United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 13-1250**
	)	**Issued: December 5, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Tyler, TX, Employer	)	

Appearances:
Edward L. Daniel, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 30, 2013 appellant, through her attorney, filed a timely appeal from an April 1, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding 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 sustained any permanent impairment to her extremities as a result of her work-related injuries, warranting a schedule award.

FACTUAL HISTORY

On November 8, 2004 appellant, then a 47-year-old rural carrier, hurt her back while trying to unload three heavy parcels from her postal vehicle. OWCP accepted the claim for a thoracic sprain, cervical spondylosis with myelopathy, cervical spondylosis without myelopathy,

[1] 5 U.S.C. §§ 8101-8193.

spinal stenosis in the cervical region and displacement of a cervical intervertebral disc without myelopathy. Other conditions accepted by OWCP include shoulder and thoracic strains under claim number xxxxxx188 and a dog bite to left leg under claim number xxxxxx693. Under claim number xxxxxx693, OWCP denied a claim for a recurrence of disability and subsequent cervical surgery in 2004. Under claim number xxxxxx570, cervical myelopathy was denied.

On May 26, 2010 appellant filed a Form CA-7 claim for a schedule award. In an August 18, 2009 report, Dr. John W. Ellis, a Board-certified family practitioner, opined that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) appellant had 8 percent impairment to the right upper extremity, 8 percent impairment to the left upper extremity, 9 percent impairment to the right lower extremity and 24 percent impairment to the left lower extremity.

In a June 19, 2010 report, an OWCP medical adviser reviewed Dr. Ellis' August 18, 2009 report and found that it was not probative as he did not apply the July/August 2009 *The Guides Newsletter*. A second opinion evaluation was recommended.

Appellant was referred to Dr. John Sklar, a Board-certified physiatrist. In a July 18, 2011 report, Dr. Sklar found that she reached maximum medical improvement on August 18, 2009. He reviewed the history of injury and medical treatment, including diagnostic tests. Dr. Sklar found no evidence of cervical radiculopathy on examination affecting either upper extremity. He opined that there was no impairment to the upper extremities and no ratable impairment in the lower extremities causally related to the accepted conditions.

In a July 27, 2011 report, Dr. Ronald Blum, an OWCP medical adviser, found Dr. Sklar's report probative and did not support impairment due to radiculopathy. He concurred with the impairment findings.

By decision dated August 1, 2011, OWCP denied appellant's claim for a schedule award.

Appellant disagreed and requested an oral hearing. By decision dated October 25, 2011, an OWCP hearing representative set aside the August 1, 2011 decision and remanded the case for further development. The hearing representative directed OWCP to issue an amended statement of accepted facts which included a complete medical history and requests that Dr. Sklar provide a supplemental opinion on whether appellant's cervical, thoracic or lumbar spine conditions were causally related to appellant's work injuries of December 9, 2000, June 4, 2001 or November 8, 2004. Dr. Sklar was to also address whether appellant sustained any permanent impairment as a result of the work injuries.

In an October 24, 2011 report, Dr. M. Stephen Wilson, an orthopedic surgeon, opined that appellant had 9 percent right arm impairment and 23 percent left arm.

On December 5, 2011 OWCP issued an amended statement of accepted facts. It referred appellant for another examination by Dr. Sklar. In a January 18, 2012 report, Dr. Sklar reviewed all the new information submitted and reevaluated appellant. He stated that maximum medical improvement was reached. On examination, appellant had a full range of motion in the upper extremities with some limitation in the shoulders without atrophy. Dr. Sklar found no evidence

of radiculopathy. He found there was zero percent impairment to either the upper or lower extremities.

In a February 17, 2012 report, Dr. Blum concurred with Dr. Sklar's impairment rating.

OWCP determined that a conflict in medical opinion arose between Dr. Wilson and Dr. Sklar as to the extent and nature of any impairment. It referred appellant to an impartial medical examination with Dr. Sameer Fino, a Board-certified physiatrist, who failed to provide OWCP with a report. OWCP then referred appellant to Dr. Mark Parker, a Board-certified physiatrist, for an impartial medical examination.

In a July 9, 2012 report, Dr. Parker reviewed the medical record and presented findings on examination. He noted that her primary complaint was of neck pain. Dr. Parker opined that appellant reached maximum medical improvement on August 18, 2009 and that she had no impairment under the sixth edition of the A.M.A., *Guides* of any extremity. He stated that appellant's physical examination was not consistent with either cervical or lumbar radiculopathy. Appellant had two prior electrodiagnostic studies; that in 2008 showed no evidence of cervical radiculopathy, but evidence of bilateral carpal and cubital tunnel syndromes. Dr. Parker noted that OWCP had not accepted these conditions as employment related. While appellant presented a May 12, 2012 report from her physical therapist which reported evidence of mild C7 radiculopathy on the left side, her physical examination did not confirm any C7 cervical radiculopathy. Dr. Parker stated that it was his understanding that no impairment was given for spine condition under Department of Labor rules. Therefore, he found that appellant had no impairment due to the accepted conditions.

By decision dated July 20, 2012, OWCP denied appellant's schedule award claim. It accorded determinative weight to Dr. Parker's impartial medical opinion finding that appellant had no impairment of any extremity.

Appellant requested an oral hearing before an OWCP hearing representative, which was held on December 14, 2012. By decision dated February 26, 2013, an OWCP hearing representative set aside the July 20, 2012 decision as OWCP did not refer Dr. Parker's report to its medical adviser prior to issuing its decision. The case was remanded for an OWCP medical adviser, who was not previously involved in the case, to review Dr. Parker's report.

On March 11 and 21, 2013 Dr. H. Mobley, an OWCP medical adviser, reviewed the statement of accepted facts and Dr. Parker's July 9, 2012 report. He noted that Dr. Parker reported degenerative cervical, thoracic and lumbar spine disease, cervical fusion, carpal and cubital tunnel surgical releases, cervical and lumbar pains and numbness in hands and feet. An electromylogram and nerve conduction study suggested a mild left C7 radiculopathy but no evidence of radiculopathy on physical examination, decreased spine range of motion, equal deep tendon reflexes, muscle testing limited by pain, no muscle atrophy and diminished sensation to pinprick in a spotty nondermatomal distribution in all four extremities. The medical adviser stated that maximum medical improvement was July 9, 2012. He agreed with Dr. Parker's zero percent impairment rating under the sixth edition of the A.M.A., *Guides* and the July/August 2009 *The Guides Newsletter*.

By decision dated April 1, 2013, OWCP denied appellant's claim for a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA[2] and its implementing regulations[3] 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. 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.[4] The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[5]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[6] 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 schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[7]

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.[8]

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History

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[2] *Id.* at § 8107.

[3] 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

[4] *Id.*

[5] *Veronica Williams*, 56 ECAB 367, 370 (2005).

[6] *Pamela J. Darling*, 49 ECAB 286 (1998).

[7] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[8] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

(GMFH) and if electrodiagnostic testing were done, Clinical Studies (GMCS).[9] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[10]

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.[11] 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.[12]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with an OWCP medical adviser providing rationale for the percentage of impairment specified.[13]

ANALYSIS

OWCP accepted the conditions of thoracic sprain, cervical spondylosis with myelopathy, cervical spondylosis without myelopathy, spinal stenosis in cervical region and displacement of cervical intervertebral disc without myelopathy. Appellant requested a schedule award. Due to a conflict between Dr. Wilson, appellant's attending physician, and Dr. Sklar, an OWCP referral physician, regarding permanent impairment, OWCP referred appellant to Dr. Fino for an impartial medical opinion, to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a). However OWCP never received a report from Dr. Fino. Thus, it properly sent appellant to Dr. Parker to resolve the conflict in medical opinion regarding permanent impairment.[14]

In his July 9, 2012 report, Dr. Parker reviewed the medical record along with a statement of accepted facts and presented examination findings. He opined that appellant reached maximum medical improvement on August 18, 2009. Further, Dr. Parker opined that appellant had no impairment under the sixth edition of the A.M.A., *Guides* for any of the extremities. He

[9] A.M.A., *Guides* 533.

[10] *Id.* at 521.

[11] 5 U.S.C. § 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

[12] *R.C.*, 58 ECAB 238 (2006).

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[14] In situations where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist. *See Guiseppe Aversa*, 55 ECAB 164 (2003).

explained that appellant's physical examination was not consistent with either cervical or lumbar radiculopathy. Dr. Parker reviewed electrodiagnostic testing and noted the studies showed no evidence of cervical radiculopathy, but showed evidence of bilateral carpal and cubital tunnel syndromes, which were not accepted conditions. He also noted that, while there was reported evidence of mild C7 radiculopathy on the left side, appellant's physical examination did not confirm impairment from a C7 cervical radiculopathy. Dr. Parker opined that appellant had zero percent impairment for the extremities due to the accepted conditions. An OWCP medical adviser reviewed Dr. Parker's report and determined that the A.M.A., *Guides* and *The Guides Newsletter* July/August 2009 were appropriately applied in the determination that there was no impairment to any of the extremities.

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.[15] The Board finds that Dr. Parker, the impartial medical examiner, properly applied the A.M.A., *Guides* to the findings on physical examination and diagnostic testing, which he found did not support cervical or lumbar radiculopathy. He also stated that his examination did not confirm that appellant had C7 cervical radiculopathy. Dr. Parker's report was sufficiently detailed and well reasoned to resolve the conflict of medical opinion. He found that appellant had no permanent impairment for schedule award purposes. The medical adviser applied Dr. Parker's findings of no cervical or lumbar radiculopathy to the A.M.A., *Guides* and *The Guides Newsletter* July/August 2009 and found it also supported no permanent impairment for schedule award purposes. The Board finds that Dr. Parker's 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 and before OWCP, appellant's counsel argued that Dr. Parker did not use *The Guides Newsletter* July/August 2009 in arriving at his conclusion and was not aware that a schedule award for impairment to the extremities could be paid under FECA. Dr. Parker based his opinion that there was no impairment in any of the extremities on his examination findings which failed to support cervical or lumbar radiculopathy. Accordingly, appellant's argument has no merit. 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 or increased 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 a ratable impairment of the extremities causally related to her work injuries.

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

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 5, 2013
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

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