

FACTUAL HISTORY

On December 23, 2005 appellant, a 56-year old distribution clerk, experienced pain in her arm, neck and back while lifting heavy bags of mail. She filed a claim for benefits on December 27, 2005, which OWCP accepted for lumbar sprain.

In an October 27, 2010 report, Dr. David Weiss, an osteopath, found that appellant had a 13 percent left lower extremity impairment and a 23 percent right lower extremity impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) (A.M.A., *Guides*), due to her accepted lumbar strain. He stated that appellant underwent x-rays of the lumbar spine on January 3, 2006 which showed arthritis at the L5-S1 level. Appellant also underwent a magnetic resonance imaging (MRI) scan on August 17, 2007. Dr. Weiss found that she had a herniated nucleus pulposus at L5-S1, with collapse of the disc space. On examination of the lumbar spine he stated that calcaneal and equinus gaits were accomplished within normal limits.

Dr. Weiss relied on Table 16-12, page 535 of the A.M.A., *Guides*,² to rate peripheral nerve impairments of the lower extremities. He provided an impairment rating based on motor strength deficit. Appellant had class 1 mild to moderate 4/5 motor strength deficit in the right extensor hallucis longus (sciatic) nerve equaling a nine percent impairment. Dr. Weiss found that appellant had a functional history modifier of two based a pain disability questionnaire (PDQ) score of 91,³ and a clinical studies modifier of two based on the August 2007 MRI scan findings of herniated disc at L5-S1, which yielded a net adjustment of two, resulting in a right lower extremity impairment of 13 percent.

With regard to the left lower extremity, Dr. Weiss made the same findings for muscle motor deficit for the left sciatic nerve rating a 13 percent impairment. He rated a class 1 sensory deficit for a left S1 nerve root impairment at Table 16-12, for a femoral nerve root impairment. Dr. Weiss found that appellant had a functional history modifier of two, a clinical studies modifier of two, which yielded a net adjustment of two, resulting in a left lower extremity impairment of two percent. He found a class 1 sensory deficit for a left S1 nerve root impairment at Table 16-12, for a sciatic nerve root impairment. Dr. Weiss found that appellant had a functional history modifier of two, a clinical studies modifier of two, which yielded a net adjustment of two, resulting in a left lower extremity impairment of nine percent. Based on the above elements, he rated a total left lower extremity impairment of 23 percent.

In an August 19, 2011 report, Dr. Robert Y. Pick, an OWCP medical adviser Board-certified in orthopedic surgery, reviewed Dr. Weiss' report. He disagreed with Dr. Weiss' impairment ratings. Dr. Pick noted that Dr. Weiss had stated at page 3 of his report that, on examination, appellant's calcaneal and equinus gaits were accomplished within normal limits; but this was the finding on which Dr. Weiss rated a 13 percent impairment for motor strength deficit for the sciatic nerve in the right and left lower extremity. He stated that normal calcaneal and equinus gait was not expected where the patient showed even slight weakness of the

² A.M.A., *Guides* 535.

³ *Id.* at 575.

extensor hallucis longus -- the major extensor tendon of each big toe. Under Table 16-12, page 535, the section used for rating sciatic nerve impairments, Dr. Pick utilized the column stating “no objective sensory or motor deficits.” He rated an 11 percent impairment of the left sciatic nerve, for an 11 percent left leg impairment. Dr. Pick found that there was no impairment for motor deficit of the left or right lower extremities finding no basis for a schedule award for the right lower extremity.

OWCP found a conflict in the medical opinion between Dr. Weiss and Dr. Pick regarding the degree of permanent impairment stemming from appellant’s accepted lumbar strain condition. In order to resolve the conflict it referred her to Dr. Michael J. Bercik, Board-certified in orthopedic surgery, for a referee medical examination.

In a report dated February 27, 2012, Dr. Bercik set forth findings on examination and reviewed the medical history and the statement of accepted facts. He found that appellant had no ratable, permanent impairment of the right or left lower extremity under the A.M.A., *Guides*. On examination, appellant had complaints of lower back pain into both legs, more severe on the left than on the right. She described the pain in her legs in a whole leg distribution from the hip to the ankle, which increased with changes in the weather, activities, bending, lifting and carrying heavy items. Dr. Bercik stated that examination of the lumbosacral spine showed normal physiologic curves; her spine was well aligned with no deformity or swelling and lordosis of the lumbar spine was within normal limits. Palpation of the paravertebral musculature revealed no muscular spasm. Appellant noted tenderness on palpation of the paravertebral musculature. Dr. Bercik related that her range of motion examination showed 0 to 20 degrees of right and left lateral bending and 0 to 90 degrees of forward flexion.

Dr. Bercik stated that neurologic examination of the lower extremities demonstrated normal muscle strength in both legs with no sensory dysesthesias, pain, numbness or other abnormal sensations in either leg. He reviewed the August 13, 2007 MRI scan and noted that while it showed disc degeneration at several levels in the lumbar spine with disc bulging at L5-S1, it did not demonstrate any disc herniations. Dr. Bercik found that the study was otherwise unremarkable. He opined that the prognosis for the accepted lumbosacral sprain injury was good and that appellant’s subjective complaints did not correlate with the objective findings.

In a June 18, 2012 report, Dr. Henry J. Magliato, a medical adviser, agreed with Dr. Bercik’s opinion that appellant had no ratable impairment stemming from her accepted lumbar strain condition.

By decision dated December 20, 2012, OWCP denied appellant’s claim for a schedule award, finding that she did not have any permanent partial impairment to the lower extremities from her December 23, 2005 employment injury.

By letter dated December 28, 2012, appellant’s attorney requested reconsideration. He stated that the issue for the referee medical specialist pertained to the left lower extremity, as both physicians of record had already found that appellant had a 13 percent impairment of the right lower extremity.⁴ Counsel contended that OWCP erred by crediting Dr. Bercik’s opinion that

⁴ As indicated above, Dr. Pick actually rated an 11 percent right lower extremity impairment.

appellant had no permanent impairment for either lower extremity. Appellant did not submit any additional medical evidence.

By decision dated February 1, 2013, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁵ and its implementing regulations⁶ 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.⁷ 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.⁸

Section 8123(a) provides that, if there is a 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 It is well established 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.¹⁰

ANALYSIS -- ISSUE 1

On appeal, appellant's attorney contends that OWCP erred in finding that Dr. Bercik's impartial medical opinion merited the special weight of an impartial medical examiner. He reiterated that OWCP erred by crediting Dr. Bercik's impartial medical opinion that appellant had no permanent impairment for either lower extremity, given the fact that Dr. Pick, OWCP's medical adviser, rated a 13 percent impairment of the right lower extremity. The issue for the referee medical specialist pertained to the degree of permanent impairment in the left lower extremity.

⁵ 5 U.S.C. § 8107.

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

⁷ *Id.*

⁸ *Veronica Williams*, 56 ECAB 367, 370 (2005).

⁹ *Regina T. Pellicchia*, 53 ECAB 155 (2001).

¹⁰ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

The Board does not accept counsel's contentions. OWCP properly relied on Dr. Bercik's impartial opinion to find that appellant had no ratable impairment of either the right or left lower extremities stemming from her December 2005 employment injury under the A.M.A., *Guides*. The Board notes that the A.M.A., *Guides* directs examiners to rate diagnosis-based impairments for the lower extremities pursuant to Chapter 16, which states at page 497, section 16.2a that impairments are defined by class and grade. The Board notes that a schedule award is not payable under FECA for injury to the spine¹¹ or based on whole person impairment.¹² However, 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.¹³ The record is not sufficient to establish that appellant sustained a lower extremity impairment caused by her accepted lumbar strain condition.

In a February 27, 2012 report, Dr. Bercik found that appellant had no ratable, permanent impairment of the right or left lower extremity under the A.M.A., *Guides*. He related that she had subjective complaints of lower back pain and pain in her legs; but her complaints were not supported by objective findings on examination. Dr. Bercik stated that appellant's lumbar spine examination showed normal physiologic curves, with no deformity or swelling and that lordosis of the lumbar spine was within normal limits. The neurologic examination of her lower extremities demonstrated normal muscle strength in both legs with no sensory dysesthesias in either leg. Dr. Bercik found, contrary to Dr. Weiss, that the August 13, 2007 MRI scan showed disc bulging but no herniation at the L5-S1 level.

The question of whether a claimant is entitled to a schedule award is a medical one. OWCP reviewed the medical evidence of record to determine that it was not sufficient to establish a permanent impairment of the right and left lower extremities from appellant's accepted lumbar strain condition based on Dr. Bercik's impartial medical opinion. It properly relied on his January 27, 2012 report, which reviewed the entire medical history, was sufficiently probative, rationalized, and based upon a proper factual background, and entitled to the special weight of an impartial medical examiner.¹⁴ The Board therefore finds that Dr. Bercik's opinion constituted the weight of medical opinion and supports OWCP's determination denying appellant a schedule award for a right and left lower extremity impairment. The Board will affirm the December 20, 2012 decision.

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

¹¹ *Pamela J. Darling*, 49 ECAB 286 n.7 (1998).

¹² *N.M.*, 58 ECAB 273 n.9 (2007).

¹³ *Thomas J. Engelhart*, 50 ECAB 319, n.8 (1999).

¹⁴ *Gary R. Seiber*, 46 ECAB 215 (1994).

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by OWCP or by submitting relevant and pertinent evidence not previously considered by OWCP.¹⁵ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁶

ANALYSIS -- ISSUE 2

In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has she advanced a relevant legal argument not previously considered by OWCP. The December 28, 2012 letter from appellant's attorney merely reiterates counsel's contention that Dr. Bercik's opinion was not sufficient to merit the special weight of a referee medical examiner because he rejected the opinions of Drs. Weiss and Pick that appellant had a 13 percent impairment rating for the right lower extremity. This argument is cumulative and repetitive. Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by OWCP. OWCP did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

CONCLUSION

The Board finds that appellant has not sustained any permanent impairment to her right or left lower extremity, thereby entitling her to a schedule award under 5 U.S.C. § 8107. The Board finds that OWCP properly refused to reopen her case for reconsideration on the merits of her claim under 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.606(b). *See generally* 5 U.S.C. § 8128(a).

¹⁶ *Howard A. Williams*, 45 ECAB 853 (1994).

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2013 and December 20, 2012 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: December 12, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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