

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

V.J., Appellant)

and)

**U.S. POSTAL SERVICE, MORGAN GENERAL
MAIL FACILITY, New York, NY, Employer**)

**Docket No. 13-5
Issued: June 3, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 1, 2012 appellant filed a timely appeal from a September 13, 2012 decision of the Office of Workers' Compensation Programs (OWCP) regarding a schedule award. 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.

ISSUE

The issue is whether appellant sustained a ratable impairment of the left leg due to an accepted lumbar injury.

On appeal, appellant asserts that the opinion of Dr. Sounder Eswar, a Board-certified orthopedic surgeon and an impartial medical examiner, should not be accorded the weight of the medical evidence as he misstated the facts of her case and did not address the claimed lumbar nerve root impairment of her left leg.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on or before December 21, 2000 appellant, then a 34-year-old mail handler, sustained low back derangement and a lumbosacral sprain due to repetitive heavy lifting, pulling, pushing and reaching at work. She was initially treated by Dr. Sheldon Manspeizar, a Board-certified orthopedic surgeon, who submitted reports from December 2000 to October 2001 diagnosing lumbar disc space narrowing, an L4-5 disc bulge with hypertrophic changes at the L4-5 neural foramen and chronic lumbar derangement.² Appellant was then seen by Dr. Cheri Durden, an internist, who followed her for lumbar pain from January 2003 to January 2005. Dr. Durden opined that the accepted condition caused chronic lumbar radiculopathy with neural foraminal encroachment. Appellant then sought treatment from Dr. Olivera Pekovic, an attending physiatrist, who prescribed medication and a transcutaneous electrical stimulation unit in reports dated through 2006. Dr. Sam Jin Yee, an attending Board-certified physiatrist, diagnosed an L5-S1 spondylolisthesis on September 15, 2007, and opined that the accepted conditions caused permanent residuals.

On October 14, 2008 appellant claimed a schedule award. She submitted the November 8 and December 6, 2008 reports of Dr. Yee, who diagnosed L4-5 and L5-S1 radiculopathy with left sacroiliac joint and piriformis syndrome. Dr. Yee opined that appellant had reached maximum medical improvement.

OWCP requested that Dr. Yee perform a lower extremity impairment rating utilizing the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, the A.M.A., *Guides*). In a February 14, 2009 report, Dr. Yee found that appellant had 4+/5 muscle weakness in the left leg due to nerve root impingement, with ankle, plantar flexion and great toe extension weakness. He submitted a March 19, 2009 MRI scan report showing bilateral foraminal recess stenosis at L5-S1 with grade 1 spondylolisthesis, degenerative facet arthritis from L4 to S1 and chronic reactive marrow edema. A March 19, 2009 electromyography and nerve conduction velocity studies showed chronic denervation in the left L4 and L5 nerve roots. On April 2, 2009 OWCP's medical adviser reviewed Dr. Yee's reports and recommended a second opinion.

On May 27, 2009 OWCP requested that Dr. Yee submit a lower extremity impairment rating using the sixth edition of the A.M.A., *Guides* in effect as of May 1, 2009. Dr. Yee responded on June 5, 2009 that he did not have the sixth edition of the A.M.A., *Guides* and so could not perform the requested rating.

On June 24, 2009 OWCP obtained a second opinion from Dr. Mark M. Kramer, a Board-certified orthopedic surgeon, who reviewed the medical record and statement of accepted facts. On examination, Dr. Kramer found no objective signs of nerve root impingement. He determined that appellant did not have any lower extremity impairment related to the accepted lumbar conditions. In a February 2, 2010 supplemental report, Dr. Kramer stated that, under

² An October 23, 2002 magnetic resonance imaging (MRI) scan showed an L5-S1 disc bulge impinging on the descending nerve roots and left proximal neural foramen.

Table 16-12 of the A.M.A., *Guides*,³ she had a class 0 impairment of the sciatic nerve, with no sensory or motor deficit.

Appellant submitted a February 8, 2010 impairment rating by Dr. John W. Ellis, a Board-certified family practitioner, who provided a history of injury and treatment and reviewed the medical records. Dr. Ellis noted that her pain disability questionnaire score was 92 and her American Association of Orthopedic Surgeons questionnaire scores were 22 for the right leg and 23 for the left leg. On examination, he observed an antalgic gait due to left leg weakness and absent left knee and ankle reflexes. Dr. Ellis diagnosed left L5-S1 spinal nerve root impingement causing left leg weakness and left knee derangement, correlating to the MRI scan reports of record. Referring to Table 16-12, he opined that appellant had 13 percent impairment of the left lower extremity due to left L5 nerve root impingement and an additional 13 percent impairment for S1 nerve root impingement. Dr. Ellis combined the two impairments to total 24 percent impairment of the left leg, with additional impairments for a knee condition acquired after she retired from federal employment in November 2009. In an October 26, 2010 supplemental report, he clarified that appellant had only 23 percent impairment of the left leg due to left L5 and S1 nerve root impingement according to Table 16-12,⁴ without any impairment of the left knee.

OWCP found a conflict of medical opinion between Dr. Kramer, for OWCP and Dr. Ellis, for appellant. It selected Dr. Eswar as impartial medical examiner. OWCP provided a statement of accepted facts and a copy of the medical record. Dr. Eswar submitted a June 6, 2011 report reviewing the medical record and statement of accepted facts. On examination, he noted no paraspinal lumbar spasm, a normal range of lumbar motion, negative straight-leg raising and normal lower extremity reflexes bilaterally. Dr. Eswar stated that appellant had no impairment related to the lumbar spine. In an October 5, 2011 supplemental report requested by OWCP, he stated that she had no muscular atrophy of the lower extremities and walked normally. Dr. Eswar opined that appellant had no lumbar or left leg impairment. On January 21, 2012 OWCP's medical adviser reviewed Dr. Eswar's reports and concurred that appellant had no ratable impairment of the lower extremities.

By decision dated February 8, 2012, OWCP denied appellant's schedule award claim, based on Dr. Eswar's opinion as impartial medical examiner that she had no objective abnormalities of the spine or lower extremities.

In a June 14, 2012 letter, appellant requested reconsideration. She contended that Dr. Ellis' reports were detailed, well rationalized and based on the proper application of the A.M.A., *Guides*, whereas Dr. Eswar's report did not address whether she had spinal nerve root impairment affecting the lower extremities. Appellant submitted duplicate copies of Dr. Ellis' reports.

³ Table 16-12, page 535 of the sixth edition of the A.M.A., *Guides* is entitled "Peripheral Nerve Impairment -- Lower Extremity Impairments."

⁴ An October 6, 2010 MRI scan demonstrated an L5-S1 disc herniation with bilateral L5 nerve root compression, and a T12-S1 disc herniation.

By decision dated September 13, 2012, OWCP denied modification, finding that Dr. Eswar's report was sufficient to represent the weight of the medical evidence.

LEGAL PRECEDENT

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

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.⁸ Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,⁹ no claimant is entitled to such an award.¹⁰ However, in 1966, amendments to FECA modified the schedule award provision 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. As the schedule award provision of FECA includes 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.¹¹

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹² When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹³ 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

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁸ *Henry B. Floyd, III*, 52 ECAB 220 (2001).

⁹ FECA specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

¹⁰ *Thomas Martinez*, 54 ECAB 623 (2003).

¹¹ *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹² 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

¹³ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

factual background, must be given special weight.¹⁴ Where the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹⁵

ANALYSIS

OWCP accepted that appellant sustained low back derangement and a lumbosacral strain on or before December 21, 2000. Appellant remained under treatment for lumbar disc displacement, disc herniations and nerve root impingement through 2007. She claimed a schedule award on October 14, 2008. As an attending physician was unable to submit an impairment rating, OWCP obtained a second opinion report from Dr. Kramer, a Board-certified orthopedic surgeon, who stated that appellant did not exhibit objective signs of sciatic or other spinal nerve root impairment. Appellant then submitted February 8 and October 26, 2010 reports from Dr. Ellis, a Board-certified family practitioner, who found 23 percent impairment of the left leg due to impingement of the left L5 and S1 nerve roots according to Table 16-12 of the A.M.A., *Guides*.

OWCP found a conflict of medical opinion between Dr. Kramer, for OWCP, and Dr. Ellis, for appellant, regarding the nature and extent of any occupationally-related permanent impairment. To resolve the conflict, it selected Dr. Eswar, a Board-certified orthopedic surgeon, as impartial medical examiner. In a June 6, 2011 report, Dr. Eswar stated that based on a thorough orthopedic examination, appellant had no lumbar impairment and bilaterally normal lower extremity reflexes indicating that there was no lower extremity impairment attributable to the lumbar spine. He stated in an October 5, 2011 supplemental report that she had atrophy in the left leg and no left knee impairment. The Board finds that Dr. Eswar's opinion is of sufficient weight to resolve the conflict of medical opinion.

Dr. Eswar was appointed to resolve a conflict of opinion as to whether appellant had any impairment of the left lower extremity due to accepted lumbar derangement and a lumbar sprain. He reviewed the medical record and statement of accepted facts, and provided detailed clinical findings based on a thorough examination. Dr. Eswar found no neurologic or orthopedic impairment of the left leg. OWCP's medical adviser reviewed Dr. Eswar's findings and concurred that there was no basis on which to find work-related impairment of the legs. The Board finds that OWCP properly accorded Dr. Eswar's opinion the weight of the medical evidence.¹⁶ OWCP's September 13, 2012 decision denying appellant's schedule award claim is therefore proper under the law and facts of the case.

On appeal, appellant asserts that Dr. Eswar's opinion should not be accorded the weight of the medical evidence as he misstated the facts of her case and did not address lumbar nerve root impairment. As stated, Dr. Eswar's opinion is based on the statement of accepted facts and is of sufficient quality to resolve the conflict of opinion between Dr. Kramer and Dr. Ellis. He

¹⁴ *Anna M. Delaney*, 53 ECAB 384 (2002).

¹⁵ *Margaret M. Gilmore*, 47 ECAB 718 (1996).

¹⁶ *Supra* note 15.

did not support appellant's contention that the accepted lumbar injury caused impairment to either leg.

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 not established that she sustained a ratable impairment of the left lower extremity due to an accepted lumbar injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 13, 2012 is affirmed.

Issued: June 3, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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