

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

L.W., Appellant)	
)	
and)	Docket No. 13-1374
)	Issued: November 15, 2013
U.S. POSTAL SERVICE, POST OFFICE,)	
King of Prussia, PA, Employer)	
)	

<i>Appearances:</i> Thomas R. Uliase, Esq., for the appellant Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
 COLLEEN DUFFY KIKO, Judge
 PATRICIA HOWARD FITZGERALD, Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 20, 2013 appellant, through her attorney, filed a timely appeal from a February 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 schedule award decision.

ISSUE

The issue is whether appellant is entitled to a schedule award for a permanent impairment of a scheduled member causally related to her March 16, 1993 employment injury.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated January 17, 2012, the Board affirmed a January 25, 2011 decision finding that appellant did not sustain an

¹ 5 U.S.C. § 8101 *et seq.*

employment-related recurrence of disability beginning March 30, 2010.²The Board further set aside a February 23, 2011 decision denying her schedule award claim. The Board found that the January 28, 2010 opinion of Dr. Ellicott Menkowitz, a Board-certified orthopedic surgeon and impartial medical examiner, was not based on a complete and accurate factual and medical background as OWCP failed to advise him of its expansion of appellant's claim to include lumbar radicular syndrome and piriformis syndrome. The Board remanded the case for OWCP to provide Dr. Menkowitz with an updated statement of accepted facts and to obtain a supplemental report addressing whether she had a permanent impairment due to her lumbar radicular syndrome and piriformis syndrome.

On February 14, 2012 Dr. Menkowitz opined that appellant did not have an impairment of the right lower extremity. He stated, "A piriformis syndrome, in my experience, is somewhat nebulous and self-limiting."

By decision dated March 9, 2012, OWCP denied appellant's claim for a schedule award. On March 14, 2012 counsel requested an oral hearing before an OWCP hearing representative. Following a preliminary review, on May 10, 2012, the hearing representative determined that the case was not in posture for a hearing. She found that Dr. Menkowitz failed to address whether appellant had an impairment of the nerve root due to her lumbar radicular syndrome. The hearing representative further determined that he did not adequately explain why he found no impairment due to piriformis syndrome. She vacated the March 9, 2012 decision and remanded the case for OWCP to obtain a supplemental report from Dr. Menkowitz explaining why he found no impairment as a result of piriformis syndrome and lumbar radiculopathy and addressing whether he performed motor and sensory testing.

In a report dated June 14, 2012, Dr. Menkowitz opined that at the time of his examination in January 2010 he performed "motor and sensory testing on the claimant's lower extremities and the results were within normal limits."

On July 10, 2012 OWCP's medical adviser reviewed the evidence of record and determined that appellant had no ratable impairment due to motor or sensory deficits of either lower extremity.

In a decision dated July 17, 2012, OWCP denied appellant's schedule award claim after finding that Dr. Menkowitz' opinion represented the weight of the evidence and established that he had no ratable impairment of the lower extremities.

On July 25, 2012 appellant, through her attorney, requested an oral hearing. At the hearing held on November 29, 2012 counsel asserted that Dr. Menkowitz did not provide range of motion measurements for the lower extremities in his January 28, 2010 examination, measure atrophy or motor strength or perform neurological testing. He also contended that Dr. Menkowitz did not acknowledge all the accepted conditions or provide rationale for his opinion.

² Docket No. 11-1412 (issued January 17, 2012) OWCP accepted that on March 16, 1993 appellant, then a 42-year-old letter carrier, sustained a lumbosacral joint sprain, fibromyositis/myalgia, a sciatic nerve lesion, lumbar radicular syndrome and piriformis syndrome.

By decision dated February 19, 2013, OWCP's hearing representative affirmed the July 17, 2012 decision.

On appeal, counsel argues that Dr. Menkowitz' opinion is insufficient as he did not measure range of motion, atrophy, motor strength or perform neurological testing in his January 28, 2010 report. He also maintains that Dr. Menkowitz did not provide an impairment rating for piriformis syndrome or any rationale for his opinion. Counsel also argues that OWCP's medical adviser was on one side of the conflict and thus should not have reviewed the findings of the impartial medical examiner.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing federal regulations⁴ 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the uniform standard applicable to all claimants.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

Appellant has the burden under FECA to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.⁷ A schedule award is not payable for a member, function or organ of the body not specified under FECA or in the implementing regulations.

When there exist 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 upon a proper factual background, must be given special weight.⁸

ANALYSIS

In the prior appeal, the Board remanded the case for OWCP to provide the impartial medical examiner, Dr. Menkowitz, with an updated statement of accepted facts that included all

³5 U.S.C. § 8107.

⁴20 C.F.R. § 10.404.

⁵*Id.* at § 10.404(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷*See Veronica Williams*, 56 ECAB 367 (2005); *Annette M. Dent*, 44 ECAB 403 (1993).

⁸*Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

of the accepted conditions, including piriformis syndrome and lumbar radicular syndrome. It instructed OWCP to obtain a supplemental report addressing whether appellant had a permanent impairment as a result of these conditions. In response to OWCP's request for clarification, on February 14, 2012 Dr. Menkowitz advised that appellant did not have a right lower extremity impairment and opined that piriformis syndrome was "nebulous and self-limiting." In a supplemental report dated June 14, 2012, he related that sensory and motor testing of the lower extremities performing during his January 2010 examination yielded normal results.

When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight. In his January 28, 2010 examination, Dr. Menkowitz reviewed appellant's complaints of pain radiating into her right leg and piriformis area soreness. On examination, he found a negative straight leg raise, full range of hip motion bilaterally without pain and no sciatic notch tenderness. Dr. Menkowitz advised that sciatic notch palpation bilaterally failed to "reproduce [appellant's] subjective complaint." On February 14, 2012 he found that she had no right lower extremity impairment. In a supplemental report dated June 14, 2012, Dr. Menkowitz provided rationale for his opinion by explaining that his January 2010 examination yielded found normal results after sensory and motor testing of the lower extremities. The Board finds that this opinion is sufficiently well rationalized and based upon a proper factual background and thus represents the weight of the evidence and establishes that appellant has no permanent impairment due to her work injury.⁹ OWCP's medical adviser reviewed Dr. Menkowitz' report and concurred with his conclusion that appellant had no permanent impairment.

On appeal, counsel argues that Dr. Menkowitz did not measure range of motion, atrophy or motor strength, provide an impairment rating for piriformis syndrome, did not provide the results of neurological testing and did not provide rationale for his opinion. However, as discussed, Dr. Menkowitz provided findings on physical examination which included finding a negative straight leg raise and full range of motion of the hips without pain. He provided rationale by explaining that he had performed motor and sensory testing of the lower extremities and that the results were normal. As the impartial medical examiner, Dr. Menkowitz' opinion is entitled to special weight.

Counsel also maintains that OWCP's medical adviser, who reviewed Dr. Menkowitz' report was on one side of the conflict resolved by the impartial medical examiner. OWCP, however, referred appellant to Dr. Menkowitz to resolve a conflict that arose between Dr. Nicholas P. Diamond, an attending osteopath, and Dr. Noubar Didizian, a Board-certified orthopedic surgeon and OWCP referral physician.

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.

⁹See *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

CONCLUSION

The Board finds that appellant has not established that she is entitled to a schedule award for a permanent impairment of a scheduled member causally related to her March 16, 1993 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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