United States Department of Labor
Employees' Compensation Appeals Board

N.F., Appellant	)	
and	)	**Docket No. 13-129**
	)	**Issued: March 15, 2013**
DEPARTMENT OF LABOR, WAGE & HOUR DIVISION, Orlando, FL, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 22, 2012 appellant filed a timely appeal from May 15 and September 24, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP) denying her schedule award claim.[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decisions.

ISSUE

The issue is whether appellant sustained permanent impairment to a scheduled member.

[1] The record also contains a June 18, 2012 decision finding that appellant received an overpayment of $805.85. Appellant has not appealed this decision and thus it is not before the Board at this time. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 17, 2009 appellant, then a 54-year-old compliance specialist, filed a traumatic injury claim alleging that on August 14, 2009 she sustained a broken cervical vertebrae in a motor vehicle accident. OWCP accepted the claim for a closed fracture of a cervical vertebra at C1 without a spinal cord injury.

In a December 16, 2009 progress report, Dr. Jason Conaughty, a Board-certified orthopedic surgeon, diagnosed a C1 burst fracture with a stable nonunion. He found that appellant had reached maximum medical improvement with a 10 percent impairment due to the "anterior and posterior fractures of the C1."

On March 16, 2011 OWCP referred appellant to Dr. Robert L. Masson, a Board-certified neurosurgeon, for a second opinion examination regarding her condition. In a report dated April 14, 2011, Dr. Masson diagnosed status post C1 Jefferson burst fracture, cervicooccipital pain and obesity. On July 15, 2011 he concurred with the finding that appellant was totally disabled with work restrictions of sedentary work.

In a November 16, 2011 progress report, Dr. Jonathan Greenberg, an attending Board-certified neurosurgeon, diagnosed a posterior C1 fracture with a fibrous nonunion and a currently healed C1 anterior ring, C2-3 and C3-4 facet arthropathy, C3-4 and C4-5 anteriolisthesis and C4-5 foraminal narrowing on the left. He stated that it was uncertain whether appellant would eventually need posterior cervical surgery. Dr. Greenberg advised that she was "now at maximum medical improvement with respect of her C1 fracture and has a five percent permanent impairment rating associated with the fracture."

On January 6, 2012 appellant filed a claim for a schedule award. By letter dated January 17, 2012, OWCP requested that she submit an impairment evaluation from her attending physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On January 25, 2012 OWCP's medical adviser reviewed Dr. Greenberg's November 16, 2011 report. He noted that it was unclear how Dr. Greenberg determined that appellant had a five percent impairment. The medical adviser recommended a second opinion examination to determine if appellant had any radiculopathy of an upper extremity as a result of her fracture at C1.[3]

On April 18, 2012 OWCP referred appellant to Dr. Jonathan Black, a Board-certified orthopedic surgeon, for an impairment evaluation. In a report dated May 7, 2012, Dr. Black reviewed the history of injury and diagnostic studies of record. He noted that an April 20, 2010 electromyogram (EMG) and nerve condition study did not show cervical radiculopathy.[4] On examination, Dr. Black found reduced range of motion of the cervical spine with "no production

[3] On March 1, 2012 appellant returned to work in a modified part-time position at the employing establishment.

[4] Electrodiagnostic studies performed on April 20, 2010 revealed bilateral carpal tunnel syndrome but no evidence "of an ulnar neuropathy or cervical radiculopathy in the nerves and muscles tested."

of radicular symptoms by these maneuvers." He found full motor strength of the upper and lower extremities bilaterally. Dr. Black stated, "[Appellant] has suffered a single level burst fracture at C1 that has functionally healed with no evidence of instability or radicular symptoms." According to Table 17-2 on page 565 of the sixth edition of the A.M.A., *Guides*, [appellant] had a zero percent impairment. Dr. Black noted that OWCP advised him to utilize Table 15-18 and Table 15-20 in rating her impairment but noted that those tables addressed "peripheral nerve issues rather than cervical radiculopathy." He related, "I was unable to identify any objective radicular signs or symptoms either by physical examination, history or review of EMG and nerve conduction studies."

On May 10, 2012 OWCP's medical adviser concurred with Dr. Black's determination that appellant had no impairment of the upper extremities under the sixth edition of the A.M.A., *Guides* based on her lack of radicular symptoms.

By decision dated May 15, 2012, OWCP denied appellant's claim for a schedule award.

On May 31, 2012 appellant requested a review of the written record by an OWCP hearing representative. She questioned why OWCP gave weight to Dr. Conaughty's report rather than Dr. Masson, the second opinion physician. Appellant asserted that she sustained lymphedema due to her employment injury such that she was unable to travel in a motor vehicle and had to use a wheelchair.[5] She also maintained that she had left carpal tunnel syndrome and left elbow and hand conditions due to her work injury.

In a decision dated September 24, 2012, OWCP's hearing representative affirmed the May 15, 2012 decision.

On appeal, appellant questioned why OWCP did not give weight to Dr. Masson's report. She noted that Dr. Black provided a third rather than second opinion. Appellant asserted that she experienced headaches daily and wore a neck collar for sleep or during the day when she was in pain.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing federal regulations[7] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[8] As of May 1, 2009, the

[5] In a report dated November 11, 2011, Dr. Jan Becker, a Board-certified internist, diagnosed bilateral intractable lymphedema due to appellant's 2009 injury. She recommended a compression device for home use.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id.* at § 10.404(a).

sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9] The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[10]

FECA specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award.[11] A schedule award is payable, however, for a permanent impairment of the extremities that is due to a work-related back condition.[12] 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 to August 2009) is to be applied.[13]

ANALYSIS

OWCP accepted that appellant sustained a closed fracture of the C1 cervical vertebra without a spinal cord injury as a result of an August 14, 2009 motor vehicle accident. On December 16, 2009 Dr. Conaughty diagnosed a C1 burst fracture with a stable nonunion. He advised that appellant had reached maximum medical improvement with a 10 percent impairment due to the fracture. Dr. Conaughty did not, however, reference the A.M.A., *Guides* in rating impairment. Thus, his report is of little probative value.[14]

In a report dated November 16, 2011, Dr. Greenberg found that appellant had reached maximum medical improvement from her C1 fracture. He stated that she had a five percent impairment from the fracture. Dr. Greenberg did not explain how he used the A.M.A., *Guides* in making the impairment determination. His opinion is insufficient to establish permanent impairment.[15] As noted, FECA specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award.[16]

OWCP referred appellant to Dr. Black for a second opinion examination to determine the extent of any permanent impairment. On May 7, 2012 Dr. Black diagnosed a healed C1 fracture

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] *See Veronica Williams*, 56 ECAB 367 (2005).

[11] *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[12] *Denise D. Cason*, 48 ECAB 530 (1997).

[13] *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).

[14] *See Mary L. Henninger*, 52 ECAB 408 (2001).

[15] *See Carl J. Cleary*, 57 ECAB 563 (2006) (an opinion which is not based upon the standards adopted by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of permanent impairment.

[16] *Francesco C. Veneziani*, 48 ECAB 572 (1997).

with "no evidence of instability or radicular symptoms." On examination, he found no radiculopathy with cervical range of motion and full motor strength of the extremities. Dr. Black concluded that appellant had no impairment of an extremity based on the lack of "any objective radicular signs or symptoms" on examination, by history or upon review of the diagnostic studies. He referred to Table 17-2 of the A.M.A., *Guides*, relevant to determining impairments of the spine. OWCP procedures provided that *The Guides Newsletter* July to August regarding spinal nerve extremity impairments would be the appropriate method for determining an upper extremity impairment in this case.[17] However, as Dr. Black found no evidence of radiculopathy, his failure to cite *The Guides Newsletter* does not affect the disposition of the case. There is no probative medical evidence establishing that appellant sustained a permanent impairment to an upper extremity resulting from her accepted cervical condition.

On appeal, appellant contends that OWCP should accept Dr. Masson's opinion that she was permanently disabled. Disability for work under section 8105 of FECA, however, is not a factor included in a schedule award impairment rating under section 8107. A schedule award is not intended to be compensation for wage loss or potential wage loss. Section 8107 provides a compensation schedule for payment of awards for permanent impairment of listed body members. A schedule award is made without regard to whether or not there is a loss of wage-earning capacity resulting from the injury and regardless of its effects upon employment or social opportunities.[18]

Appellant also notes that she experiences daily headaches and often wears a neck collar. Limitations on daily activities, however, have no bearing on the calculation of a schedule award.[19]

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 is entitled to a schedule award for a permanent impairment to a scheduled member.

[17] *See supra* note 13.

[18] *See Renee M. Straubinger*, 51 ECAB 667 (2000).

[19] *E.L.*, 59 ECAB 405 (2008); *Kimberly M. Held*, 56 ECAB 670 (2005).

ORDER

IT IS HEREBY ORDERED THAT the September 24 and May 15, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 15, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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