathy, she found no lower extremity impairment relating to the accepted injuries and concluded that appellant was capable of performing her regular job duties.

A left lower extremity venous Doppler ultrasound revealed no evidence of deep venous thrombosis in the left leg.

In a November 17, 2009 report, Dr. Berman, an OWCP medical adviser, reviewed Dr. Langa's September 1, 2009 report. Although Dr. Langa did not make reference to the A.M.A., *Guides*, the sixth edition, page 570, Table 17-4: *Lumbar Spine Regional Grid, Spine Impairments*, indicated that appellant would be considered in the category of class 0. Dr. Berman concurred with Dr. Langa's opinion that appellant had no percent impairment because class 0 was defined as documented history of sprain/strain-type injury now resolved or continued complaints of back pain with no objective findings on examination. He indicated that the date of maximum medical improvement was September 1, 2009, the date of Dr. Langa's examination.

By decision dated November 19, 2009, OWCP denied appellant's schedule award claim on the basis that the medical evidence did not establish a ratable impairment of a scheduled member.

On November 25, 2009 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative.

By decision dated January 12, 2010, an OWCP hearing representative found a conflict in medical opinion between Dr. Hochman and Dr. Langa. The case was remanded for appellant to be referred to an impartial medical examiner to resolve the conflict.

By letter dated May 12, 2010, OWCP referred appellant to Dr. Subrata P. Barua, a Board-certified orthopedic surgeon, for an impartial medical examination. In his May 28, 2010 report, Dr. Barua diagnosed degenerative disc disease at L5-S1 with degenerative joint disease and chronic lumbar strain and posterior lateral bulging of the disc with no radiculopathy and trochanteric bursitis. He also concluded that appellant's left knee and lower back contusions had resolved. Dr. Barua determined that appellant had a three percent whole person impairment based on the lumbar spine regional grid, Table 17-4, page 570 of the sixth edition of the A.M.A.,

Guides. He concluded that no impairment to the lower extremities existed and opined that Dr. Hochman's impairment ratings under the fifth edition of the A.M.A., *Guides* were not acceptable.

In a June 18, 2010 report, OWCP's medical adviser, Dr. Craig M. Uejo, a Board-certified occupational medicine physician, concurred with Dr. Barua that there was no ratable impairment affecting the lower extremities. He found insufficient evidence to support a verifiable lumbar radiculopathy and zero percent lower extremity impairment as a result.

By decision dated June 18, 2010, OWCP denied appellant's schedule award claim as the medical evidence failed to establish a ratable impairment of either leg.

On March 23, 2011 appellant, through her attorney, requested reconsideration. In a September 22, 2010 report, Dr. William N. Grant, a Board-certified internist, opined that appellant had a 52 percent left lower extremity impairment and a 25 percent right lower extremity impairment based on her history and physical examination under the sixth edition of the A.M.A., *Guides*.

In an April 2, 2011 report, Dr. Berman concluded that appellant had a zero percent impairment of either lower extremity. He reviewed Dr. Barua's May 28, 2010 report and found that the ratings could not be accepted. Dr. Berman noted that Dr. Grant's September 22, 2010 report did not document any motor deficit and found a 25 percent right lower extremity impairment based on sciatic nerve deficit, but did not document any physical findings to justify his opinion. He found that Dr. Grant did not appropriately apply the A.M.A., *Guides*. Dr. Berman concluded that the weight of the medical evidence was represented by Dr. Langa's September 1, 2009 report which found no atrophy, normal sensation, normal motor strength testing and no impairment of the lower extremities.

By decision dated April 13, 2011, OWCP denied appellant's schedule award claim on the grounds that the medical evidence did not establish any impairment of the legs.

On April 20, 2011 appellant, through her attorney, requested a hearing before an OWCP hearing representative, which was held on July 7, 2011.

By decision dated September 22, 2011, an OWCP hearing representative affirmed the April 13, 2011 decision.

LEGAL PRECEDENT

The schedule award provision of FECA² and its implementing regulations³ 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.⁴ For

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ See *Linda R. Sherman*, 56 ECAB 127 (2004); *Daniel C. Goings*, 37 ECAB 781 (1986).

consistent results and to ensure equal justice under the law to all claimants, good administrative 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.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

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).⁷ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁸

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.⁹ 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.¹⁰ 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.¹¹

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.¹² 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,

⁵ See *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); see also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ A.M.A., *Guides* 494-531.

⁸ *Id.* at 521.

⁹ 5 U.S.C. § 8123(a).

¹⁰ 20 C.F.R. § 10.321.

¹¹ See *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

¹² See *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.¹³

To properly resolve a conflict in a schedule award claim, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*. An OWCP medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.¹⁴

ANALYSIS

OWCP accepted appellant's claim for lumbosacral sprain and contusions of the left knee and left low back. Appellant subsequently requested a schedule award. OWCP found a conflict between appellant's physician, Dr. Hochman, who rated 44 percent right leg impairment and 27 percent left leg impairment and Dr. Berman, an OWCP medical adviser, who found that appellant had no impairment to either lower extremity. OWCP referred appellant to Dr. Barua, as an impartial medical specialist to resolve the conflict in medical opinion as to the extent and degree of any permanent impairment resulting from the employment injury.

In a May 28, 2010 report, Dr. Barua found that appellant's left knee and lower back contusions had resolved and concluded that no impairment to the lower extremities existed. He opined that Dr. Hochman's impairment ratings were not acceptable as they were determined under the fifth edition of the A.M.A., *Guides* and added that appellant had a three percent whole person impairment based on the lumbar spine regional grid in the sixth edition of the A.M.A., *Guides*. On June 18, 2010 Dr. Uejo, an OWCP medical adviser, concurred with Dr. Barua that there was no ratable impairment affecting the lower extremities.

With her March 23, 2011 request for reconsideration, appellant submitted a September 22, 2010 report by Dr. Grant who opined that appellant had a 52 percent left lower extremity impairment and a 25 percent right lower extremity impairment under the sixth edition of the A.M.A., *Guides*.

On April 2, 2011 Dr. Berman, an OWCP medical adviser, reviewed the medical report of record and concluded that appellant had no (zero percent) impairment of either lower extremity. He reviewed Dr. Barua's rating but advised it could not be accepted as he never made a calculation with any reference to the abnormalities that could be found in any lower extremities. Dr. Berman noted that Dr. Grant's September 22, 2010 report did not document any motor deficit and found a 25 percent right lower extremity impairment based on sciatic nerve deficit, but did not document any physical findings to support his opinion. He opined that Dr. Grant did not appropriately apply the A.M.A., *Guides*. Dr. Berman concluded that the weight of the medical evidence was represented by Dr. Langa's September 1, 2009 second opinion report which found no atrophy, normal sensation, normal motor strength testing and no impairment of the lower extremities.

¹³ See Nancy Keenan, 56 ECAB 687 (2005); Roger W. Griffith, 51 ECAB 491 (2000); Talmadge Miller, 47 ECAB 673 (1996).

¹⁴ See Richard R. LeMay, 56 ECAB 341 (2005); Thomas J. Fragale, 55 ECAB 619 (2004).

The Board notes that Dr. Barua did not resolve the conflict in medical evidence; rather, Dr. Berman found fault with the report of the impartial specialist. OWCP erred by relying on the medical adviser's opinion. Dr. Barua stated that he utilized the sixth edition of the A.M.A., *Guides* and found that appellant's accepted left knee and lower back contusions had resolved and concluded that appellant had no impairment to the lower extremities. He also concluded that appellant had a three percent whole person impairment based on the lumbar spine regional grid in the A.M.A., *Guides*. However, neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole. FECA itself specifically excludes the back from the definition of organ.¹⁵ A schedule award is payable for a permanent impairment of any of the extremities that is due to an employment-related back condition.¹⁶ OWCP did not seek clarification from Dr. Barua as to whether appellant had any employment-related impairment. Dr. Barua's opinion is insufficient to resolve the medical conflict. The hearing representative relied on OWCP's medical adviser's opinion on permanent impairment and stated that an OWCP medical adviser may be the weight of the evidence. However, the Board has held that, where there is a medical conflict in a schedule award situation, an OWCP medical adviser may review the opinion of the impartial specialist with regard to permanent impairment but the resolution of the conflict is the responsibility of the impartial medical specialist.¹⁷

The case will be remanded to OWCP to request clarification from Dr. Barua. If the physician is unable or unwilling to provide clarification, OWCP shall refer appellant to another impartial medical specialist. Following this and any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision. There remains an unresolved conflict in medical evidence regarding the extent of any lower extremity impairment related to appellant's accepted left knee and back injuries.

¹⁵ 5 U.S.C. § 8101(19); *see also Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹⁶ *See Denise D. Cason*, 48 ECAB 530, 531 (1997); *S. Gordon McNeil*, 42 ECAB 140 (1990).

¹⁷ *See supra* note 14. *See also K.P.*, Docket No. 11-1012 (issued January 13, 2012).

ORDER

IT IS HEREBY ORDERED THAT the September 22, 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: September 12, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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