

January 12, 2008. By decision dated March 31, 2008, OWCP accepted her claim for lumbar strain.

Appellant requested a schedule award on April 20, 2009. In support of this claim she submitted a February 11, 2009 medical report from Dr. Nicholas Diamond, D.O., who opined that appellant had a 29 percent impairment of the left lower extremity, pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). OWCP also received a magnetic resonance imaging (MRI) scan report dated January 25, 2008, which found that she had disc degenerative changes at the L5-S1 level with a degree of posterior disc protrusion and facet hypertrophy present at L4-5 and L5-S1.

On June 9, 2009 OWCP wrote to Dr. Diamond and requested that he submit a report providing an impairment rating under the sixth edition of the A.M.A., *Guides*.

Dr. Diamond submitted a revised medical report on August 3, 2009. In this report, he opined that appellant had 23 percent bilateral impairment of her lower extremities based on the sixth edition of the A.M.A., *Guides*. Dr. Diamond's report and pertinent medical evidence were forwarded to a district medical adviser (DMA) for review.

In a September 9, 2009 report Dr. Henry J. Maglioto, a Board-certified orthopedic surgeon and OWCP medical adviser, stated that Dr. Diamond did not apply the A.M.A., *Guides* correctly in evaluating appellant's impairment due to radiculopathy.

On November 23, 2009 OWCP forwarded a copy of the DMA's report to Dr. Diamond and asked whether he agreed with the DMA's findings.

In response, Dr. Diamond submitted a January 26, 2010 report. He noted that his earlier report had contained a few typographical errors. Dr. Diamond then concluded that appellant had motor strength deficit in the right hip flexors, right hip adductors and right hip abductors, as well as left hip abductors and left hip adductors. He concluded that: "each of these are specific muscle groups generated by specific nerves and it is my opinion that [appellant] is entitled to an impairment rating according to each of these deficits. These muscle groups are indeed supplied by the lumbosacral area."

Dr. Diamond's January 26, 2010 report was forwarded to Dr. Andrew A. Merola, a Board-certified orthopedic surgeon, acting as an OWCP medical adviser. In a February 20, 2010 report, Dr. Merola determined that appellant had a two percent impairment of her right lower extremity. He explained that her MRI scan documented L5-S1 disc herniation, would involve the hip adductors, but not the hip flexors or abductors, nor would it involve the left side. Dr. Merola concluded that after net adjustments, appellant had a two percent permanent impairment of the right side, pursuant to Table 16-12, page 534 of the A.M.A., *Guides*.

On March 29, 2010 OWCP forward the DMA's report to Dr. Diamond.

In an April 22, 2010 report, Dr. Diamond reiterated that appellant had 23 percent bilateral lower extremity impairment. He stated that, although the MRI scan only revealed an L5-S1 disc herniation, it was possible that multiple nerve roots could be involved. Dr. Diamond further

stated that he disagreed with the DMA's finding because appellant also complained of left lower extremity radicular problems.

Dr. Merola thereafter explained in his May 24, 2010 report that a L5-S1 disc herniation could compress the L5 and/or the S1 nerve root up to and including descending nerve roots of S2, 3 and 4 but could not, on an anatomical or surgical basis, produce any compression to the nerve roots that innervate the hip flexors or the hip abductors. He stated that it was completely and entirely anatomically impossible for this to occur unless there was some documentation supporting an exceptional anomaly in this particular patient. Dr. Diamond's follow-up letters dated January 26 and April 22, 2010 completely and entirely ignored human anatomy, human physiology, surgical pathology and neurological principles. The DMA concluded that the results and conclusions of his prior review dated February 20, 2010 stood as documented.

OWCP determined that a second opinion evaluation was necessary. Appellant was referred to Dr. Jerome Rosman, Board-certified in orthopedic surgery.

In a July 15, 2010 report, Dr. Rosman determined that appellant had no impairment as a result of her accepted work-related injury. He opined that she had only sustained a soft tissue injury and had reached maximum medical improvement on August 5, 2008.

Dr. Rosman's report was referred to Dr. Merola for review. Dr. Merola concurred with Dr. Rosman's findings in an August 10, 2010 report. He explained that Dr. Rosman had performed a complete and thorough examination including a neurological examination of the lower extremities which documented no objective neurological deficits to the lower extremities in any of the nerve roots emanating from the lumbar spine. Dr. Merola also noted that given his previous suspicions regarding the anatomical basis of Dr. Diamond's report he agreed that appellant had a zero percent permanent impairment as determined by the sixth edition of the A.M.A., *Guides*.

In an August 23, 2010 decision, OWCP determined that appellant was not entitled to a schedule award. On September 17, 2010 appellant requested a hearing before the Branch of Hearings and Review.

By decision dated November 30, 2010, an OWCP hearing representative found a conflict in the medical opinion evidence between Dr. Diamond and Dr. Rosman and remanded the claim for an impartial medical evaluation.

OWCP referred appellant to Dr. Andrew Carollo, a Board-certified physician in orthopaedic surgery, for an impartial medical evaluation. Dr. Carollo reported on February 16, 2011 that her findings were that of lumbosacral strain without evidence of radiculopathy involving her lower extremities. Appellant's complaints were subjective in nature and she had no objective findings to substantiate a diagnosis of radiculopathy involving either one of her lower extremities. Dr. Carollo also noted her findings upon examination including range of motion of her hips. He reported that appellant had flexion of 100 degrees of both hips, while normal flexion was 120 degrees. Dr. Carollo concluded that her range of motion findings were normal.

In a March 18, 2011 decision, OWCP denied appellant's claim for schedule award.

Appellant disagreed with the decision and requested an oral hearing. A telephonic hearing was held on July 6, 2011. At the hearing, her representative argued that there were deficiencies in the referee physician report. He noted that Dr. Carollo referenced a January 15, 2008 MRI scan report, when the report was actually completed on January 25, 2008. The hearing representative also stated that Dr. Carollo did not include findings of numbness in appellant's foot in his report, which she testified was revealed by a test that he performed.

Following the hearing, appellant submitted a June 3, 2011 medical report from Dr. Diamond. In this report, Dr. Diamond reiterated that on examination he noted a mild motor strength deficit grade 4/5 in the hip flexors, hip abductors and hip adductors, which would justify his own impairment rating dated February 11, 2009.

By decision dated August 23, 2011, the hearing representative denied appellant's claim for schedule award.

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 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

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.⁷ 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

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

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

⁵ *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); Federal (FECA) Procedure Manual, Part 3 -- *Medical, Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ *Pamela J. Darling*, 49 ECAB 286 (1998).

schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.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

ANALYSIS

The Board finds that this case is not in posture for decision. OWCP accepted that appellant sustained a lumbar strain as a result of lifting a heavy bag on January 8, 2012. Dr. Diamond, her treating physician, has repeatedly reported that she has a 23 percent bilateral permanent impairment of the lower extremities due to sensory and motor deficits of the hips, resulting from the accepted lumbar injury. Dr. Merola, an OWCP medical adviser, initially reviewed Dr. Diamond's reports and concluded that appellant had a two percent permanent impairment of the right hip, due to sensory and motor deficit. OWCP referred her for a second opinion evaluation to Dr. Rosman, who concluded that her soft tissue injury caused no permanent impairment. The DMA then reviewed his report and concurred that appellant had no permanent impairment. Due to a conflict between appellant's physician, Dr. Diamond and Dr. Rosman regarding permanent impairment, OWCP referred her to Dr. Carollo, for an impartial medical evaluation to resolve the conflict in medical opinion.

Dr. Carollo examined appellant on February 8, 2011 and reviewed a statement of accepted facts and appellant's medical record. He provided a detailed physical examination wherein he concluded that her findings were that of lumbosacral strain and that neither the physical examinations nor the MRI scan findings substantiated any permanent impairment. Dr. Carollo did however note abnormal range of motion finding for appellant's hips. OWCP denied her claim for schedule award on August 23, 2011 based upon Dr. Carollo's report.

⁸ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁹ 5 U.S.C. § 8123(a).

¹⁰ 20 C.F.R. § 10.321.

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

The Board has explained in *Richard R. Lemay*,¹² 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 a proper factual and medical background, must be given special weight. OWCP's procedures note that, after all necessary medical evidence is obtained, the case file must be routed to the medical adviser for an opinion concerning the nature and percentage of impairment. However, cases returned from an impartial medical specialist should not be routinely sent to a DMA unless a schedule award is at issue. Where a referee examination is arranged to resolve a conflict created between a claimant's physician and a DMA with respect to a schedule award issue, the same DMA should not review the referee specialist report. Rather, another OWCP medical adviser should review the file.

In the present appeal, while an OWCP medical adviser did review the record on several occasions, a DMA did not review the final report from Dr. Carollo, the impartial medical specialist. This additional review is contemplated by the procedures and is necessary in this case. The Board notes that Dr. Merola, an OWCP medical adviser, initially supported a schedule award based upon physical examination findings regarding appellant's right hip. Dr. Merola subsequently concurred with Dr. Roswell that appellant did not have a permanent impairment as her injury only caused soft tissue injury of the lumbar spine. Dr. Carollo, the IME did find objective findings regarding her hips, but classified these findings as normal. His report should have been reviewed by an OWCP medical adviser to determine whether further clarification was necessary.

This case will be remanded to OWCP to have another OWCP medical adviser review Dr. Carollo's report. If it is determined that Dr. Carollo's opinion is in accordance with the A.M.A., *Guides*, then his report should be given the weight of the medical opinion. Following such further development as necessary OWCP shall issue an appropriate decision.

CONCLUSION

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

¹² 56 ECAB 341 (2005).

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2011 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further action consistent with this opinion.

Issued: September 12, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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