

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

L.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Hartford, CT, Employer)

**Docket No. 12-1269
Issued: January 16, 2013**

Appearances:
Appellant, pro se
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 May 14, 2012 appellant filed a timely appeal from an April 19, 2012 merit 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.²

ISSUE

The issue is whether appellant has established that she sustained a permanent impairment warranting a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence following the April 19, 2012 schedule award decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration.

FACTUAL HISTORY

On December 18, 2008 appellant, then a 45-year-old letter carrier, filed a traumatic injury claim alleging that she sustained injuries to her elbow, lower back and hip when she fell down the stairs after slipping on black ice at work. She stopped work and received wage-loss compensation. OWCP accepted appellant's claim for left elbow contusion, back sprain and neck sprain.

In July 16 and August 6, 2010 reports, Dr. Joseph M. Sohn, a Board-certified orthopedic surgeon, related appellant's complaints of low back pain and intermittent radicular symptoms. Examination of the spinal column revealed tenderness upon palpation and limited truncal range of motion. Dr. Sohn observed no motor or sensory deficits in the lower extremities. Distal pulses were 2/4 in the lower extremities bilaterally. Dr. Sohn diagnosed lumbar spondylosis and lumbar radiculitis with intermittent radiculitis and myofascial pain.

In an October 11, 2010 report, Dr. Sohn noted appellant's complaints of persistent back pain as a result of a work-related injury. Appellant was on a permanent lifting restriction of 20 pounds. Dr. Sohn stated that she reached maximum medical improvement and opined that she had a permanent partial disability rating of five percent to her lumbar spine based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2008).

On January 24, 2011 appellant requested a schedule award.

On February 18, 2011 OWCP referred the case, together with a statement of accepted facts, to Dr. Christopher R. Brigham, a Board-certified orthopedic surgeon and medical adviser. He was asked to address whether appellant sustained any permanent impairment as a result of her accepted injuries and the extent of any permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.

In a March 2, 2011 report, Dr. Brigham accurately described appellant's December 18, 2008 work-related injury and reviewed her medical history, including Dr. Sohn's October 11, 2010 impairment evaluation. He stated that Dr. Sohn's impairment rating did not conform to OWCP regulations as it was assigned for the spine and expressed as a whole person rating and not according to the specific instructions in the A.M.A., *Guides* and *The Guides Newsletter*. Utilizing Table 15-4, the Elbow Regional Grid, on page 398 of the A.M.A., *Guides* (6th ed. 2008), Dr. Brigham determined that appellant had a class 0 rating for her elbow contusion with no significant symptoms, which resulted in a rating of 0 percent upper extremity impairment. According to Table 15-33, page 474, he also noted that appellant had 0 percent upper extremity impairment because there were no reported motion deficits of the left elbow. Thus, Dr. Brigham concluded that appellant did not suffer any permanent impairment to her left elbow. Regarding permanent impairment for the lumbar spine, he referenced *The Guides Newsletter*, July/August 2009 the sixth edition of the A.M.A., *Guides* for spinal nerve extremity impairment and explained that the process for rating peripheral nerve injuries of the upper and lower extremities was found in page 430 of the A.M.A., *Guides*. Dr. Brigham determined that there was zero percent lower extremity impairment related to appellant's spinal injury because Dr. Sohn reported that there were no motor or sensory deficits in the lower extremity. He stated

that she reached maximum medical improvement on October 11, 2010 the date of Dr. Sohn's examination.

On March 9, 2011 OWCP referred the case to Dr. Balazs B. Somogyi, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant sustained any permanent impairment as a result of her accepted injuries and the extent of any permanent impairment in accordance with the A.M.A., *Guides*.

In an April 4, 2011 report, Dr. Somogyi accurately described the December 18, 2008 employment injury and reviewed the medical history. Upon examination of the lumbar spine, he observed tenderness at the mid to lower aspect at the midline and over the left and right sacroiliac joint areas. No gross deformity or abnormality was found. Range of motion of the lumbosacral segment revealed forward flexion to mid tibia with discomfort and extension to neutral with pain. Examination of the lower extremities did not reveal any atrophy or fasciculation and straight leg raise testing was negative bilaterally. Fabere test was somewhat uncomfortable bilaterally and Homans sign was unremarkable and normal. Dr. Somogyi reported that, based upon the available information, appellant reached maximum medical improvement by the end of 2009. He stated that, according to the Lumbar Spine Regional Grid for nonspecific chronic or chronic recurrent low back pain, she had four percent impairment of the lumbosacral region. Dr. Somogyi also determined that, according to the Lumbar Spine Regional Grid on page 570 of the A.M.A., *Guides*, appellant's two percent impairment related to the whole person should be increased by one percent due to functional history and physical examination.

In an April 20, 2011 supplemental report, Dr. Somogyi stated that he used the impairment evaluation related to pain-related impairment. He noted that appellant had a pain level between 6 to 10 on a regular basis and a pain pattern of 6 to 8, which was severe in nature. Based on Table 3-1, page 40, of the A.M.A., *Guides*, Dr. Somogyi concluded that she had two percent whole person impairment. To determine the regional lumbosacral impairment, he divided 2 by .75 which resulted in three percent impairment of the lumbosacral segment.

In a June 10, 2011 report, Dr. Brigham reviewed Dr. Somogyi's reports and disagreed with the impairment rating. He noted that Dr. Somogyi converted the whole person impairment rating for the spine to regional spine impairment, but FECA regulations only authorized impairment based on the impact to the lower extremities. Dr. Brigham explained that the correct approach to the evaluation of spinal nerve was based on the sixth edition of the A.M.A., *Guides* and the July/August 2009 *The Guides Newsletter*, which rated spinal nerve impairment based on the process defined for rating peripheral nerve injuries in the lower extremities. Because the medical examination revealed that appellant did not have any sensory deficits in the lower extremities, he again concluded that she had zero percent lower extremity impairment. Dr. Brigham further stated that the rating of zero percent left upper extremity impairment remained the same.

In June 3 and July 15 reports, Dr. Sohn related appellant's treatment for back pain and radicular symptoms. Upon examination, he observed tenderness in the neck and sciatic notch paraspinal muscles upon palpation of the spinal column. Dr. Sohn reported that there were no motor or sensory deficits in the lower extremities and no peripheral edema. He diagnosed

lumbar spondylosis with intermittent radiculitis and authorized appellant to return to work with restrictions.

OWCP determined that a conflict in medical opinion arose between Dr. Somogyi, the second opinion examiner, and Dr. Brigham, an OWCP medical adviser, regarding appellant's schedule award impairment rating and referred her case, together with a statement of accepted facts, to Dr. Thomas Stevens, a Board-certified orthopedic surgeon, for an impartial medical examination to determine the percentage of impairment of her upper and/or lower extremities according to the sixth edition of the A.M.A., *Guides*.

In a December 5, 2011 report, Dr. Stevens accurately described the December 18, 2008 employment injury and reviewed appellant's medical history. Upon examination of the cervical spine, he observed normal range of motion with complaints of some discomfort and no obvious spasms. Dr. Stevens also noted that appellant's upper extremity reflexes and gross neurological examinations were within normal limits. Examination of appellant's lumbar spine revealed mild lumbar paravertebral spasm during forward flexion but no scoliosis. Straight leg raise testing was negative to 90 degrees bilaterally and produced no discomfort until 80 degrees bilaterally. Fabere test caused slight pelvis discomfort, but Homans test was negative. Active lumbar extension was 10 degrees and side tilts and rotation were to 15 degrees. Utilizing Table 17-4, page 570, of the A.M.A., *Guides* (6th ed. 2008), Dr. Stevens determined that appellant had class 1 level impairment with a five percent impairment of her lumbar spine. He reported that no rating needed to be considered for her lower extremities or her cervical spine.

On March 13, 2012 OWCP advised Dr. Stevens that its regulations did not allow schedule award for impairments to the spine or whole person and requested that he provide an impairment rating for the upper and/or lower extremities based on the sixth edition of the A.M.A., *Guides*.

On April 16, 2012 OWCP referred appellant to a different district medical adviser to determine her permanent impairment according to the sixth edition of the A.M.A., *Guides*. In an April 19, 2012 report, Dr. Robert Y. Pick, a Board-certified orthopedic surgeon and OWCP medical adviser, disagreed with Dr. Stevens' impairment rating. He noted that Dr. Stevens referenced Table 17-4, page 570, for the Lumbar Regional Grid but failed to elaborate further and to include grade modifiers. Utilizing Table 17-4, page 570 of the A.M.A., *Guides* (6th ed. 2008), Dr. Pick determined that appellant had one percent whole person impairment.³ He agreed that no rating was needed for her cervical spine.

In a decision dated April 19, 2012, OWCP denied appellant's claim for a schedule award finding that the medical evidence failed to establish that she sustained a permanent impairment to her upper or lower extremities as a result of her accepted work-related injuries.

³ Dr. Pick reported that appellant fell under class 1 for nonspecific chronic or chronic recurrent low back pain and had a default value of two percent and diagnosis (CDX) of 1. Utilizing the grade modifiers for Functional History (GMFH) on Table 17-6, page 575, grade modifier 1, Physical Examination (GMPE) on Table 17-7, page 576, grade modifier 1 and Clinical Studies (GMCS) on Table 17-9, page 581, grade modifier 0, he determined that an adjustment of -1 was necessary. As applied to the Lumbar Spine Regional Grid, Table 17-4, page 570, appellant's grade was reduced from two to one percent whole person impairment.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing federal regulations⁵ 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.⁸ 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.⁹ However, a claimant may be entitled to a schedule award where the employment-related back condition affects the upper and/or lower extremities.¹⁰

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.¹¹

ANALYSIS

The Board initially finds that OWCP erred in finding a conflict in medical opinion between Dr. Brigham, an OWCP medical adviser, who found that appellant had no ratable permanent impairment for the lower extremities as related to her spine and for her left elbow and Dr. Somogyi, the second opinion examiner, who determined that she had two percent whole person impairment and three percent spinal impairment. Section 8123(a) of the 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

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404.

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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

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

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a(3) (January 2010).

¹¹ *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

an examination.¹² As Dr. Somogyi and Dr. Brigham both examined appellant on behalf of OWCP, a conflict did not exist in the medical opinion evidence, as contemplated by FECA, between these two physicians.

Appellant did submit reports from her treating physician, Dr. Sohn in support of her schedule award claim. In his October 11, 2010 report, Dr. Sohn reported that she had a five percent impairment of her lumbar spine. His report however is of limited probative value because he failed to properly apply the A.M.A., *Guides* and *The Guides Newsletter* in determining appellant's permanent impairment. Dr. Sohn did not provide an impairment rating based on permanent impairment of appellant's upper and/or lower extremities resulting from appellant's accepted conditions. Instead, he provided impairment ratings for her spine and whole person, which FECA does not authorize. The Board notes that 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.¹³ A claimant may only be entitled to a schedule award where the employment-related back condition affects the upper and/or lower extremities.¹⁴ Regarding appellant's lower extremities, Dr. Sohn found in his August 6, 2010 report that appellant had no motor or sensory deficits in the lower extremities, the deficits which would be the basis for payment of a schedule award. He therefore provided no basis for payment of a schedule award for permanent impairment of appellant's upper or lower extremities.

Dr. Somogyi determined that, according to the Lumbar Spine Regional Grid on page 570 of the A.M.A., *Guides* (6th ed. 2008), appellant had four percent impairment of the lumbar spine due to her chronic recurrent low back pain and three percent impairment for the whole person. In a June 10, 2011 report, Dr. Brigham reviewed Dr. Somogyi's impairment rating and disagreed with his findings because FECA regulations did not authorize impairment ratings for the spine or whole person. The Board finds that Dr. Somogyi did not properly apply the sixth edition of the A.M.A., *Guides* or provide a rating for peripheral nerve impairments to appellant's lower extremities as a result of her accepted lumbar condition and he did not reference *The Guides Newsletter* July/August 2009. Dr. Somogyi's opinion therefore is of limited probative value.

Dr. Stevens and Dr. Pick found that appellant's impairment was to the lumbar spine and not to the upper or lower extremities. Both of the physicians rated her impairment as either a lumbar spine impairment or a whole person impairment. As noted, FECA however does not authorize payment for permanent impairment of the lumbar spine or whole person impairment. The reports from Dr. Stevens and Dr. Pick are therefore also of limited probative value.

The Board finds that the weight of the medical evidence rests with the opinion of Dr. Brigham, who provided an impairment rating in accordance with the protocols and tables of the sixth edition of the A.M.A., *Guides*. As noted OWCP's procedures provide that *The Guides Newsletter* July/August 2009 for Rating Spinal Nerve Extremity Impairment is to be applied when determining peripheral nerve impairments to the upper or lower extremities resulting from

¹² 5 U.S.C. § 8123(a).

¹³ *Supra* note 9.

¹⁴ *Supra* note 10.

spinal injuries.¹⁵ The record reveals that Dr. Brigham was the only physician to reference and properly apply *The Guides Newsletter* to determine whether appellant sustained any impairment to her upper or lower extremities as a result of her spinal injury. In his March 2, 2011 report, Dr. Brigham explained that according to *The Guides Newsletter* July/August 2009 the process for rating spinal nerve extremity impairment was found in page 430 of the A.M.A., *Guides*. He noted that Dr. Sohn reported no motor or sensory deficits in the lower extremities and recommended class 0 findings resulting in zero percent permanent impairment. Dr. Brigham properly concluded that there was no medical evidence demonstrating any impairment to the bilateral lower extremities resulting from appellant's accepted lumbar condition. The Board finds that Dr. Brigham, OWCP's medical adviser, properly applied the A.M.A., *Guides* and *The Guides Newsletter* to find that appellant did not suffer any permanent impairment to her lower extremities as related to her lumbar spine.

Dr. Brigham further explained that rating permanent impairment to claimant's left elbow was based on diagnosis or range of motion. He referenced Table 15-4, page 398, of the sixth edition of the A.M.A., *Guides* and determined that appellant had class zero rating for the her elbow contusion resulting in a rating of zero percent upper extremity impairment. According to Table 15-33, page 474, Dr. Brigham concluded that appellant had zero percent upper extremity impairment because there were no reported motion deficits of the left elbow. The Board finds that he properly applied the A.M.A., *Guides* to determine that appellant had zero percent upper extremity impairment. Thus, Dr. Brigham's opinion constituted a sufficient basis to determine that appellant did not sustain any permanent impairment to her upper or lower extremities as a result of her work-related back injury and to her left elbow and thus, is not entitled to a schedule award.

On appeal, appellant alleged that she should be awarded five percent permanent impairment according to Dr. Sohn's evaluation because he is her physician and knows her condition better than the other physicians. As explained above, however, Dr. Sohn's impairment rating is of little probative value as he did not properly apply the A.M.A., *Guides* to rate appellant's lower extremity impairment as related to her lumbar conditions. The Board finds that Dr. Brigham properly applied the A.M.A., *Guides* methods for rating spinal impairments and thus, his opinion constitutes the weight of the medical evidence.

Appellant did not submit sufficient medical evidence to establish that she sustained any permanent impairment as a result of her December 18, 2008 employment injury. The medical evidence demonstrates that she has no impairment to her lower extremities as a result of her lumbar conditions and to her left upper extremity. The Board finds that appellant is not entitled to a schedule award as a result of her accepted employment-related injury.

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

¹⁵ *Supra* note 11.

CONCLUSION

The Board finds that appellant has not established any ratable impairment related to her December 18, 2008 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 16, 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