United States Department of Labor
Employees' Compensation Appeals Board

V.J., Appellant	)	
	)	
and	)	**Docket No. 12-1528**
	)	**Issued: March 4, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Waldorf, MD, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 9, 2012 appellant, through her attorney, filed a timely appeal of a March 30, 2012 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 this case.

ISSUE

The issue is whether appellant sustained permanent impairment of her upper or lower extremities, warranting a schedule award.

On appeal, appellant's attorney contends that OWCP's March 30, 2012 decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on January 15, 2006 appellant, then a 30-year-old mail carrier, sustained cervical and lumbar intervertebral disc disorder with myelopathy as a result of a motor vehicle accident. It authorized an anterior cervical discectomy, interbody arthrodesis with allograft and anterior plating at C5-6 performed on February 21, 2007 by Dr. Faheem A. Sandhu, a Board-certified neurologist.

On January 8, 2010 appellant filed a claim for a schedule award. On February 3, 2010 Dr. Guy W. Gargour, an attending Board-certified neurologist, performed an impairment evaluation based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He advised that appellant had 19 percent impairment of the upper extremity and 15 percent impairment of the lower extremity[2] or a 31 percent whole person impairment due to her ruptured disc at C5-6 with myelopathy. Regarding the upper extremity, Dr. Gargour assigned a class 3 impairment. He also assigned a grade 2 modifier for functional history which resulted in a grade B impairment. Dr. Gargour assigned a grade 3 modifier each for physical examination and clinical studies which each resulted in a grade C impairment. He advised that this resulted in 19 percent upper extremity impairment. Regarding appellant's lower extremity, Dr. Gargour assigned a class 2 impairment. He also assigned a grade 2 modifier each for functional history, physical examination and clinical studies regarding appellant's lower extremity which resulted in 15 percent impairment. Using the Combined Values Chart Dr. Gargour combined the 19 percent upper extremity impairment rating and 15 percent lower extremity impairment rating and advised that it resulted in 31 percent impairment of the whole person.

On June 3, 2010 Dr. Lawrence A. Manning, an OWCP medical adviser, reviewed the medical record and Dr. Gargour's February 3, 2010 report. He advised that there was no basis for rating impairment of appellant's upper and lower extremities. Dr. Manning stated that Dr. Gargour failed to explain how he rated upper or lower extremity impairment. In addition, the medical evidence of record was not helpful in determining impairment to the upper or lower extremities. Dr. Manning stated that appellant reached maximum medical improvement on February 21, 2008. Based on the medical evidence of record, he concluded that she had no impairment of the upper or lower extremities. Dr. Manning recommended a medical evaluation to objectively evaluate whether there was any residual motor or sensory impairment to the upper or lower extremities.

On May 25, 2011 OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Charles J. Azzam, a Board-certified neurologist, for a second opinion. In a June 9, 2011 report, Dr. Azzam reviewed a history of the January 15, 2006 employment injury and appellant's medical treatment, social and family background. He listed findings on neurological and musculoskeletal examination. Dr. Azzam advised that appellant had symptoms related to residuals of her cervical and lumbar disc disease. An April 1, 2011 cervical magnetic resonance imaging (MRI) scan showed no evidence of residual disc herniation.

[2] Dr. Gargour submitted two OWCP permanent impairment worksheets but did not specify whether his ratings applied to each upper or lower extremity.

A June 21, 2010 lumbar MRI scan showed borderline L4-L5 stenosis but no definite disc herniation. It also showed a decreased left central disc protrusion at L5-S1. Dr. Azzam advised that appellant's symptoms were related to residuals of her cervical disc herniation and lumbar disc spondylosis. He diagnosed lumbago and lumbosacral spondylosis without myelopathy and advised that these conditions were related to the January 15, 2006 work injury. Dr. Azzam found that appellant reached maximum medical improvement as of the date of his examination. Appellant's current physical restrictions were reasonable and permanent. She was unable to resume her mail driver position, but she could work part time up to six hours a day. Dr. Azzam concluded that appellant's prognosis was guarded and the partial permanent impairment rated by Dr. Gargour was reasonable with regard to her cervical disc disease.

On August 31, 2011 Dr. Christopher R. Brigham, Board-certified in occupational medicine and serving as an OWCP medical adviser, reviewed the medical record, including the findings of Drs. Azzam and Gargour. He stated that the whole person impairment rating provided was not allowed under FECA and that impairment should be evaluated for the functional loss of the upper and lower extremities. Dr. Brigham stated that Dr. Gargour misapplied Table 17-2, the cervical spine regional grid; which rated impairment for the spine. The correct method for rating impairment of the extremities was discussed in the July/August 2009 edition of *The Guides Newsletter*. Dr. Brigham noted that, in this case, there were no ratable sensory or motor deficits in the upper or lower extremities. He determined that appellant reached maximum medical improvement on February 3, 2010. Dr. Brigham noted that the April 1, 2011 cervical MRI scan found no evidence of spinal cord involvement. Dr. Azzam did not report any findings of hyperreflexia at the time of his recent evaluation. Based on the objective findings of record, Dr. Brigham found that there was no evidence of residual radiculopathy. Citing page 576 of the sixth edition of the A.M.A., *Guides*, which related to a radiculopathy diagnosis, he stated that neither Dr. Azzam nor Dr. Gargour any reported sensory or motor deficits in the upper or lower extremities. Regarding loss of reflex, Dr. Brigham stated that Dr. Gargour's February 3, 2010 evaluation was outdated. Dr. Azzam's June 9, 2011 evaluation did not reveal any abnormal reflex findings. Dr. Brigham concluded that there were no ratable sensory or motor deficit that would be ratable under Proposed Table 1, Spinal Nerve Impairment -- Upper Extremity Impairments or Proposed Table 2, Spinal Nerve Impairment: Lower Extremity Impairments as provided in the July/August 2009 edition of *The Guides Newsletter*.

In a September 14, 2011 decision, OWCP denied appellant's schedule award claim on the grounds that the medical evidence did not establish permanent impairment of the upper and lower extremities.

By letter dated October 5, 2011, appellant, through her attorney, requested a telephone hearing before an OWCP hearing representative.

In a February 15, 2012 report, Dr. Stuart J. Goodman, a Board-certified neurologist, listed a history of injury and appellant's medical treatment. Appellant complained about ongoing headaches and pain and numbness in her head, neck, back and shoulder. Sitting and standing too long aggravated her discomfort. On review of neurological and medical systems, Dr. Goodman found neck and back pain and muscle weakness, headache, sleep issues and fatigue. On neurological examination, he reported essentially normal findings with the exception of tenderness of the paraspinal muscles in the cervical spine region with decreased range of motion of the neck and shoulder structures. Dr. Goodman also reported essentially normal findings on motor examination, which the exception of tenderness and spasm of the associated paraspinal muscles and shoulder musculature. He found no deficit on sensory examination. Dr. Goodman advised that appellant suffered from neck and shoulder injuries, which led to a ruptured disc and an anterior cervical discectomy and fusion at C5-6. Appellant had residual neck pain, but no evidence of myelopathy. Dr. Goodman referred to Table 17.5, Adjustment Grid, of the sixth edition of the A.M.A., *Guides* and assessed a grade 1 modifier. Under Table 17.6, Adjustment Grid, he assessed a grade 1 modifier for functional history. Dr. Goodman stated that there were problems with activity with symptoms present. He assessed a grade 0 modifier for physical examination, noting that appellant had a class 1 impairment under Table 17.2, Cervical Spine Regional Grid. Dr. Goodman concluded that she had one percent permanent impairment of each upper extremity and no impairment of the lower extremities. He stated that the upper extremity impairment rating was mainly based on appellant's residual pain and decreased use of the extremity, which were noted on examination and demonstrated by her subjective complaints.

In a March 30, 2012 decision, an OWCP hearing representative affirmed the September 14, 2011 decision. She found that the medical evidence did not support a finding of permanent impairment.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing federal regulations,[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions and organs of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[5] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] Effective May 1, 2009, FECA adopted the sixth edition of the A.M.A., *Guides*[7] as the appropriate edition for all awards issued after that date.[8]

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),

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Ausbon N. Johnson*, 50 ECAB 304 (1999).

[6] *See supra* note 4; *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

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

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

Physical Examination (GMPE) and Clinical Studies (GMCS).[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10]

ANALYSIS

OWCP accepted that on January 15, 2006 appellant sustained cervical and lumbar intervertebral disc disorder with myelopathy. On February 21, 2007 Dr. Sandhu performed authorized cervical surgery. Appellant claimed a schedule award due to her accepted conditions. In decisions dated September 14, 2011 and March 30, 2012, OWCP denied her claim for a schedule award. The Board finds that appellant has not met her burden of proof to establish that she sustained permanent impairment to a scheduled member due to her accepted conditions.[11]

On February 3, 2010 Dr. Gargour, an attending physician, opined that under the sixth edition of the A.M.A., *Guides* appellant had 19 percent impairment of the upper extremity and 15 percent impairment of the lower extremity, which represented a 31 percent whole person impairment based on her ruptured disc at C5-6 and myelopathy. FECA does not authorize schedule awards for loss of use of the spine or the body as a whole.[12] The Board finds that Dr. Gargour failed to rate appellant's impairment using *The Guides Newsletter* standard for spinal nerve root injuries involving the extremities. OWCP's procedures provide that The *Guides Newsletter Rating Spinal Nerve Extremity Impairment* is the appropriate method of determining impairment in this case.[13] *The Guides Newsletter* provides a specific method for determining impairments for conditions such as radiculopathy from a spinal nerve injury. It explains that, in the sixth edition, impairment for radiculopathy is reflected in the diagnosis-based impairment for the spinal region. In developing an alternative approach to rating isolated radiculopathy, it is important to provide consistency in impairment ratings between the chapters.[14] Dr. Gargour did not discuss the July/August 2009 edition of *The Guides Newsletter*. The Board finds, therefore, that his impairment rating is of diminished probative value and insufficient to establish permanent impairment to appellant's upper and lower extremities causally related to the accepted injuries.

On June 9, 2011 Dr. Azzam, an OWCP referral physician, generally agreed with Dr. Gargour that appellant had 19 percent impairment to the upper extremity and 15 percent impairment to the lower extremity due to the accepted work-related cervical condition. He did not discuss the July/August 2009 edition of *The Guides Newsletter* in rating her permanent impairment. Further, Dr. Azzam provided only conclusory discussion of rating 19 percent upper

[9] A.M.A., *Guides* 494-531.

[10] *Id.* at 521.

[11] An employee seeking a schedule award has the burden of proof to establish permanent impairment. *See Denise D. Cason*, 48 ECAB 530 (1997).

[12] *D.A.*, Docket No. 10-2172 (issued August 3, 2011); *J.Q.*, 59 ECAB 366 (2008).

[13] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 3.700, Exhibit 1, note 6 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[14] *L.J.*, Docket No. 10-1263 (issued March 3, 2011); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

extremity and 15 lower extremity impairment without fully explaining how he arrived at these percentages. As he failed to properly address the provisions of the A.M.A., *Guides* or to provide rationale for his opinion, the Board finds that his report is diminished probative value in determining the extent of appellant's permanent impairment.

Dr. Brigham, an OWCP medical adviser, reviewed the clinical findings and reports of Drs. Gargour and Azzam.[15] He concluded that appellant had no permanent impairment to the upper or lower extremities under the sixth edition of the A.M.A., *Guides*. Dr. Brigham properly noted that a schedule award for the whole person or spine impairment is not allowed under FECA.[16] He found that OWCP had adopted the approach set forth in *The Guides Newsletter* for rating spinal nerve injuries as impairments of the extremities. Dr. Brigham noted that *The Guides Newsletter* required identification of the affected nerve and the extent of any sensory or motor loss. He concluded that, as neither Dr. Gargour nor Dr. Azzam found any sensory or motor deficit, appellant had no ratable impairment.

The Board finds that Dr. Brigham properly applied the A.M.A., *Guides* to find that appellant had no impairment to the upper or lower extremities due to the accepted January 15, 2006 employment injuries. Dr. Brigham reviewed the medical evidence and fully explained how he determined that she had no impairment and why the ratings of Drs. Gargour and Azzam were not in conformance with the A.M.A., *Guides*. The Board finds that, under the circumstances of this case, the weight of the medical evidence establishes that appellant has no permanent impairment to the upper or lower extremities.

Dr. Goodman's February 15, 2012 report found that appellant had one percent impairment of the upper extremities; but the rating was not in conformance with the A.M.A., *Guides*. Dr. Goodman did not discuss the July/August 2009 edition of *The Guides Newsletter* in rating permanent impairment. He failed to identify the affected nerve and the extent of any sensory or motor deficit as required by *The Guides Newsletter*. Dr. Goodman found that appellant had no sensory of motor deficits on examination. The Board finds that she has not provided medical evidence in conformance with the A.M.A., *Guides* supporting a ratable impairment of the upper or lower extremities. Consequently, appellant has not met her burden of proof.

On appeal, appellant's attorney contended that OWCP's decision was contrary to fact and law. For reasons stated above, the Board finds that the weight of the medical evidence does not establish any entitlement to a schedule award.

Appellant may request a 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.

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[15] OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claim*, Chapter 2.808.6(d) (January 2010).

[16] *See* cases cited, *supra* note 12.

CONCLUSION

The Board finds that appellant has failed to establish that she has any permanent impairment to the upper and lower extremities, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 2013
Washington, DC

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

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

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