United States Department of Labor
Employees' Compensation Appeals Board

K.K., Appellant	)	
and	)	**Docket No. 14-1066**
	)	**Issued: December 19, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Melrose Park, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 8, 2014 appellant filed a timely appeal of a January 31, 2014 merit 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 established permanent impairment due to her accepted employment-related condition.

FACTUAL HISTORY

On June 5, 2010 appellant, then a 31-year-old mail carrier, filed a traumatic injury claim alleging that on May 26, 2010 she injured her lower back while unloading a tub of flats. OWCP

[1] 5 U.S.C. § 8101 *et seq.*

accepted the claim for right side lumbar strain, which was expanded to include temporary aggravation of degenerative disc disease and bilateral lumbar radiculopathy.[2]

On June 8, 2011 appellant filed a claim for a schedule award and submitted a June 7, 2011 report from Dr. Jacob Salomon, an examining Board-certified surgeon, who noted the injury and medical history, reviewed objective tests and provided findings on physical examination. A review of an electromyograph (EMG) test revealed L4-S1 left lower lumbar radiculopathy with prolonged latency and no response on stimulation to the sural or peroneal nerves. Dr. Salomon also reported right L4 to S1 distribution prolonged latency with slowing of nerve conduction velocity. A review of a magnetic resonance imaging (MRI) scan showed neuroforaminal stenosis, lumbar spondylosis, and multiple levels of bulging discs. Dr. Salomon indicated that appellant reached maximum medical improvement on May 25, 2011 as there was no change in her symptoms on her return to work. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he found a 16 percent left lower extremity impairment and a 4 percent right lower extremity impairment based on appellant's lumbar radiculopathy and spinal disease.

Using Table 16-12, page 535 placed appellant in class 2 based on her more severe symptoms on the left. Dr. Salomon assigned a grade modifier 2 for functional history due to appellant's inability to walk or stand for prolonged periods of time. Next, he found grade modifier 2 for both clinical studies and physical examination. Using the net adjustment formula, Dr. Salomon determined a final grade of C or 16 percent permanent left lower extremity impairment.

For the right lower extremity, Dr. Salomon assigned class 1 with grade modifier 1 for each functional history, clinical studies, and physical examination as the symptoms on this side were not as severe. Using the net adjustment formula, it resulted in a final grade C with a four percent impairment.

On June 30, 2011 Dr. Nabil F. Angley, an OWCP medical adviser and Board-certified orthopedic physician, reviewed Dr. Salomon's report and concurred with his impairment determination. He identified the sciatic nerve and assigned a class 2 with a default grade C using Table 16-12, page 535. Using the net adjustment formula Dr. Angley assigned a grade modifier 2 for functional history, physical examination, and clinical studies which resulted in a final net adustment of zero. As the next adjustment was zero, the grade remained unchanged with a 16 percent left lower extremity impairment.

Using the same formula for the right side, Dr. Angley found a class 1 with a default grade C and four percent impairment due to the less severe symptoms. Using the net adjustment formula, he assigned a grade modifier 1 for functional history, physical examination, and clinical

[2] OWCP assigned File No. xxxxxx144. On May 1, 2012 OWCP combined File Nos. xxxxxx144, xxxxxx561 and xxxxxx024, with File No xxxxxx561 assigned as the master File No. Under File No. xxxxxx561, OWCP accepted the conditions of aggravated cervical disc disease, bilateral carpal tunnel syndrome, left cubital syndrome, and bilateral shoulder tendinitis with an injury date of March 16, 2011. For File No. xxxxxx024, OWCP noted an injury date of August 27, 2009.

studies which resulted in a final net adustment of zero. As the next adjustment was zero, the grade remained unchanged with a four percent right lower extremity impairment.

By letter dated August 8, 2011, OWCP requested that Dr. Angley determine whether appellant was still at maximum medical improvement in light of additional medical treatment appellant had received since the earlier maximum medical improvement determination.

In an August 18, 2011 report, Dr. Angley recommended asking Dr. Salomon about the date of maximum medical improvement in view of July 1, 2011 therapy notes and a June 20, 2011 medical report indicating that appellant was disabled for work.

In a November 30, 2011 letter, OWCP asked Dr. Anatoly Rozman, appellant's treating Board-certified physiatrist, whether appellant had reached maximum medical improvement.[3] On December 5, 2011 it received a December 2, 2011 prescription which read: "Patient reached maximum medical improvement for her lower extremities lumbar spine injury."

In a letter dated April 18, 2012, OWCP informed appellant that additional issues needed to be resolved before a final impairment rating could be determined. It stated that it was waiting for OWCP File No. xxxxx651 as it covered the same part of the body. OWCP requested appellant to provide a statement as to whether she was performing her full duties and how much walking per day she was doing.

On May 1, 2012 OWCP stated that OWCP File Nos. xxxxxx561, xxxxxx444, and xxxxxx024 should be combined. Under OWCP File No. xxxxxx561, it noted an injry date of March 16, 2011 and that the claim had been accepted for aggravated cervical disc disease, bilateral carpal tunnel syndrome, left cubital syndrome, and bilateral shoulder tendinitis. OWCP accepted the back condition under OWCP File No. xxxxxx024 with an injury date of August 27, 2009. Under OWCP File No. xxxxxx444, it reported the accepted conditions of lumbar back sprain, bilateral lumbar radiculopathy, and temporary aggravation of right degenerative disc disease. OWCP noted that appellant was currently receiving wage-loss compensation for the National Reassessment Program and medical appointments under OWCP File No. xxxxxx651 and requested that this file be made the master file number.

In a July 23, 2012 memorandum to file, OWCP noted that appellant was schedule to have surgery on August 16, 2012. It advised appellant that her schedule award claim was on hold until she returned to full duty following the August 16, 2012 surgery.

On May 22, 2013 appellant filed a new claim for a schedule award.

In a June 6, 2013 letter, OWCP informed appellant that the evidence was insufficient to establish her schedule award and advised her to provide an updated impairment evaluation due to her intervening surgery on August 16, 2012.

[3] By letter of November 23, 2011, OWCP authorized appellant's request to change her treating physician to Dr. Rozman effective that date.

In a July 12, 2013 report, Dr. Rozman reviewed Dr. Salomon's June 7, 2011 impairment rating and performed an examination on July 8, 2013. He concurred with Dr. Salomon's impairment rating of 16 percent left lower extremity impairment and 4 percent right lower extremity impairment. Dr. Rozman stated that there was no change in either the impairment rating or physical examination.

On July 25, 2013 Dr. Morley Slutsky, a physician Board-certified in occupational and preventive medicine and an OWCP medical adviser, reviewed Dr. Salomon's June 7, 2011 impairment rating and concluded appellant had an 11 percent left lower extremity impairment. He advised that there was no right lower extremity impairment as Dr. Salomon had not documented any clinical deficits. Dr. Slutsky determined May 25, 2011 as the date of maximum medical improvement based on Dr. Salomon's report. He recommended referral to a second opinion physician for a more accurate impairment rating.

Using Table 16-11, page 533 Dr. Slutsky considered appellant's sensory deficits for L4 nerve root and determined a severity of 2 or moderate and placed into class 1 with a default grade of three percent. Using the net adjustment formula he assigned grade modifier 1 for functional history, he found the physical examination grade modifier was not relevant, and assigned grade modifier 2 for clinical studies, which resulted in a final net adustment of one. As the next adjustment was one, the grade moved to the right of C resulting in a final default grade of D or four left lower extremity impairment.

Next, Dr. Slutsky considered sensory deficits for the L-5 nerve root using Table 16-11, page 533 and determined a severity of 2 or moderate and placed into class 1 with a default grade of three percent. Using the net adjustment formula, he assigned a grade modifier 1 for functional history, he found the physical examination grade modifier was not relevant, and assigned grade modifier 2 for clinical studies, which resulted in a final net adustment of one. As the next adjustment was one, the grade moved to the right of C resulting in a final default grade of D or four left lower extremity impairment.

Finally, Dr. Slutsky considered appellant's sensory impairment for the S-1 nerve root and determined a severity of 2 or moderate and placed into class 1 with a default grade of three percent. Using the net adjustment formula he assigned a grade modifier 1 for functional history, he found the physical examination grade modifier was not relevant, and assigned grade modifier 2 for clinical studies, which resulted in a final net adustment of one. As the next adjustment was one, the grade moved to the right of C resulting in a final default grade of D or three left lower extremity impairment. Dr. Slutsky then combined the impairment ratings for the L4, L5, and S1 nerve roots to find a total 11 percent left lower extremity impairment.

In a September 23, 2013 report, Dr. Axel Vargas, an examining Board-certified anesthesiologist, conducted an initial evaluation of appellant and performed a physical examination. Diagnoses included lumbar facet pain syndrome, lumbosacral discogenic radiculopathy, lumbosacral discogenic pain syndrome, L5-S1 and L4-5 herniated discs, cervical discogenic radiculopathy, cervical discogenic pain syndrome, cervica facet syndrome, and C3-4 disc herniation. Dr. Vargas indicated that appellant required further treatment for her conditions and that said conditions "were directly related to the injury she sustained."

In November 7, 2013 report, Dr. Allan Brecher, a second opinion Board-certified orthopedic surgeon, based upon a review of the medical records, statement of accepted facts, and physical examination, concluded that appellant had no permanent impairment of the lower extremities. A physical examination revealed intact lower extremities sensibility, no clear Tinel's sign, negative fabere and straight leg raising, no lower extremity pain, and complete joint motion. Under assessment and plan, Dr. Brecher stated that appellant had some spinal stenosis with an EMG "not diagnostic for clear radiculopathy." He indicated that she reached maximum medical improvement on June 27, 2011 the date of Dr. Salomon's impairment rating. Dr. Brecher stated that based on appellant's intact strength and no tension sign there was no objective evidence supporting a lower extremity condition. He determined that maximum medical improvement had been reached as of June 27, 2011, the date of Dr. Salomon's report. Lastly, as there were no lower extremity findings, he found that appellant had no impairment under the sixth edition of the A.M.A., *Guides*.

On December 5, 2013 Dr. Slutsky reviewed the medical evidence and found that maximum medical improvement was November 6, 2012, the date of Dr. Brecher's report. He concurred with Dr. Brecher's opinion that as there were no lower extremity motor or sensory deficits to establish a lower extremity impairment rating using the sixth edition of the A.M.A., *Guides*.

By decision dated January 31, 2014, OWCP denied appellant's claim for a schedule award as she had no permanent impairment due to her accepted employment injuries.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[5] 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[7]

The sixth edition requires identifying the impairment class for the Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH),

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.*

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

Physical Examination (GMPE) and Clinical Studies (GMCS).[8] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. 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/August 2009) is to be applied.[9]

ANALYSIS

OWCP accepted appellant's claim for right side lumbar strain, temporary aggravation of degenerative disc disease and bilateral lumbar radiculopathy. Appellant filed claims for a schedule award on June 8, 2011 and May 22, 2013. By decision dated January 31, 2014, OWCP denied the claim based on the opinion of the second opinion examiner, Dr. Brecher and the review of this report by an OWCP medical adviser.

The Board finds that this case is not in posture for a decision as further development of the evidence is required.

In the June 7, 2011 report, Dr. Salomon found a 16 percent left lower extremity impairment and a 4 percent right lower extremity impairment based on appellant's lumbar radiculopathy and spinal disease. On July 12, 2013 Dr. Rozman, appellant's treating Board-certified physiatrist, reviewed Dr. Salomon's impairment rating and performed a physical examination on July 8, 2013. He stated that he concurred with Dr. Salomon's impairment rating as he found no change in either her physical examination or her impairment rating.

Dr. Brecher, a second opinion physician, in a November 7, 2013 report, opined that appellant had no impairment to either lower extremity based on the A.M.A., *Guides* because of the fact that there was no objective evidence supporting a lower extremity condition due to her intact strength and no tension sign. He indicated that maximum medical improvement had been reached on June 27, 2011. Dr. Slutsky reviewed the medical record and agreed with Dr. Brecher's impairment rating. The Board finds that at the time appellant was referred to Dr. Brecher the record was unclear as to whether appellant had reached maximum medical improvement considering her August 16, 2012 surgery and Dr. Vargas' September 23, 2013 report, which indicated that appellant required further treatment. For these reasons, the Board finds that the opinions of Drs. Brecher and Slutsky are insufficient to find that appellant was not entitled to a schedule award.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[10] While appellant has the burden to establish entitlement to

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

[9] *See L.S.*, Docket No. 13-1703 (issued March 5, 2014); *G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.3.

[10] *R.B.*, Docket No. 08-1662 (issued December 18, 2008); *A.A.*, 59 ECAB 726 (2008); *Donald R. Gervasi*, 57

compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[11] When OWCP undertakes to develop the medical aspects of a case, it must exercise extreme care in seeing that its administrative processes are impartially and fairly conducted.[12] Following such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding whether appellant is entitled to a schedule award for her lower extremity conditions.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 31, 2014 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: December 19, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

ECAB 281 (2005); *Vanessa Young*, 55 ECAB 575 (2004).

[11] *D.N.*, 59 ECAB 576 (2008); *Richard E. Simpson*, 55 ECAB 490 (2004).

[12] *See P.K.*, Docket No. 08-2551 (issued June 2, 2009); *Peter C. Belkind*, 56 ECAB 580 (2005).