United States Department of Labor
Employees' Compensation Appeals Board

R.E., Appellant	)	
and	)	**Docket No. 13-179**
	)	**Issued: June 11, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Cameron, OK, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2012 appellant filed a timely appeal from the July 27, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which found a one percent physical impairment of her right upper extremity. 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 this case.

ISSUE

The issue is whether appellant has a one percent physical impairment of her right upper extremity.

FACTUAL HISTORY

On May 20, 2000 appellant, then a 42-year-old rural carrier, filed a claim alleging an occupational injury resulting from repetitive lifting, pulling and carrying mail. OWCP accepted

[1] 5 U.S.C. § 8101 *et seq.*

her claim for an aggravation of cervical disc displacement requiring a C5-6 and C6-7 anterior discectomy with interbody fusion.

In 2011, appellant filed a claim for schedule award. Dr. Gary S. Edwards, her osteopath, found that she had reached maximum medical improvement. Appellant's diagnoses were herniated cervical disc with multilevel degenerative facet syndrome, degenerative arthritis, severe spinal stenosis, subclavian steal syndrome with thoracic outlet syndrome. Dr. Edwards noted that she had acromioclavicular and glenohumeral dysfunction with degeneration and had trouble moving her left shoulder. Appellant also had some gluteal pain from degenerative arthritis of her lumbar spine, with sciatica waxing and waning. Dr. Edwards stated that he asked her to seek 100 percent disability for the chronic pain in her neck, shoulder and back.

OWCP referred appellant, together with her medical record and a statement of accepted facts, to Dr. Timothy G. Pettingell, a Board-certified physiatrist, for an evaluation of her upper extremity impairment. Although appellant's neurological examination was nonfocal, her history suggested left C5 paresthesias and previous treating physicians had commented regarding cervical radiculopathy and C4-5 disc pathology.

Applying the procedure for rating spinal nerve extremity impairment, Dr. Pettingell found that the default impairment rating for a mild sensory deficit of the C5 nerve root was one percent of the upper extremity. Appellant's functional history was also mild, warranting no adjustment. Clinical studies did not apply, as electrodiagnostic testing was not performed within a reasonable time in the past. Dr. Pettingell concluded that appellant had a one percent impairment of her left upper extremity. He explained that she had no impairment of her right upper extremity because there was no objective evidence of cervical radiculopathy or consistent documentation in the medical record of right upper extremity paresthesias.

OWCP's medical adviser reviewed Dr. Pettingell's evaluation and found it acceptable. He mistakenly attributed the one percent impairment, however, to the right upper extremity.

On July 27, 2012 OWCP issued a schedule award for a one percent impairment of appellant's right upper extremity.

On appeal, appellant argues that she does not understand OWCP's decision: she has been disabled since 2004 and has not improved, yet OWCP paid her schedule award for three weeks. "I have been impaired for years." Appellant noted that Dr. Edwards found that she was 100 percent disabled. She adds that she has to live like this the rest of her life.

LEGAL PRECEDENT

FECA sets forth the number of weeks of compensation payable for permanent physical impairment from the loss or loss of use, of specified members, functions or organs of the body. It does not, however, specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.[2]

[2] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

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. OWCP has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the appropriate standard for evaluating schedule losses.[3] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[4]

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.[5] Because neither FECA nor the regulations provide a schedule award for the permanent loss of use of the back,[6] no claimant is entitled to such an award.[7]

Amendments to FECA modified the schedule award provisions to provide 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 schedule or nonschedule member. As the schedule award provisions of FECA include 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.[8]

ANALYSIS

OWCP accepted that appellant sustained an aggravation of cervical disc displacement requiring a C5-6 and C6-7 anterior discectomy with interbody fusion. Although she is not entitled to a schedule award for any impairment to her cervical spine or back, as these parts of the body are not specified in FECA, she may be entitled to a schedule award for any resulting impairment to an upper extremity.

Most impairment values for the upper extremity are calculated using the diagnosis-based impairment method. Impairment is determined first by identifying the relevant diagnosis, then by selecting the class of the impairment: no objective problem, mild problem, moderate problem, severe problem, very severe problem approaching total function loss. This defines the default impairment rating, which may be adjusted slightly based on grade modifiers or nonkey factors, such as functional history, physical examination and clinical studies.[9]

[3] 20 C.F.R. § 10.404.

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010).

[5] *William Edwin Muir*, 27 ECAB 579 (1976).

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

[7] *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

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

[9] A.M.A., *Guides* 385 (6th ed. 2009)

Dr. Pettingell, the physiatrist referral physician, evaluated appellant's left upper extremity using the diagnosis-based impairment method for rating spinal nerve extremity impairment.[10] He noted that her history suggested left C5 paresthesias and previous treating physicians had commented regarding cervical radiculopathy and C4-5 disc pathology. Dr. Pettingell therefore identified the affected nerve as the C5 spinal nerve root. He then classified the severity of the sensory deficit as mild. This gave a default impairment value of one percent. Indeed, one percent is the maximum impairment rating possible for a mild sensory deficit of the C5 nerve root. No adjustment for functional history or clinical findings can increase it.

Dr. Pettingell gave a final impairment rating of one percent for the left upper extremity. As noted earlier, he found no impairment of the right upper extremity because there was no objective evidence of cervical radiculopathy or consistent medical documentation of right upper extremity paresthesias.

The Board finds that Dr. Pettingell properly applied the A.M.A., *Guides* to determine the permanent physical impairment resulting from the accepted spinal condition. When OWCP's medical adviser found this impairment rating acceptable, however, he mistakenly attributed the one percent impairment to the right upper extremity. Appellant's schedule award reflected this error. Accordingly, the Board will modify her July 27, 2012 schedule award to find that she has a one percent impairment of her left upper extremity, not her right. The Board will affirm appellant's schedule award as modified.

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.

Appellant argues that she is 100 percent disabled. There is a difference between disability and permanent physical impairment. "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[11] The July 27, 2012 decision determined that appellant was entitled to an award for the mild but permanent physical impairment the injury had caused to her left upper extremity. OWCP made no finding as to whether this physical impairment in any way disabled her for work or decreased her capacity to earn wages.[12]

As for the 3-week period of appellant's schedule award, section 8107 of FECA provides 312 weeks of compensation for the complete loss of an upper extremity, as with amputation at the shoulder.[13] That is the most compensation a claimant can receive for the loss or loss of use

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (6th ed. 2009).

[11] 20 C.F.R. § 10.5(f).

[12] In the case of *Gary L. Loser*, 38 ECAB 673 (1987), although the employee sustained a permanent physical impairment of his legs due to his thrombophlebitis condition, the evidence did not demonstrate that such a condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury.

[13] 5 U.S.C. § 8107(c)(1).

of an upper extremity. Section 8107(c)(19) provides that partial losses are compensated proportionately.[14] A one percent impairment of appellant's left upper extremity is therefore one percent of 312 weeks of compensation or 3.12 weeks of compensation, which OWCP properly awarded. This is so even though the impairment is permanent.

CONCLUSION

The Board finds that appellant has a one percent physical impairment of her left upper extremity not her right and no permanent impairment of her right.

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2012 decision of the Office of Workers' Compensation Programs is modified to find a one percent impairment of the left upper extremity, not her right, and is otherwise affirmed.

Issued: June 11, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[14] *Id*. at § 8107(c)(19).