United States Department of Labor
Employees' Compensation Appeals Board

K.A., Appellant	)	
and	)	
U.S. POSTAL SERVICE, FOX CHASE POST OFFICE, Philadelphia, PA, Employer	)	**Docket No. 12-1210 & 13-516** **Issued: March 19, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 9, 2012 appellant, through her attorney, filed a timely appeal from a January 25, 2012 decision of the Office of Workers' Compensation Programs (OWCP) regarding a schedule award docketed as No. 12-1210. On July 25, 2012 counsel filed a timely appeal of a May 7, 2012 schedule award decision docketed as No. 13-516. 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 sustained more than 12 percent impairment of the right arm, 10 percent impairment of the left arm and 6 percent impairment of each lower extremity, for which she received schedule awards.

On appeal, counsel contends that appellant sustained 19 percent impairment of the right arm, 18 percent impairment of the left arm and 13 percent impairment to each lower extremity, based on the opinion of her an attending physician. Alternatively, counsel asserts a conflict in

[1] 5 U.S.C. § 8101 *et seq.*

medical opinion requiring selection of an impartial medical examiner. He also asserts that OWCP should have based the schedule awards on the 2007 reports of an OWCP medical adviser.

FACTUAL HISTORY

OWCP accepted that on December 15, 2003 appellant, then a 52-year-old letter carrier, sustained a cervical sprain, lumbar strain and aggravation of a herniated cervical disc when lifting a tub of mail. Under File No. xxxxxx024, it accepted that, on or before December 26, 2003, appellant sustained bilateral carpal tunnel syndrome, cervical and lumbar sprains and an aggravation of cervical and lumbar herniated discs. Under File No. xxxxxx368, OWCP accepted that appellant sustained cervical and lumbar sprains on October 7, 2008. It combined all three claims under File No. xxxxxx860.

Appellant was treated by Dr. Charles Bolno, an attending osteopathic physician specializing in family practice and orthopedic surgery. He submitted reports from December 7, 2003 to June 2004 prescribing work restrictions due to the December 15, 2003 injuries, which he opined aggravated preexisting degenerative disc disease with radiculopathy into all extremities.[2] Appellant obtained a December 16, 2003 magnetic resonance imaging (MRI) scan showing disc protrusions throughout C2 to C6 with nerve root irritation, disc herniations at C3-4, C6-7, C7-T1, an L2-L3 disc protrusion with impingement on the dural sac, disc protrusions with nerve root impingement at L3, L4 and L5, and L5-S1 disc protrusion. Dr. Bolno submitted periodic reports through May 15, 2010, noting chronic cervical radiculopathy in both arms, bilateral carpal tunnel syndrome, lumbar radiculopathy in both legs, pain and paresthesias throughout all extremities and decreased or absent extensor hallucis longus and ankle reflexes bilaterally. He attributed the findings to the accepted injuries.[3]

On December 23, 2005 appellant claimed a schedule award. In a July 7, 2005 impairment report, Dr. Nicholas Diamond, an attending osteopath, used the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, the A.M.A., *Guides*). He found a 41 percent impairment of the right upper extremity, a 51 percent impairment of the left upper extremity and 9 percent impairment of each lower extremity.

[2] In a December 23, 2003 report, Dr. Leonard A. Bruno, an attending Board-certified neurosurgeon, opined that the disc herniations and protrusions throughout appellant's cervical and lumbar spine caused radiculitis in all extremities.

[3] A February 21, 2004 nerve conduction velocity (NCV) and electromyogram (EMG) study showed acute right-sided C5 radiculopathy superimposed on chronic left-sided C5-6, C6-7 and C7-T1 radiculopathy, severe median nerve compression in the right wrist and moderate carpal tunnel syndrome in the left wrist. A March 6, 2004 lumbar EMG and NCV study showed left-sided L4-5 radiculopathy and right-sided L5-S1 radiculopathy. An October 3, 2005 lumbar EMG and NCV study showed multilevel lumbar radiculopathy, on the left at L4-5 and on the right at L5-S1, progressed since the March 2004 study with increased denervation of the L5-S1 muscles on the right. An October 17, 2005 EMG and NCV study showed bilateral radiculopathy at C5-6 and C6-7, progressed since February 2004 and severe progressive carpal tunnel syndrome on the right. A November 15, 2007 NCV and EMG study showed bilateral, progressive, severe carpal tunnel syndrome and chronic left-sided C5-6 and C6-7 radiculopathy with progressive denervation.

In a February 17, 2007 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and OWCP medical adviser, opined that, under the fifth edition of the A.M.A., *Guides*, appellant had 15 percent impairment of each arm, 28 percent impairment of the right leg and 27 percent impairment of the left leg due to the accepted conditions. He noted that Dr. Diamond inappropriately included pinch strength and range of wrist motion as elements of upper extremity impairment.

In a September 11, 2008 letter, counsel requested a case status update and submitted a second copy of Dr. Diamond's July 7, 2005 report. On October 9, 2008 OWCP requested that an OWCP medical adviser review Dr. Diamond's report and calculate the percentages of permanent impairment based on the fifth edition of the A.M.A., *Guides*. In an October 17, 2008 report, the medical adviser opined that appellant reached maximum medical improvement as of July 7, 2005, the date of Dr. Diamond's evaluation. The medical adviser found that appellant's condition had not changed since his February 17, 2007 impairment rating.

In a May 4, 2009 letter, OWCP advised counsel to submit an impairment rating from appellant's physician utilizing the sixth edition of the A.M.A., *Guides* in effect as of May 1, 2009. It noted that it combined appellant's claims, File No. xxxxxx368 and xxxxxx024 under File No. xxxxxx368. Counsel contended in a May 8, 2009 letter that appellant was entitled to a schedule award under the fifth edition of the A.M.A., *Guides* as OWCP delayed in processing her claim.

On July 21, 2009 OWCP requested that an OWCP medical adviser address his February 17, 2007 impairment rating using the sixth edition of the A.M.A., *Guides*. In an August 2, 2009 report, OWCP's medical adviser discussed spinal and whole person impairments.[4]

On November 12, 2009 Dr. Diamond resubmitted his July 7, 2005 impairment report. Referring to the sixth edition of the A.M.A., *Guides*, he found 25 percent impairment of the right upper extremity, 26 percent impairment of the left upper extremity and 13 percent impairment of each lower extremity. Regarding the left leg, Dr. Diamond found a class 1 diagnosis-based impairment (CDX) for sensory deficit of the L5-S1 nerve root, affecting the sciatic nerve, equaling four percent impairment according to Table 16-12,[5] based on appellant's history of injury, chronic sciatica as documented on examinations. He assessed a grade 2 modifier for Functional History (GMFH), according to Table 16-6.[6] Dr. Diamond found a grade 1 modifier

[4] Counsel submitted September 3, 2009 impairment rating from an evaluator, approved on September 4, 2009 by Dr. David Weiss, an osteopath and associate of Dr. Diamond. The evaluator applied the sixth edition of the A.M.A., *Guides* to Dr. Diamond's July 5, 2005 findings, and opined that appellant had 13 percent impairment of each leg, 18 percent impairment of the left arm and 19 percent impairment of the right arm.

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

[6] Table 16-6, page 516 of the sixth edition of the A.M.A., *Guides* is entitled "Functional History Adjustment -- Lower Extremities."

for Clinical Studies (GMCS) according to Table 16-8[7] based on prior EMG studies. Using the net adjustment formula of (GMFH - CDX) + (GMPE[8] - CDX) + (GMCS - CDX), he found a plus one adjustment, raising the default value of four percent for the sciatic nerve to six percent. Dr. Diamond also found a class 1 motor strength deficit in the left quadriceps, implicating the femoral nerve, with a default value of five percent according to Table 16-12. He found a GMFH of 2 due to weakness on prior and current examinations, and a GMCS of 1 for prior NCV studies. Using the net adjustment formula, Dr. Diamond calculated a net adjustment of plus 1, raising the default five percent for the femoral nerve to seven percent. He then combined the six percent sciatic nerve and seven percent femoral nerve impairments to equal a 13 percent impairment of the left leg. Dr. Diamond applied the same grade modifiers and formulae to the right leg, finding 13 percent impairment attributable to the sciatic and femoral nerves.

Regarding the left arm, Dr. Diamond noted a GMCS of 1, a GMFH of 3 and a GMPE of 3 for decreased pinch strength according to Table 15-23,[9] equaling five percent arm impairment. He also found a class 1 motor strength deficit of the left deltoids due to axillary nerve impairment, according to Table 15-21,[10] equaling five percent impairment, six percent impairment due to left triceps weakness in the radial nerve distribution adjusted upward to nine percent, and a class 1 motor strength deficit of the left biceps equaling five percent impairment of the musculocutaneous nerve. Dr. Diamond totaled these impairments to equal 26 percent impairment of the left arm. He then explained how he applied his findings to these tables and grading schemes to arrive at 25 percent impairment of the right arm.

On June 27, 2010 Dr. Berman reviewed Dr. Diamond's report. He found that Dr. Diamond misapplied the A.M.A., *Guides* by rating individual nerves and muscle groups instead of nerve roots originating in the cervical spine. Dr. Berman rated 12 percent impairment of the right arm, seven percent impairment of the left arm and six percent impairment of each lower extremity. Regarding the right arm, under Table 15-23, appellant had a GMCS of 1 based on electrodiagnostic findings of motor delay, a GMFH of 2 for significant intermittent symptoms and a GMPE of 2 due to objectively decreased sensation. Applying the net adjustment formula, or 1 + 1 + 2, Dr. Berman divided the total of 5 by 3, the number of modifiers, averaging 1.66, rounded upward to 2, resulting in five percent arm impairment due to carpal tunnel syndrome. Regarding the left arm, he found a GMCS of 1, a GMFH of 1 and a GMPE of 2. Using the net adjustment formula, resulting in the equation of 1 + 1 + 2 = 4, divided by 3, equaled 1.3, rounded downward to 1, equaling a default value of two percent arm impairment. As Dr. Diamond found a higher GMFH for the left arm, the medical adviser found three percent impairment of the left arm. Dr. Berman addressed the spinal nerve impairment affecting the upper extremities. He referred to the Spinal Nerve Impairment, Upper Extremity Impairment, Proposed Table 1 from

[7] Table 16-8, page 519 of the sixth edition of the A.M.A., *Guides* is entitled "Clinical History Adjustment -- Lower Extremities."

[8] Grade modifier for Physical Examination"(GMPE)."

[9] Table 15-23, page 449 of the sixth edition of the A.M.A., *Guides* is entitled "Entrapment/Compression Neuropathy Impairment."

[10] Table 15-21, page 436 of the sixth edition of the A.M.A., *Guides* is entitled "Peripheral Nerve Impairment: Upper Extremity Impairments."

the July/August 2009, *The Guides Newsletter*. He found seven percent impairment of each arm due to a class 1 impairment of C5 equaling two percent, three percent impairment for C6 and two percent impairment for C7. Dr. Diamond used the Combined Values Chart to rate 12 percent impairment of the right arm and seven percent impairment of the left arm. Regarding the legs, Dr. Berman referred to proposed Table 2 of the July/August 2009 newsletter, finding a moderate sensory deficit of three percent for L4 and three percent for L5, for a total six percent impairment of each lower extremity.

By decision dated July 1, 2010, OWCP granted appellant schedule awards for a 12 percent impairment of the left arm, 7 percent impairment of the right arm and 6 percent impairment to each lower extremity.

Counsel requested a hearing, contending that the July 1, 2010 schedule award reversed the upper extremity impairment percentages as found in 2007 by OWCP's medical adviser. He submitted an October 19, 2010 report from Dr. Diamond, who reviewed his report of 2005. Counsel stated that left triceps strength, coinciding with the radial nerve, "which is nerve root C5 through T1, should be included in the impairment rating." This would result in a 24 percent impairment of the left upper extremity and a 22 percent impairment of the right upper extremity. At the hearing, held on October 27, 2010, counsel contended that Dr. Diamond's reports demonstrated a greater percentage of impairment to the right arm and both lower extremities.

In a January 6, 2011 decision, OWCP's hearing representative remanded the case finding that the schedule award was in error, as it reversed the upper extremity percentages found by OWCP's medical examiner. By decision dated February 9, 2011, OWCP issued a corrected schedule award for 12 percent impairment of the right upper extremity, 7 percent impairment of the left upper extremity and 6 percent impairment of each lower extremity. In a February 16, 2011 letter, counsel requested a hearing.

By decision dated March 24, 2011, OWCP awarded appellant a schedule award for an additional 5 percent impairment of the left arm, for a total of 10 percent.

In a March 29, 2011 letter, counsel requested a hearing.

By decision dated June 13, 2011, OWCP determined that the case was not in posture for a decision as it had not properly determined the percentage of impairment to appellant's left arm under the sixth edition of the A.M.A., *Guides*. It set aside its March 24, 2011 decision and referred the case to an OWCP medical director for a supplemental report.

In a February 8, 2011 report, Dr. Berman reviewed the record and opined that appellant had a class 1, grade C impairment equaling two percent impairment of the C5 nerve root, three percent impairment of the C6 nerve root and two percent impairment of the C7 nerve root, resulting in seven percent impairment of the left arm for cervical radiculopathy. Using the Combined Values Chart, he found that the 7 percent impairment for cervical radiculopathy, combined with the 5 percent previously awarded, totaled 10 percent impairment of the left arm. OWCP issued a February 9, 2011 decision granting 12 percent impairment of the right arm and 6 percent impairment of each leg.

Counsel requested a hearing, held on June 21, 2011, at which he asserted that there was conflict of medical opinion between Dr. Diamond and Dr. Berman regarding the appropriate percentages of right upper extremity and bilateral lower extremity impairment.

By decision dated June 13, 2011, an OWCP hearing representative remanded the case for recalculation of the schedule award for the left arm. In a July 14, 2011 report, Dr. Berman affirmed his prior rating of 10 percent impairment of the left arm due to carpal tunnel syndrome and cervical nerve root compression.

By decision dated July 27, 2011, OWCP granted appellant an additional 5 percent impairment of the left arm, for a total of 10 percent. Counsel requested a hearing by an August 1, 2011 letter, held on November 16, 2011.

By decision dated September 1, 2011, an OWCP hearing representative remanded the case to OWCP to consider Dr. Diamond's November 12, 2009 and October 19, 2010 reports, to determine if appellant sustained greater than 12 percent impairment of the right upper extremity and 6 percent impairment to each lower extremity.

In an October 12, 2011 report, Dr. Berman reviewed Dr. Diamond's reports and opined that they did not support more than 12 percent impairment of the right arm or 6 percent impairment of each leg. He found that Dr. Diamond misapplied the sixth edition of the A.M.A., *Guides* by rating the sciatic and femoral nerves, encompassing multiple nerve roots, rather than the single nerve root rating method specified in the A.M.A., *Guides*. Regarding the right arm, Dr. Diamond improperly rated both the C4, C5 and C6 cervical nerve roots and the median nerve.

By decision dated October 20, 2011, OWCP denied appellant's claim for additional schedule awards on the grounds that the evidence submitted did not establish greater percentages of impairment than 12 percent of the right arm or 6 percent for each lower extremity.

At a November 16, 2011 telephonic hearing regarding the percentage of left upper extremity impairment, counsel asserted that OWCP should have based the schedule award on the fifth edition of the A.M.A., *Guides*, and that there was a conflict of medical opinion between Dr. Diamond and Dr. Berman.

By decision dated January 25, 2012, an OWCP hearing representative found that appellant had not established greater than 10 percent impairment of the left arm. The hearing representative found that OWCP properly utilized the sixth edition of the A.M.A., *Guides* in assessing the percentages of impairment.

Counsel requested an oral hearing, held on February 27, 2012. At the hearing, he contended that OWCP deprived appellant of a valuable property right by adjudicating her claim under the sixth edition of the A.M.A., *Guides* although she timely submitted an adequate impairment rating while the fifth edition of the A.M.A., *Guides* was in effect. Counsel submitted 2011 and 2012 progress notes from Dr. Bolno, who did not address the issue of permanent impairment.

In a May 7, 2012 decision, an OWCP hearing representative affirmed the October 20, 2011 decision, finding that appellant did not establish more than 12 percent impairment of the right arm and 6 percent impairment of each leg. The hearing representative found that an OWCP medical adviser properly applied the appropriate portions of the sixth edition of the A.M.A., *Guides* to Dr. Diamond's findings. The hearing representative found that OWCP did not unduly delay processing appellant's schedule award claim such that OWCP would be compelled to calculate the schedule awards under the fifth edition of the A.M.A., *Guides.*

LEGAL PRECEDENT

The schedule award provision of FECA[11] and its implementing regulations[12] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[13]

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.[14] Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,[15] no claimant is entitled to such an award.[16] 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.[17]

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome, cervical and lumbar sprains, a lumbar strain and aggravation of a herniated cervical disc. Appellant claimed a schedule award on December 23, 2005. The Board notes that, although FECA does not provide

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

[13] *Id*. at § 10.404; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[14] *Henry B. Floyd, III*, 52 ECAB 220 (2001).

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

[16] *Thomas Martinez*, 54 ECAB 623 (2003).

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

for a schedule award for the back or spine, impairment of the extremities due to a spinal injury may be compensable.[18]

In a July 7, 2005 report, Dr. Diamond, an attending osteopath, examined appellant and rated impairment under the fifth edition of the A.M.A., *Guides*. He subsequently updated his impairment ratings in 2009 and 2010 to address the sixth edition of the A.M.A., *Guides.* It appears that the later impairment ratings were based on the physical examination findings of 2005. Dr. Diamond found 25 percent impairment of the right arm, 26 percent impairment of the left arm and 13 percent impairment of each leg. Dr. Berman reviewed his report on June 6, 2010 and found that Dr. Diamond misapplied the A.M.A., *Guides* by expressing impairment by muscle and innervation instead of spinal nerve roots. He used Table 15-23 to rate 12 percent impairment of the right arm and 7 percent impairment of the left arm based on bilateral median nerve entrapment at the wrist and C4, C5 and C6 nerve root impairments. For the right arm, the medical adviser referred to Table 15-23, noting a GMCS of 1 for motor delay, a GMFH of 2 for symptoms, and a GMPE of 2 due to decreased sensation. Applying the net adjustment formula, he found a modifier of 2, resulting in five percent upper extremity impairment due to carpal tunnel syndrome. Regarding the left upper extremity, the medical adviser found a GMCS of 1, a GMFH of 1 and a GMPE of 2, resulting in a grade modifier of 1, equaling two percent upper extremity impairment, adjusted to three percent based on Dr. Diamond's GMFH determination. Dr. Berman used Spinal Nerve Impairment, Upper Extremity Impairment, Proposed Table 1 from the July/August 2009, *The Guides Newsletter*, to find seven percent impairment of each arm due to C5, C6 and C7 nerve root impairments. He combined the impairments to rate a 12 percent impairment of the right arm and 7 percent impairment of the left arm. Regarding the legs, the medical adviser utilized proposed Table 2, finding six percent impairment of each lower extremity for sensory deficit in the L4 and L5 nerve roots. Following additional development, Dr. Berman found an additional 5 percent impairment of the left upper extremity due to C5 nerve root impairment, combined to equal 10 percent.

The Board finds that Dr. Berman properly used the appropriate portions of the A.M.A., *Guides* to calculate a 12 percent impairment of the right upper extremity, 10 percent impairment of the left upper extremity and 6 percent impairment of each lower extremity. Dr. Diamond misapplied the sixth edition of the A.M.A., *Guides*. OWCP properly accorded Dr. Berman's opinion of the weight of the medical evidence. Its January 25 and May 7, 2012 decisions were therefore proper under the facts and circumstances of this case.

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.

On appeal, counsel contends that appellant sustained greater impairment based on the opinion of Dr. Diamond. Alternatively, he asserts a conflict between Dr. Diamond and Dr. Berman. Counsel asserts that OWCP should have based its schedule awards on the 2007 reports of Dr. Berman. As noted, Dr. Diamond misapplied the A.M.A., *Guides.* Therefore, his

[18] *See id.*

ratings of impairment are outweighed by those of Dr. Berman. As of May 2009, the sixth edition of the A.M.A., *Guides* became applicable to all schedule award ratings.[19]

CONCLUSION

The Board finds that appellant has 12 percent impairment of the right arm, 10 percent impairment of the left arm and 6 percent impairment of each lower extremity, for which she received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the May 7 and January 25, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 19, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

[19] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards. *J.B.*, Docket No. 09-2191 (issued May 14, 2010). The Board has held that the applicable date of the sixth edition of the A.M.A., *Guides* relates to the date of the schedule award decision, not the date of maximum medical improvement or when the schedule award claim was filed. *See C.R.*, Docket No. 11-1441 (issued January 12, 2012).