United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 12-1759**
	)	**Issued: June 11, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Southeastern, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On August 20, 2012 appellant, through her attorney, filed a timely appeal from a March 20, 2012 merit 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 this case.

ISSUE

The issue is whether appellant sustained permanent impairment warranting a schedule award.

On appeal, appellant's attorney contends that Dr. William H. Spellman, a Board-certified orthopedic surgeon, was not properly selected as an impartial medical specialist using the Physicians Directory System (PDS) as there was no screen shot showing his selection. He also contends that Dr. Spellman's report should be treated as a second opinion report because the only impairment rating established under the sixth edition of the American Medical Association,

[1] 5 U.S.C. § 8101 *et seq.*

Guides to the Evaluation of Permanent Impairment (A.M.A., *Guides*) was from an OWCP medical adviser. This created a conflict between the two physicians as to the extent of appellant's permanent impairment which required referral to a new referee medical examination. Counsel further contends that Dr. Spellman did not conduct a thorough medical examination as he did not report any neurological findings.

FACTUAL HISTORY

This case has previously been before the Board. In a March 2, 2007 decision, the Board found that OWCP properly found a conflict in the medical opinion evidence between Dr. David Weiss, an osteopath, and Dr. Stephen J. Valentino, an OWCP referral physician, regarding the extent of permanent impairment to appellant's left lower extremity.[2] However, the Board found that the reports of Dr. Barry A. Silver were insufficient to resolve the conflict in the medical opinion evidence as he did not address the deficiencies noted by OWCP regarding appellant's impairment. The Board remanded the case to OWCP for referral of appellant to another impartial medical specialist to resolve the conflict. In a February 3, 2009 decision, the Board found that the case was not in posture for decision regarding appellant's entitlement to a schedule award for impairment to her lower extremities.[3] The Board stated that a conflict remained unresolved, as Dr. Evan S. Kovalsky, a Board-certified orthopedic surgeon and impartial medical specialist, failed to properly apply the fifth edition of the A.M.A., *Guides* in determining that appellant had five percent impairment to her left lower extremity. The Board directed OWCP to secure a supplemental report from Dr. Kovalsky to correct the defect in his original opinion. The facts and history contained in the prior appeal are incorporated by reference.[4]

On remand, OWCP obtained a supplemental report from Dr. Kovalsky and had an OWCP medical adviser review and comment on this report. In an April 15, 2009 decision, OWCP denied appellant's claim for a schedule award based on the opinion of the medical adviser. This decision was set aside by an OWCP hearing representative in a decision dated June 12, 2009. The hearing representative found that OWCP improperly accorded determinative weight to the medical adviser's opinion over Dr. Kovalsky's opinion. She remanded the case to OWCP for referral of appellant to a third impartial medical adviser. In an October 5, 2009 decision, OWCP denied appellant's schedule award claim based on the impartial medical opinion of Dr. Elliott Menkowitz, a Board-certified orthopedic surgeon. In a May 7, 2010 decision, an OWCP hearing representative set aside the October 5, 2009 decision and remanded the case for further development. She found that Dr. Menkowitz's report was insufficiently rationalized. The hearing representative directed OWCP to obtain a supplemental report from him acknowledging the accepted employment-related condition and providing a detailed description of his physical findings and testing, and a reasoned opinion as to whether appellant

[2] Docket No. 06-2111 (issued March 2, 2007).

[3] Docket No. 08-1691 (issued February 3, 2009).

[4] On December 15, 1991 appellant, then a 33-year-old mail processor, filed an occupational disease claim alleging that on July 3, 1991 she first became aware of her lower back condition and realized that her condition was caused by her employment duties. OWCP accepted the claim for temporary exacerbation of preexisting L5-S1 degenerative disc disease.

had any employment-related impairment to either lower extremity in accordance with the sixth edition of the A.M.A., *Guides*. In a July 22, 2010 decision, OWCP denied appellant's claim for a schedule award based on Dr. Menkowitz's supplemental report. This decision was set aside and the case was remanded for further development by an OWCP hearing representative in a decision dated December 21, 2010. The hearing representative found that Dr. Menkowitz's report was not well rationalized. She directed OWCP to refer appellant to a new impartial medical specialist to determine the extent of her permanent impairment.

On February 2, 2011 appellant was referred to Dr. Spellman for a fourth impartial medical examination. The record contains an iFECS Report: MEO23 Appointment Schedule Notification referring appellant to Dr. Spellman for an impartial medical examination. Additionally, a Bypass Doctor screenshot for another Board-certified orthopedic surgeon who was bypassed is of record. The screenshot reflects that Dr. Stephanie Sweet, a Board-certified orthopedic surgeon, was bypassed because she did not perform impartial medical examinations at that time. The record also contains a ME-M-Memorandum of Referral to Specialist and a ME-M-Referee Medical Referral Philadelphia District Office both dated January 31, 2011. Both documents include a listing of all physicians previously involved in the case.

In an April 4, 2011 medical report, Dr. Spellman obtained a history of appellant's work duties and medical background. He provided a detailed review of her medical records. Dr. Spellman noted appellant's complaint of back pain which she rated as eight with associated numbness. On physical examination of the back, he found no scoliosis, abnormal lordosis or list. The pelvis was level. On bony and soft tissue palpation, there was no tenderness or muscle spasm. The soft tissues were smooth without areas of induration or trigger points. On forward flexion more than 15 degrees, appellant reported increased back pain. In a sitting position, she had full painless internal and external rotation of both hips and negative straight leg raising when sustained at 90 degrees symmetrically. Deep tendon reflexes were 2+ symmetrically in the lower extremities. Proximal and distal motor strength was grossly full in the lower extremities. A Fabere's test was negative symmetrically. On examination of the lower extremities, Dr. Spellman found unremarkable morphology. Skin color, temperature, texture and hydration from the knees to the toes were unremarkable. Circumferential measurements of both lower legs 10 centimeters proximal to the tibial tubercle were equal. There was no swelling in the ankles or distal joints. Quadriceps were appropriately reactive and circumferential measurements of both thighs 10 centimeters proximal to the superior pole of the patella were equal. Regarding the left lower extremity, appellant reported decreased sensation with light touch over the left posterior and lateral leg extending to include the entire dorsum of the left foot and over the first metatarsal, great toe, the first web space and plantar surface of the foot. There was full range of motion of the knees, ankles and distal joints. All joints were stable and pain free to stressing. Full distal pulses were present. Proximal and distal motor strength was grossly full. Deep tendon reflexes were 2+ symmetrically in the lower extremities. A Fabere's test was negative symmetrically.

Dr. Spellman noted that appellant had no findings or complaints regarding her right lower extremity. The concern was her left lower extremity as it related to her back condition. This involved lumbar root irritation and then by extension, peripheral nerve impairment. Dr. Spellman noted that under Table 17-4, Lumbar Spine Regional Grid: Spine Impairments, on page 571 of the sixth edition of the A.M.A., *Guides*, a patient with subjective complaints without physical findings or significant clinical abnormalities that were generally assigned class 0

impairment and had no ratable impairment.[5] He, thus, determined that since appellant did not have any anatomically verifiable complaints, she had no permanent impairment. Dr. Spellman noted that in evaluating peripheral nerve impairment under Table 16-12, page 532 of the A.M.A., *Guides*, stated that the sensory examination should conform to the cutaneous distribution of a peripheral nerve or branch of a peripheral nerve. On sensory examination, he found an altered sensation over the entire posterior and lateral aspect of appellant's left lower leg and dorsum and plantar surface of her left foot. This was not consistent with a single nerve root or peripheral nerve. Dr. Spellman determined that the sensory changes consistent with a nerve root which, in this case was S1 resulted in class 0 impairment. He noted that appellant had no motor function impairment in the left lower extremity as demonstrated by gross strength assessment or atrophic changes. Dr. Spellman stated that other concerns of lower extremity impairment such as, complex regional pain syndrome (CRPS), amputation and range of motion were not relevant. He opined that appellant had no impairment of her lower extremities secondary to her accepted back condition. Dr. Spellman concluded that she had reached maximum medical improvement.

In an April 18, 2011 decision, OWCP denied appellant's schedule award claim based on Dr. Spellman's April 4, 2011 impartial medical opinion.

By letter dated April 21, 2011, appellant, through her attorney, requested an oral hearing before an OWCP hearing representative.

In a July 13, 2011 decision, an OWCP hearing representative set aside the April 18, 2011 decision and remanded the case for OWCP to forward Dr. Spellman's April 4, 2011 report together with the medical record to an OWCP medical adviser for review and determination of the extent of appellant's permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.

On August 19, 2011 an OWCP medical adviser reviewed Dr. Spellman's findings. He advised that appellant probably reached maximum medical improvement in January 1992. The medical adviser stated that while Dr. Spellman's finding that appellant had no bilateral lower extremity impairment was correct, the methodology he used was not appropriate. The correct method for rating impairment of spinal nerve impairment such as, radiculopathy affecting the extremities was discussed in the July/August 2009 edition of *The Guides Newsletter*. The medical adviser stated that the physical examination findings documented by Dr. Spellman demonstrated normal motor function in the lower extremities. He further stated that Dr. Spellman's sensory examination identified a decrease in light touch sensation over the posterior and lateral leg extending to include the entire dorsum of the left foot, extending over the first metatarsal and great toe and the first web space and plantar surface of the foot. The medical adviser noted Dr. Spellman's opinion that this finding was not consistent with a specific nerve root. As such, it cannot serve as a basis for assignment of impairment. Additionally, the medical adviser noted that a June 14, 2011 magnetic resonance imaging (MRI) scan revealed mild degenerative disease without significant central canal or neural foramina stenosis did not demonstrate nerve root compromise. He concluded that as the imaging studies and physical

[5] The Board notes that it appears Dr. Spellman inadvertently stated that Table 17-4 was located on page 561 rather than page 571 of the sixth edition of the A.M.A., *Guides* as he provided the correct title of the table.

examination findings did not demonstrate nerve root compromise, there was no basis for rating regional impairment to either lower extremity due to appellant's lumbar spine injury.

In a September 6, 2011 decision, OWCP denied appellant's claim, finding that the weight of the medical evidence rested with Dr. Spellman's impartial medical opinion that appellant had no impairment of either lower extremity under the sixth edition of the A.M.A., *Guides*. It found that his opinion was supported by OWCP's medical adviser's opinion.

On September 9, 2011 appellant's attorney requested an oral hearing before a hearing representative.

At the January 5, 2012 hearing, appellant's attorney argued that Dr. Spellman was not properly selected as an impartial medical specialist under the PDS as there was no screen shot showing his selection. Counsel also contended that his report was of diminished probative value as he failed to identify neurological examination findings, used the wrong methodology to formulate his impairment rating as noted by OWCP's medical adviser and was instrumental in writing the A.M.A., *Guides*.

In a March 20, 2012 decision, an OWCP hearing representative affirmed the denial of appellant's schedule award claim. The hearing representative accorded determinative weight to Dr. Spellman's impartial medical opinion.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing regulations[7] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[8] However, neither FECA nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, OWCP adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[9] For OWCP decisions issued on or after May 1, 2009, the A.M.A., *Guides* (6th ed. 2008) is used for evaluating permanent impairment.[10]

A claimant seeking compensation under FECA has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.[11] A claimant seeking a schedule award therefore has the burden of establishing that

[6] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[7] 20 C.F.R. § 10.404.

[8] 5 U.S.C. § 8107(c)(19).

[9] 20 C.F.R. § 10.404(a).

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

[11] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

her accepted employment injury caused permanent impairment of a scheduled member, organ or function of the body.[12]

A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under FECA. Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.[13]

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 procedures indicate that *The Guides Newsletter* Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009) is to be applied.[14]

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 (GMFH) and if electrodiagnostic testing were done, Clinical Studies (GMCS).[15] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[16]

Section 8123(a) of FECA provides in pertinent part: 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.[17] In situations where 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.[18]

It is well established that OWCP procedures provide that an impartial medical specialist must be selected from a rotational list of qualified Board-certified specialists, including those

[12] *E.g., Russell E. Grove,* 14 ECAB 288 (1963) (where medical reports from the attending physicians showed that the only leg impairment was due to arthritis of the knees, which was not injury related, the claimant failed to meet his burden of proof to establish entitlement to a schedule award).

[13] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

[14] *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.

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

[16] *Id.* at 521.

[17] 5 U.S.C. § 8123(a).

[18] *L.S.*, Docket No. 12-139 (issued June 6, 2012); *see also Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

certified by the American Medical Association and American Osteopathic Association.[19] The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, OWCP has developed procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against the appearance that the selected physician's opinion was biased or prejudiced.[20] The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.[21] OWCP's procedures provide that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the PDS should be used for this purpose wherever possible.[22] The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.[23] The PDS database of physicians is obtained from the American Board of Medical Specialties which contains the names of physicians who are Board-certified in certain specialties. It is also 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 proper factual and medical background must be given special weight.[24]

In some instances, an OWCP medical adviser's opinion can constitute the weight of the medical evidence. This occurs in schedule award cases where an opinion on the percentage of permanent impairment and a description of physical findings is on file from an examining physician, but the percentage estimate by this physician is not based on the A.M.A., *Guides*. In this instance, a detailed opinion by OWCP's medical adviser which gives a percentage based on reported findings and the A.M.A., *Guides* may constitute the weight of the medical evidence.[25]

ANALYSIS

The Board previously found that the opinions of Drs. Silver and Kovalsky, impartial medical examiners, were insufficiently rationalized to establish the extent of appellant's permanent impairment causally related to the accepted employment-related lumbar injury. The Board concluded that there remained an unresolved conflict in medical opinion.

---

[19] *See LaDonna M. Andrews*, 55 ECAB 301 (2004); *A.R.*, Docket No. 09-1566 (issued June 2, 2010).

[20] *See Raymond J. Brown*, 52 ECAB 192 (2001); *A.R., supra* note 19.

[21] *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

[22] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003). The Board notes that, as of July 2011, the Medical Management Application in iFECS replaced the prior PDS selection procedure for an impartial medical specialist. *Id.* at Chapter 3.500.5 (July 2011).

[23] *Id.* at Chapter 3.500.7 (September 1995, May 2003).

[24] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[25] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(h) (April 1993).

On remand, OWCP referred appellant to several impartial medical specialists who were unable to resolve the conflict of medical opinion. Thus, it ultimately referred her to Dr. Spellman to evaluate the extent of her permanent impairment. In a March 20, 2012 decision, OWCP denied appellant's schedule award claim based on Dr. Spellman's April 4, 2011 report.

Counsel contended on appeal that Dr. Spellman should be considered a second opinion physician and not an impartial medical specialist because the only impairment rating based on the sixth edition of the A.M.A., *Guides* was from an OWCP medical adviser. As the Board previously found, OWCP properly determined that a conflict arose in the medical opinion evidence between Dr. Weiss, an attending physician, and Dr. Valentino, an OWCP referral physician, as to the nature and extent of appellant's employment-related permanent impairment, which required referral to an impartial medical examiner. As the selected physicians were unable to resolve the conflict of medical opinion, OWCP properly referred appellant to Dr. Spellman.

Counsel further contended on appeal that OWCP did not properly select Dr. Spellman as the impartial medical specialist as there was no screen shot showing his selection. The Bypass Doctor screenshot provided by OWCP indicated that Dr. Sweet did not perform impartial medical examinations at that time. Documentation also listed other physicians previously involved in the case so as to avoid any appearance of impropriety on the part of OWCP in the selection process. There is no evidence to establish that OWCP's decision to bypass this physician was inappropriate or unreasonable or that it failed to comply with its rotational procedures. Appellant did not provide any probative evidence to demonstrate bias on the part of Dr. Spellman. The Board has held that an impartial medical specialist properly selected under OWCP's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias.[26] The Board finds, therefore, that the evidence does not establish an error in the selection of Dr. Spellman as an impartial medical specialist.

In an April 4, 2011 report, Dr. Spellman reported that appellant had reached maximum medical improvement. He concluded that she had no permanent impairment to either lower extremity due to her employment-related back condition. Dr. Spellman reviewed a history of the accepted injury and appellant's medical treatment and records. On examination of the back, he provided essentially normal findings except increased pain on forward flexion more than 15 degrees. On examination of the bilateral lower extremities, Dr. Spellman also reported essentially normal findings except appellant's complaint of decreased sensation with light touch over the left posterior and lateral left leg extending to the entire dorsum of the left foot and over the first metatarsal, great toe, the first web space and plantar surface of the foot. Under Table 17-4, Lumbar Spine Regional Grid: Spine Impairments, on page 571 of the sixth edition of the A.M.A., *Guides*, he opined that appellant had a class 0 impairment without physical findings or significant clinical abnormalities which resulted in no impairment. Under Table 16-12 for peripheral nerve impairment (A.M.A., *Guides*, 534-36), Dr. Spellman found that she had a class 0 impairment as her complaint of an altered sensation over the entire posterior and lateral aspect of her left lower leg and dorsum and plantar surface of her left foot was not consistent

[26] *See L.W.*, 59 ECAB 471 (2008).

with a single nerve root or peripheral nerve. He stated that appellant had no motor function impairment in the left lower extremity as demonstrated by gross strength assessment or atrophic changes. Dr. Spellman noted that lower extremity impairment due to CRPS, amputation and range of motion were not relevant. He concluded that appellant had no impairment of her lower extremities secondary to her accepted back condition.

OWCP procedures state that an OWCP medical adviser must review the report to verify correct application of the A.M.A., *Guides* and confirm the percentage of permanent impairment as well as specify his reasons for assigning a certain percentage of loss of use to the measurements or factors provided by the examining physician.[27] In this case, the medical adviser properly stated that Dr. Spellman used an incorrect methodology to rate appellant's impairment and determined that there was no basis for a lower extremity impairment in either extremity under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* July/August 2009. He noted his physical examination finding of normal motor function in the lower extremities. The medical adviser also noted Dr. Spellman's sensory examination finding of a decrease in light touch sensation over the posterior and lateral leg extending to include the entire dorsum of the left foot, extending over the first metatarsal and great toe and the first web space and plantar surface of the foot and opinion that this finding was not consistent with a specific nerve root. He further noted his conclusion that this finding could not serve as a basis for assignment of impairment. The medical adviser noted that the June 14, 2011 MRI scan, which revealed mild degenerative disease without significant central canal or neural foramina stenosis, did not demonstrate nerve root compromise. He concluded that as the imaging studies and physical examination findings did not demonstrate nerve root compromise, there was no basis for rating regional impairment to either lower extremity due to appellant's lumbar spine injury. As the medical adviser utilized Dr. Spellman's objective clinical findings to compare them with impairment criteria listed in the A.M.A., *Guides*, the Board finds that appellant is not entitled to a schedule award for any employment-related impairment of either lower extremity.[28]

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 sustained permanent impairment warranting a schedule award.

[27] *R.S.*, Docket No. 09-1331 (issued April 5, 2010); Federal (FECA) Procedure Manual, *supra* note 25 at Chapter 2.810.7(c) (April 1993).

[28] If the clinical findings are fully described, any knowledgeable observer may check the findings with the A.M.A., *Guides* criteria. A.M.A., *Guides* 17. *See also I.H.*, Docket No. 08-1352 (issued December 24, 2008).

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 11, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board