United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 13-659**
	)	**Issued: July 17, 2013**
DEPARTMENT OF THE AIR FORCE, WRIGHT-PATTERSON AIR FORCE BASE, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 28, 2013 appellant, through her attorney, filed a timely appeal from a January 11, 2013 schedule award decision of the Office of Workers' Compensation Programs (OWCP). 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 schedule award decision.

ISSUE

The issue is whether appellant met her burden of proof to establish more than an 11 percent impairment of the right upper extremity for which she received a schedule award and whether she is entitled to a schedule award for either lower extremity.

On appeal, appellant's attorney asserts that the January 11, 2013 decision is contrary to fact and law.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On April 13, 1991 appellant, then a 36-year-old food service worker, sustained an employment-related right hip contusion, right shoulder condition and lumbar strain when she fell on a wet floor at work. OWCP adjudicated the claim under file number xxxxxx642.

On December 8, 2006 appellant, then a cook, fell again at work. In a claim adjudicated under file number xxxxxx622, OWCP accepted the 2006 claim for lumbosacral and neck sprains and bilateral sciatica. Appellant missed intermittent periods of work and returned to regular duty without restrictions on May 7, 2007. By decision dated June 3, 2010, OWCP denied her claim for wage-loss compensation for the period January 21 to February 6, 2008, finding that she did not establish that she was disabled from work due to either the 1991 or 2006 employment injury.

In a September 24, 2008 report, Dr. Martin Fritzhand, a Board-certified urologist, noted the history of the 2006 employment injury and provided examination findings. He advised that, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[2] appellant had a 15 percent impairment for each lower extremity.

OWCP continued to develop the claim and in June 2010 referred appellant to Dr. Rudolph A. Hofmann, a Board-certified orthopedic surgeon, for an opinion regarding residuals of the accepted conditions and whether appellant had a permanent impairment due to the 1991 and/or 2006 employment injury. In a July 1, 2010 report, Dr. Hofmann advised that, in accordance with the sixth edition of the A.M.A., *Guides*,[3] appellant had an 11 percent impairment of the right upper extremity due to decreased shoulder range of motion and no clinical evidence of an impairment of either lower extremity.

By decision dated October 25, 2010, appellant was granted a schedule award for an 11 percent loss of use of the right arm and zero percent for loss of use of the right or left leg. On November 3, 2010 appellant, through her attorney, requested a hearing regarding the October 25, 2010 schedule award decision. A May 31, 2007 magnetic resonance imaging (MRI) scan study of the lumbar spine that demonstrated multilevel degenerative disc disease with significant neural compromise at L4-5. A July 1, 2008 electrodiagnostic study of the lower extremities demonstrated lumbar radiculopathy involving the anterior rami with possible mild L5 nerve root irritation. In a December 18, 2008 report, Dr. Morris L. Brown, an attending Board-certified family physician, described his care of appellant from December 6, 2006 to December 12, 2008. He advised that, in accordance with the sixth edition of the A.M.A., *Guides*, appellant had a right shoulder impairment of 14 percent, a right wrist impairment of 14 percent and a lumbar spine impairment of 25 percent.

Following a March 15, 2011 hearing, regarding the October 25, 2010 schedule award decision, the record was held open for 30 days for appellant to submit additional evidence. In a March 25, 2011 report, Dr. Fritzhand advised that he had examined appellant on September 28,

[2] A.M.A., *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

[3] *Id.* at (6th ed. 2008).

2008 and was now reassessing her findings under the sixth edition of the A.M.A., *Guides*. He indicated that, in accordance with the July to August 2009 *Guides Newletter*, under Table 16-11, appellant had a severe, level 3, sensory deficit involving both lower extremities and a mild, level 1, motor deficit also involving both lower extremities. Dr. Fritzhand concluded that she had a four percent sensory and a four percent motor deficit of each lower for extremity, for a total eight percent impairment of each lower extremity.

In a May 18, 2011 decision, OWCP's hearing representative affirmed the October 25, 2010 schedule award decision. On August 2, 2011 appellant, through her attorney, requested an additional schedule award and submitted a July 22, 2011 report in which Dr. Fritzhand noted that he had reexamined appellant that day. Dr. Fritzhand provided physical examination findings and indicated that maximum medical improvement was reached by January 2008. He indicated that, in accordance with the July to August 2009 *Guides Newsletter*, appellant had a 12 percent impairment of the right upper extremity and a 3 percent impairment on the left. Dr. Fritzhand also found that she had a sensory impairment to each lower extremity of 6 percent.

OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Hofmann, who provided a second-opinion evaluation for OWCP and Dr. Fritzhand, an attending physician, and referred appellant to Dr. Pietro Seni, a Board-certified orthopedic surgeon, for an impartial evaluation regarding the degree of appellant's impairment to the bilateral upper and lower extremities due to the accepted employment injuries.

In a November 19, 2012 report, Dr. Seni reviewed the medical record, statement of accepted facts and histories of the 1991 and 2006 employment injuries. He reported appellant's complaint of chronic neck, back and right leg pain and that she continued to work as a cook at the employing establishment. Dr. Seni noted that, at the end of his physical examination, she was complaining of severe pain and was crying. He indicated that, after examining appellant, there was no evidence whatsoever that she had any radiculopathy of the cervical or lumbar spine affecting the upper or lower extremities. Dr. Seni disagreed with the opinion of Dr. Fritzhand, stating that he found no symptoms or signs on physical examination to indicate either a C5 or L5 radiculopathy. He noted that during this examination there were severe emotional components. Dr. Seni found no further residuals of the accepted conditions of bilateral sciatica, lumbar sprain, right hip contusion, neck sprain and right shoulder sprain. He indicated that the only positive physical findings were decreased range of motion of the right shoulder and noted that appellant had previously received an 11 percent right upper extremity schedule award based on this condition. Regarding the lower extremities, Dr. Seni indicated that, while disc protrusions were evident on the lumbar MRI scan study, these did not translate into any lower extremity symptoms and were therefore not ratable. He specifically advised that on physical examination all reflexes were present and symmetrical. There were no sensory changes that, followed a particular dermatomal pattern, no muscle weakness or atrophy and range of motion was within normal limits. Regarding the upper extremities, Dr. Seni found no evidence of radiculopathy. Other than the shoulder range of motion described above, he stated that there was no upper extremity muscle weakness from the shoulder girdle down to the tip of the fingers, no sensory changes and no atrophy. Dr. Seni opined that appellant most likely had fibromyalgia but that her physical examination was not reliable enough to make an absolute diagnosis. He recommended a psychological evaluation. Dr. Seni indicated that the accepted conditions had stabilized when appellant reached maximum medical improvement in 2008 and, as such, no further treatment

was necessary. He concluded that, after carefully reviewing the sixth edition of the A.M.A., *Guides* and its newsletter, she had no ratable impairment of the lower extremities and no additional impairment of the upper extremities.

On December 20, 2012 Dr. Nabil F. Angley, Board-certified in orthopedic surgery and an OWCP medical adviser, reviewed appellant's record including Dr. Seni's November 12, 2012 report. OWCP's medical adviser indicated that Dr. Seni had provided a thorough and meticulous report in which he commented on the conflicting medical reports and also provided his own history, physical examination and independent opinion. Dr. Angley discussed Dr. Seni's opinion and physical examination findings and agreed with him.

In a merit decision dated January 11, 2013, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Seni, the referee physician, and affirmed the October 25, 2010 and May 18, 2011 decisions which found that appellant was not entitled to an additional schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing federal regulations[5] 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] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* was used to calculate schedule awards.[7] For decisions issued after May 1, 2009, the sixth edition is to be used.[8]

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.[9] 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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.* at § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[8] FECA Bulletin No. 09-03 (issued March 15, 2009).

[9] *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.[10]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.[11] OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures which memorializes proposed tables outlined in the July to August 2009 *Guides Newsletter*.[12]

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.[13] 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.[14] When 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.[15]

ANALYSIS

OWCP accepted that on April 13, 1991 appellant sustained a right hip contusion, right shoulder condition and lumbar strain and that on December 8, 2006 she sustained lumbosacral and neck sprains and bilateral sciatica. On October 25, 2010 appellant was granted a schedule award for an 11 percent loss of use of the right arm and 0 percent for loss of use of either leg. In a May 18, 2011 decision, OWCP's hearing representative affirmed the October 25, 2010 decision.

On August 2, 2011 appellant requested an additional schedule award. OWCP properly determined that a conflict existed between Dr. Fritzhand, an attending physician, and Dr. Hofmann, who provided a second-opinion evaluation for OWCP, regarding the extent of permanent impairment of the upper and lower extremities. It referred appellant to Dr. Seni for resolution of the conflict.

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

[11] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[12] FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, *supra* note 9.

[13] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[14] 20 C.F.R. § 10.321.

[15] *V.G.*, 59 ECAB 635 (2008).

The Board finds that Dr. Seni's opinion is thorough and well rationalized. It represents the weight of the medical evidence.[16] In a report dated November 19, 2012, Dr. Seni reviewed the history of both employment injuries and the diagnostic studies. He discussed the medical evidence of record. Dr. Seni provided extensive physical examination findings and indicated that the only positive physical findings were decreased range of motion of the right shoulder but that appellant had previously received a right upper extremity schedule award based on this condition. He opined that she most likely had fibromyalgia and recommended a psychological evaluation. Dr. Seni indicated that the accepted conditions had stabilized when appellant reached maximum medical improvement in 2008 and, as such, no further treatment was necessary. He concluded that, after carefully reviewing the sixth edition of the A.M.A., *Guides* and its newsletter, she had no ratable impairment of the lower extremities and no additional impairment of the upper extremities.

The Board has carefully reviewed the opinion of Dr. Seni and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. Dr. Seni's opinion is based on a proper factual and medical history and he thoroughly reviewed the factual and medical history and accurately summarized the relevant medical evidence.[17] He extensively described physical examination findings and provided medical rationale for his opinion by explaining that appellant had no ratable impairment of the lower extremities and no additional impairment of the upper extremities under the A.M.A., *Guides*. Dr. Seni's opinion is consequently entitled to special weight as the impartial medical examiner and establishes that she has no additional upper extremity impairment and no lower extremity impairment due to either employment injury.[18]

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 did not establish that she has more than an 11 percent impairment of the right upper extremity.

[16] *Id*.

[17] *See Melvina Jackson*, 38 ECAB 443 (1987).

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

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 2013
Washington, DC

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

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

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