

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

M.K., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Memphis, TN, Employer**

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**Docket No. 13-1160
Issued: August 21, 2013**

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 April 17, 2013 appellant, through her attorney, filed a timely appeal from a February 28, 2013 schedule award decision of the Office of Workers' Compensation Programs (OWCP). 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 has permanent impairment of her lower extremities, warranting a schedule award.

On appeal, appellant's attorney contends that the February 28, 2013 decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board with regard to the termination of appellant's compensation benefits.² In an October 5, 2010 decision, the Board affirmed OWCP's September 29, 2009 decision terminating her wage-loss compensation and medical benefits effective February 17, 2009 on the grounds she no longer had any residuals or disability causally related to her accepted April 16, 2008 employment-related injury. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.³

On August 18, 2009 appellant filed a claim for a schedule award. On July 28, 2009 Dr. Martin D. Fritzhand, an attending occupational physician and Board-certified urologist, performed an impairment evaluation based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*). He advised that appellant had 17 percent impairment to the right lower extremity and 6 percent impairment to the left lower extremity.

On August 28, 2009 an OWCP medical adviser reviewed the medical record and Dr. Fritzhand's July 28, 2009 report. He determined that appellant reached maximum medical improvement on January 9, 2009. The medical adviser stated that Dr. Fritzhand's impairment ratings were inconsistent with the accepted diagnosis and previous examiners' findings. He stated that Dr. Fritzhand's report was not credible and that appellant had no impairment to the lower extremities.

In a November 23, 2010 decision, OWCP denied appellant's schedule award claim. It found that the Board had previously affirmed the termination of her compensation benefits and there was a lack of credible medical evidence to establish measurable impairment.

By letter dated November 30, 2010, appellant, through her attorney, requested a telephone hearing with an OWCP hearing representative.

In a June 28, 2011 decision, an OWCP hearing representative set aside the November 23, 2010 decision and remanded the case to OWCP for referral of appellant to an appropriate medical specialist to determine the extent of any permanent impairment.

On July 8, 2011 OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. James T. Galyon, a Board-certified orthopedic surgeon, for a second opinion. In an August 3, 2011 report, Dr. Galyon reviewed a history of the April 16, 2008 employment injury and her medical treatment, social and family background. He also reviewed the medical record and noted appellant's complaints of lumbar pain radiating down to her left foot. Dr. Galyon listed findings on physical examination and diagnosed degenerative disc disease with aggravation due to the April 16, 2008 employment injury. He applied the sixth edition of the A.M.A., *Guides* to determine that appellant had five percent impairment of the

² Docket No. 10-290 (issued October 5, 2010).

³ OWCP accepted that on April 16, 2008 appellant, then a 59-year-old tax examining technician, sustained a lumbar strain when she slipped and fell on a recently mopped floor at work.

whole person. Dr. Galyon stated that the objective findings were not as well documented or found as easily as the subjective complaints. There was an exaggeration or magnification of symptomology during the examination.

By letter dated September 16, 2011, OWCP requested that Dr. Galyon clarify his finding that appellant had degenerative disc disease that was aggravated by the 2008 employment-related fall. Dr. Galyon was asked to address whether the aggravation was temporary or permanent and if it was temporary whether it had resolved. He was also asked to provide medical rationale in support of his opinion.

In a report dated September 14, 2011, Dr. Galyon related that the sixth edition of the A.M.A., *Guides*, clearly stated that pain could be used as a sensory deficit. If the Department of Labor did not allow pain to be used as part of the sensory deficit, then appellant had no positive findings since pain was purely subjective and she had no partial permanent disability if pain was not utilized as a factor in the sensory disturbance.

On November 8, 2011 the prior OWCP medical adviser reviewed the medical record and Dr. Galyon's August 3, 2011 report. He again noted that appellant reached maximum medical improvement on January 9, 2009. The medical adviser opined that, based on the lack of objective findings of motor or sensory loss in an anatomic distribution, she had no impairment of the lower extremities under the sixth edition of the A.M.A., *Guides*.

On November 15, 2011 OWCP found a conflict in medical opinion between Drs. Fritzhand and Galyon regarding permanent impairment. By letter dated November 21, 2011, it referred her to Dr. Apurva R. Dalal, a Board-certified orthopedic surgeon. In a January 9, 2012 report, Dr. Dalal applied the fifth edition of the A.M.A., *Guides* and *The Guides Newsletter* July/August 2009 to determine that she had 17 percent impairment of the left lower extremity for moderate sensory deficit in the sciatica nerve distribution. He multiplied this impairment rating by 60 percent impairment for moderate loss of sensation to calculate 10 percent impairment of the left lower extremity.

On February 17 and 28, 2012 new OWCP medical advisers reviewed the medical record and stated that maximum medical improvement was reached on July 28, 2009. The physicians stated that Dr. Dalal incorrectly used the fifth edition of the A.M.A., *Guides* rather than the sixth edition to determine that appellant had a 17 percent left lower extremity impairment rating. The medical advisers recommended referral of appellant to a qualified physician who was well-versed in the use of *The Guides Newsletter* to rate spinal nerve root extremity impairment.

By letter dated March 2, 2012, OWCP requested that Dr. Dalal reevaluate appellant's impairment using the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* July/August 2008/2009. Dr. Dalal did not respond.

On April 26, 2012 OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Rommel G. Childress, a Board-certified orthopedic surgeon, for an impartial medical examination. In a June 22, 2012 report, Dr. Childress reviewed a history of the April 16, 2008 employment injury and medical record. He noted appellant's complaints of back pain, numbness in her right and left feet, popping and pain in her right lower extremity and

her physical limitations. On physical examination of the toes, heels, neck, shoulders, elbows, wrists and hands, Dr. Childress provided essentially normal findings except weakness and difficulty displayed by her in getting up from a knee bend and squat. He reported that an examination of the back showed no tenderness in the dorsal or cervical region, but tenderness in the right and left lumbar paraspinal regions. Appellant had limited lumbar mobility and palpable right lumbar paraspinal spasm with the extremes of motion. She expressed lumbar discomfort with straight leg raising. Appellant had slightly diminished sensation to light touch in the lateral and dorsal aspect of the left foot. Appellant's motor function, however, was intact. Dr. Childress rated her strength as four over five about the hip, knees, feet and ankles on either side. He diagnosed acute and chronic lumbar spine strain with persistent symptoms due to aggravation of underlying degenerative disc and facet disease. Dr. Childress also diagnosed a tendency for radiculopathy documented by electromyogram/nerve conduction study (EMG/NCD), which was abnormal, showing some paraspinal muscle abnormality.⁴

Dr. Childress advised that appellant had reached maximum medical improvement on the date she retired from the employing establishment.⁵ He stated that it was difficult to provide an accurate impairment rating because the federal guidelines did not allow the use of abnormalities found in the lumbar spine, but rather how they affected the extremities. The problem was that appellant had abnormalities found on a magnetic resonance imaging (MRI) scan that explained her continued back pain and difficulty.⁶ The fact that she had abnormal facets and hypertrophic ligaments could also explain her tendency to experience irritation of the nerves in the extremities, although the only abnormality, which had been noted, was the EMG/NCD abnormality in the paraspinal muscles. Symptoms could be present due to irritation from the nerves without abnormality showing in the EMG/NCD, just as some carpal tunnel compressions could be present without the EMG/NCD documenting the compression. Dr. Childress determined that, based on a strict use of the A.M.A., *Guides*, appellant had no impairment to the extremities. He suggested an arbitrary impairment rating of three percent for each lower extremity if the case was handled outside the A.M.A., *Guides* due to the significant abnormality noted on the MRI scan which showed the reason for her ongoing and continuing difficulty.

In an August 14, 2012 decision, OWCP denied appellant's schedule award claim. The weight of the medical evidence was accorded to Dr. Childress' opinion.

By letter dated September 6, 2012, appellant's attorney requested a telephone hearing with an OWCP hearing representative.

⁴ A June 24, 2008 (May 8, 2008) EMG/NCD revealed irritation of the left paraspinal muscles which suggested lumbar radiculopathy. There was no denervation and the rest of the study was normal.

⁵ The record does not indicate when appellant retired from the employing establishment.

⁶ A May 8, 2008 MRI scan showed mild degenerative changes of the lower lumbar spine without central canal stenosis or nerve encroachment or fracture. An August 29, 2008 lumbar MRI scan demonstrated mild degenerative disc disease that was most advanced at L4-5 with secondary borderline significant central stenosis. There was no neural impingement, disc herniation or cause of left-sided radicular symptoms demonstrated.

In a February 28, 2013 decision, an OWCP hearing representative affirmed the August 14, 2012 decision. The weight of the medical evidence was accorded to Dr. Childress' opinion.

LEGAL PRECEDENT

The schedule award provision of FECA⁷ and its implementing federal regulations,⁸ 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.⁹ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹⁰ Effective May 1, 2009, FECA adopted the sixth edition of the A.M.A., *Guides*¹¹ as the appropriate edition for all awards issued after that date.¹²

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.¹³ Neither, FECA nor the implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.¹⁴ However, a claimant may be entitled to a schedule award where the employment-related back condition affects the upper and/or lower extremities.¹⁵

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009) is to be applied.¹⁶

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Ausbon N. Johnson*, 50 ECAB 304 (1999).

¹⁰ 20 C.F.R. § 10.404; *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

¹¹ A.M.A., *Guides* (6th ed. 2009).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹³ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁴ 5 U.S.C. § 8107(c) (2006); 20 C.F.R. § 10.404(a) (2011); *see Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a(3) (January 2010).

¹⁶ *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also supra* note 12. *The Guides Newsletter* is included as Exhibit 4.

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA, which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employing establishment, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.¹⁷ 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.¹⁸

ANALYSIS

OWCP accepted that on April 16, 2008 appellant sustain a lumbar strain while in the performance of duty. Appellant requested a schedule award. Due to a conflict between appellant's physician, Dr. Fritzhand, and Dr. Galyon, an OWCP referral physician, regarding permanent impairment, OWCP referred appellant to Dr. Dalal as the impartial medical specialist, to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a).

In his January 9, 2012 report, Dr. Dalal applied the fifth edition of the A.M.A., *Guides* and *The Guides Newsletter* July/August 2009 and determined that appellant had 10 percent impairment of the left lower extremity. OWCP determined that Dr. Dalal's opinion required clarification and correctly requested on March 2, 2012 that he provide an impairment rating under the standards of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* July/August 2009.¹⁹ Dr. Dalal did not respond. The Board's precedent and OWCP's procedure provide that, if the selected impartial medical examiner failed to provide an adequate clear response after a specific request for clarification, OWCP may then seek a second impartial medical examiner's opinion.²⁰

Accordingly, OWCP referred appellant to Dr. Childress, as an impartial medical specialist, to determine the extent of her permanent impairment for schedule award purposes. In his June 22, 2012 report, Dr. Childress discussed the April 16, 2008 employment injury, her medical history, including pain and numbness in her back, right and left feet and right leg and essentially normal findings on examination. He reviewed appellant's medical records, including diagnostic testing of the lumbar spine and nerves in the lower extremities. Dr. Childress found that the date of maximum medical improvement was the date she retired from the employing establishment. He opined that appellant had no impairment to either lower extremity under strict use of the sixth edition of the A.M.A., *Guides*. Dr. Childress explained that diagnostic testing revealed abnormalities in the lumbar spine, but the A.M.A., *Guides* did not allow the use of these findings to rate impairment.

¹⁷ 5 U.S.C. § 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

¹⁸ *R.C.*, 58 ECAB 238 (2006).

¹⁹ OWCP's decisions regarding impairment were not issued until after May 1, 2009 and, therefore, its use of the sixth edition of the A.M.A., *Guides* was appropriate. *See supra* note 11.

²⁰ *James P. Roberts*, 31 ECAB 1010 (1980); *supra* note 12, *Medical Examinations*, Chapter 3.500.6.b (May 2003).

In situations where there are 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 on a proper factual background, must be given special weight.²¹ The Board finds that Dr. Childress, the impartial medical examiner, properly applied the A.M.A., *Guides* to the findings on physical examination and diagnostic testing. Dr. Childress' report was sufficiently detailed and well reasoned to resolve the conflict of medical opinion evidence and establish appellant's permanent impairment for schedule award purposes. The Board finds that his report is entitled to the special weight of the medical evidence, afforded an impartial medical examiner, with regard to appellant's employment-related permanent impairment.

On appeal, counsel contended that OWCP's February 28, 2013 decision is contrary to fact and law. For reasons stated above, the Board finds that the weight of the medical evidence does not establish any entitlement to a schedule award. There is no other medical evidence of record addressing the extent of appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.

Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has failed to establish that she has any permanent impairment to the lower extremities, warranting a schedule award.

²¹ *Anna M. Delaney*, 53 ECAB 384 (2002); *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2013
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