

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

T.J., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
PRISON CAMP, Bryan, TX, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 14-556
Issued: July 7, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 13, 2014 appellant filed a timely appeal from a November 15, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for a schedule award. 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 merits of this case.

ISSUE

The issue is whether appellant sustained permanent impairment of her lower extremities due to the accepted lumbar injuries.

On appeal, appellant objected to the report of the second opinion physician and contended that there was a conflict between her physician and the second opinion physician, necessitating an impartial medical examination.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 25, 1998 appellant, then a 28-year-old correctional officer, injured herself while attending basic prisoner transportation training. She pulled muscles in her low back while attempting to physically lift another officer out of a chair. OWCP accepted appellant's claim for a lumbar sprain and displacement of a lumbar intervertebral disc without myelopathy. Appellant underwent lumbar spinal surgery on May 20, 2011.

On November 19, 2012 appellant filed a claim for a schedule award based on her accepted lumbar injury.

In a September 18, 2012 note, Dr. Rogelio G. Rodriguez, a chiropractor, diagnosed appellant's condition as status postoperative, lumbar spine, intervertebral disc syndrome, lumbar spine and radiculitis, lumbar spine. He stated that she had reached maximum medical improvement. Dr. Rodriguez noted that appellant's whole person impairment of the lumbar spine was 12 percent based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th edition 2008) (A.M.A., *Guides*). He stated that Table 17-4, page 570 was utilized to determine impairment rating class which was calculated under Figure 17-2, page 561, Spine and Pelvis Impairment Evaluation Record. OWCP forwarded this report to Dr. Stephen I. Esses, a Board-certified orthopedic surgeon, who signed the report on December 20, 2012. In a November 8, 2012 note, Dr. Esses indicated that appellant had returned to work full time. He agreed that she had 12 percent impairment.

On August 5, 2013 Dr. Ronald Blum, an OWCP medical adviser reviewed the medical evidence from Dr. Rodriguez and Dr. Esses. He noted that, for purposes of determining permanent impairment, ratings of the spine or whole person were not set forth as schedule members. Dr. Blum noted that Dr. Rodriguez did not provide an adequate description of abnormalities to recommend impairment of either lower extremity. He recommended that OWCP obtain an impairment rating from a Board-certified specialist.

On September 23, 2013 OWCP referred appellant to Dr. Ivan J. Antosh, a Board-certified orthopedic surgeon, for a second opinion. In an October 11, 2013 report, Dr. Antosh reviewed appellant's medical, work and social histories and the statement of accepted facts. He diagnosed lumbar sprain/strain and lumbar disc herniation at L5-S1. Dr. Antosh noted that the lumbar spine injury was to be rated using the July to August 2009 *The Guides Newsletter* (*Guides Newsletter*) for spinal nerve injuries resulting in lower extremity impairment. On examination, appellant had normal lower extremity sensation on soft touch and 5/5 motor testing throughout both lower extremities. Dr. Antosh did not find any evidence of lumbar radiculopathy resulting in sensory or motor deficits on examination and therefore appellant had a zero percent (no) impairment for the accepted lumbar sprain and lumbar disc herniation.

On November 14, 2013 Dr. Michael M. Katz, an OWCP medical adviser reviewed Dr. Antosh's report. He noted that FECA does not provide for a schedule award of the spine and that a diagnosed injury originating in the spine may be considered only to the extent that it resulted in permanent impairment of the extremities as manifested through spinal nerve impairment. Using *The Guides Newsletter* of July to August 2009, Dr. Katz noted that, under proposed table two, the findings documented by Dr. Antosh resulted in class 0 impairment, both

motor and sensory, for all lumbar spinal nerves in the table, which represented a zero percent impairment to each lower extremity. He noted that Dr. Antosh properly documented a detailed neurological examination of the lower extremities with respect to spinal nerve motor and sensory function and found no abnormalities. This resulted in no impairment of either lower extremity.

By decision dated November 15, 2013, OWCP denied appellant's claim for a schedule award. It found that the medical evidence was not sufficient to establish that she sustained permanent impairment to either leg due to her accepted lumbar injury.

LEGAL PRECEDENT

The schedule award provision of FECA² and its implementing regulations³ 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 stands applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁴ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.⁶ Neither FECA nor the implementing federal regulations provide for payment of a schedule award for the permanent loss of use of the back, the spine or the body as a whole; a claimant is not entitled to such a schedule award.⁷ The Board notes that section 8101(19) specifically excludes the back from the definition of organ.⁸ A claimant may receive a schedule award for any permanent impairment to the upper or lower extremities even though the cause of the impairment originated in the spine.⁹

² *Id.* at § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.* For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

⁵ *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁶ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁷ *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

⁸ 5 U.S.C. § 8101(19).

⁹ *Supra* note 6.

The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve impairment, set forth in the July to August 2009 *The Guides Newsletter*.¹⁰ It was designed for situation in which a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.¹¹ The Board has recognized the adoption of this methodology as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.¹²

ANALYSIS

OWCP accepted appellant's claim for sprain of the back, lumbar region and displacement of lumbar intervertebral disc without myelopathy. Appellant filed a claim for a schedule award. OWCP determined that she did not establish a ratable impairment to her lower extremities.

Dr. Rodriguez determined that appellant had whole person impairment of the spine of 12 percent. Dr. Esses countersigned this report. The Board notes that FECA does not authorize schedule awards for loss of use of the body as a whole or the back or spine.¹³ This report, therefore, is of little probative value.¹⁴ Dr. Blum reviewed the report of Dr. Rodriguez, and noted that FECA does not allow impairment for whole person or the spine. Further Dr. Rodriguez did not provide sufficient findings on examination to allow for an impairment rating to appellant's legs. OWCP referred appellant to Dr. Antosh, who applied the A.M.A., *Guides* and *The Guides Newsletter* to determine that she had a zero percent impairment of either lower extremity due to the accepted lumbar sprain and lumbar disc herniation. Dr. Katz reviewed his report and determined that as there were no abnormalities to appellant's lower extremities with respect to spinal nerve motor or sensory function. He agreed that there was a zero percent impairment to her lower extremities and that she had no ratable impairment for schedule award purposes. There is no current medical evidence in conformance with the A.M.A., *Guides* to establish permanent impairment.¹⁵

On appeal, appellant contends that Dr. Antosh did not conduct a thorough examination and was biased. The Board notes that she has not submitted any evidence to establish that Dr. Antosh conducted an inadequate physical examination or that he was biased in his consideration of the case.¹⁶ Appellant also contended that there was an unresolved conflict

¹⁰ The methodology and applicable tables were published in *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July to August 2009).

¹¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4.

¹² *D.S.*, Docket No. 14-12 (issued March 18, 2014).

¹³ *M.E.*, Docket No. 13-159 (issued May 14, 2013).

¹⁴ *J.S.*, Docket No. 13-381 (issued April 26, 2013).

¹⁵ *T.R.*, Docket No. 12-988 (issued February 22, 2013).

¹⁶ See *D.C.*, Docket No. 12-1921 (issued August 13, 2013).

between Dr. Rodriguez and Dr. Esses and the second opinion physician, Dr. Antosh. As noted by Dr. Blum, OWCP procedures do not recognize impairment of the spine or whole person as compensable. Dr. Rodriguez found no neurologic deficit from which an impairment to the lower extremities could be calculated.¹⁷ Accordingly, the medical evidence is not sufficient to create a conflict in medical opinion. The weight of medical opinion as represented by Dr. Antosh, does not support permanent impairment to appellant's legs.

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

Appellant has not established that he sustained a ratable impairment of his lower extremities due the accepted lumbar injuries.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 15, 2013 is affirmed.

Issued: July 7, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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

¹⁷ See *supra* note 13.