United States Department of Labor
Employees' Compensation Appeals Board

B.T., Appellant	)	
and	)	**Docket No. 13-2128**
	)	**Issued: March 10, 2014**
DEPARTMENT OF COMMERCE, CENSUS BUREAU, Detroit, MI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 17, 2013 appellant, through her attorney, filed a timely appeal of a July 3, 2013 Office of Workers' Compensation Programs' (OWCP) merit decision addressing her schedule award claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has a ratable impairment of her right leg warranting a schedule award.

On appeal, counsel argued that appellant had an abnormal electromyogram (EMG) which was objective evidence of nerve root impairment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 5, 2010 appellant, then 75-year-old enumerator, sustained injury when she fell on her right side injuring her shoulder and hip in the performance of duty. Emergency room notes diagnosed right shoulder and hip pain and hip contusion. OWCP accepted appellant's claim for sprain of the right shoulder and upper arm as well as right rotator cuff, contusion of the hip and thoracic or lumbar neuritis or radiculitis.

Appellant underwent hip x-rays on May 5, 2010 which demonstrated mild osteoarthritis in the hips bilaterally. Shoulder x-rays demonstrated mild osteoarthritis of the right glenohumeral joint. On November 30, 2010 appellant underwent a right hip magnetic resonance imaging (MRI) scan which was normal. She underwent electromyogram testing on December 15, 2010 which demonstrated "subtle evidence of injury to the right L5 root possible extending to the S1 root."

Appellant's attending physician, Dr. Todd S. Hochman, a Board-certified internist, examined her on December 29, 2010. He found that appellant's electrodiagnostic studies demonstrated nerve irritation at L5 and S1 on the right. Appellant reported burning pain in her right lower extremity and the physician opined that she developed lumbar radiculitis as a result of her May 5, 2010 employment injury.

On January 25, 2011 appellant underwent an MRI scan which demonstrated herniated discs at T10-11 and L2-3, grade 1 spondylolisthesis at L5 and minimal retrolisthesis at L5-S1.

Counsel requested a schedule award on March 7, 2011. Dr. William N. Grant, a Board-certified internist, completed an impairment rating on February 23, 2011. He noted that appellant experienced constant pain in her right shoulder radiating down her right arm as well as right hip and leg pain and numbness radiating down her right leg to the medial and lateral foot. Dr. Grant found that she had difficulty performing her activities of daily living. He opined that appellant reached maximum medical improvement on February 23, 2011. Dr. Grant reported that she had limited range of motion of the right shoulder and tenderness to palpation with good range of motion in her right hip. He diagnosed right sprain rotator cuff, contusion of the hip and lumbosacral neuritis.

Dr. Grant applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition)[2] and found that appellant had a class 2 injury of her right shoulder with a functional history grade modifier of 3, physical examination modifier of 3 and a net adjustment of 2 for 25 percent impairment of the arm based on brachial plexus impairment. He provided citations to the provisions that he utilized in the A.M.A., *Guides*.

In regard to appellant's lower extremities, Dr. Grant diagnosed sciatic and moderate motor deficit utilizing Table 16-12, page 535 of the A.M.A., *Guides*. He found that appellant

[2] 20 C.F.R. § 10.404. 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).

had a functional history modifier of 2, per Table 16-6, page 516; and a physical examination modifier of 2, per Table 16-7, page 517 for 25 percent right lower extremity impairment.

OWCP referred the record to Dr. Brain M. Tonne, a medical adviser, on April 12, 2011. On April 18, 2011 Dr. Tonne opined that Dr. Grant's impairment rating was not consistent with the A.M.A., *Guides*. He noted that Dr. Grant did not provide adequate documentation of appellant's physical examination and the upper extremity impairment rating was not consistent with appellant's diagnosed condition or the A.M.A., *Guides*. Dr. Tonne recommended additional development.

On April 26, 2011 OWCP referred appellant for a second opinion evaluation to Dr. Robert J. Nickodem, Jr., a Board-certified orthopedic surgeon. In a report dated May 17, 2011, Dr. Nickodem reviewed the statement of accepted facts, medical records and examined appellant. He found that she had no current pain and reported occasional burning pain in the right thigh. Dr. Nickodem reported appellant's range of motion in her right shoulder as 135 degrees of abduction, 180 degrees of forward flexion, 60 degrees of extension, 90 degrees of internal rotation 90 degrees of external rotation and 45 degrees of adduction. He found normal rotator cuff and deltoid function strength. Dr. Nickodem stated that appellant had a positive impingement sign with resisted abduction and forward flexion. He noted no intrinsic wasting or atrophy and intact sensation.

As to appellant's lumbar spine, Dr. Nickodem found no tenderness or muscle spasm. Appellant had no complaint of radicular pain when she bent over to touch her toes. Dr. Nickodem stated that she had some vague complaints of right buttock pain occasionally when seated. He listed appellant's range of motion of her hips as symmetrical. Dr. Nickodem reported that sensation was intact to all dermatomes in her right lower extremity and that reflexes were symmetrical. He reported appellant's *Quick*DASH score as 48 and her pain disability questionnaire as 35.

Dr. Nickodem stated that appellant had pain in her right shoulder with resisted abduction and forward flexion consistent with persistent tendinitis of the rotator cuff tendons. He found no evidence of any residuals of her right hip contusion or evidence of any lumbar radiculitis. Dr. Nickodem applied the A.M.A., *Guides* to his findings and concluded that appellant had persistent tendinitis in the right shoulder. He applied Table 15-5 to rate a class 1 impairment due to pain with function. Dr. Nickodem found a functional history grade modifier of 2 based on appellant's *Quick*DASH score and a physical examination grade modifier of 1 with mild findings, good range of motion and good strength but pain on resisted abduction. He found a clinical studies grade modifier of 1 based on mild arthritis. Dr. Nickodem concluded that appellant had a net adjustment of 1 or grade D under Table 15-5 for four percent right upper extremity impairment.

Dr. Nickodem stated that he found no ratable impairment in the right lower extremity. He reviewed Dr. Grant's findings of lower extremity impairment and noted that appellant's current examination revealed normal motor strength with no complaint of weakness or radicular pain. Further, appellant's sensory examination was normal. In regards to Dr. Grant's upper extremity impairment, Dr. Nickodem concluded that there was no clinical evidence of a brachial plexus injury as appellant had normal motor strength and no sensory deficits.

Dr. Tonne reviewed this report on May 31, 2011 and agreed with Dr. Nickodem's findings and conclusions. He stated that appellant had no residual objective findings of lower extremity impairment. Dr. Tonne also applied the formula of the A.M.A., *Guides* to Dr. Nickodem's grade modifiers and concurred that appellant had four percent impairment of her right arm.

By decision dated January 10, 2013, OWCP granted appellant a schedule award for four percent impairment of her right arm. It found no impairment of her right leg.

Counsel requested an oral hearing on January 15, 2013. At the oral hearing, he agreed with Dr. Nickodem's impairment rating of appellant's right arm but contended that she was entitled to a schedule award due to impairment of her right leg. Appellant testified that she continued to experience burning pain in her right thigh. Counsel also contended that there was a conflict of medical opinion evidence between Dr. Nickodem and Dr. Grant regarding appellant's lower extremity impairment.

By decision dated July 3, 2013, OWCP's hearing representative affirmed the January 10, 2013 decision. She found that Dr. Nickodem and Dr. Tonne were entitled to the weight of the medical evidence as to appellant's right leg impairment.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards 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*.[5]

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or in the implementing regulations.[6] The list of scheduled members includes the eye, arm, hand, fingers, leg, foot and toes.[7] Additionally, FECA specifically provides for

[3] 5 U.S.C. §§ 8101-8193, 8107.

[4] 20 C.F.R. § 10.404.

[5] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[6] *C.B.*, Docket No. 13-1516 (issued December 6, 2013); *Anna V. Burke*, 57 ECAB 521 (2006).

[7] 5 U.S.C. § 8107(c).

compensation for loss of hearing and loss of vision.[8] By authority granted under FECA, the Secretary of Labor expanded the list of scheduled members to include the breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix and vulva/vagina and skin.[9]

Neither, FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[10] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[11] The sixth edition of the A.M.A., *Guides* does not provide a specific methodology for rating spinal nerve extremity impairment.[12] It was designed for situations where 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 FECA procedure manual.[13] Specifically, it will address lower extremity impairments originating in the spine through Table 16-11 and upper extremity impairment originating in the spine through Table 15-14.[14]

ANALYSIS

The Board notes that appellant did not dispute her right upper extremity rating of four percent. Appellant contends that she also has a ratable impairment of her right leg due to her accepted condition of lumbar neuritis or radiculitis.

Dr. Grant provided an impairment rating of appellant's lower extremity diagnosing sciatic and moderate motor deficit utilizing Table 16-12, page 535 of the A.M.A., *Guides*. He found that she had a functional history modifier of 2 and a physical examination modifier of 2 for 25 percent right lower extremity impairment. On April 18, 2011 Dr. Tonne determined that Dr. Grant's impairment rating was not consistent with the A.M.A., *Guides*. He noted that Dr. Grant did not provide adequate documentation of appellant's physical examination. It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides,* his or her opinion is of diminished probative value in establishing the degree of permanent impairment and OWCP may rely on the opinion of its medical adviser.[15] The Board finds that Dr. Grant did not apply the appropriate table for lower extremity impairments resulting from spine injuries. Further, Dr. Tonne determined that his

[8] *Id.*

[9] *Id.*; 20 C.F.R. § 10.404(b).

[10] *Id.*; *see Jay K Tomokiyo*, 51 ECAB 361 (2000).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards*, Chapter 2.808.6a (January 2010).

[12] The methodology and applicable tables were published in the July/August 2009 edition of *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition.

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

[14] A.M.A., *Guides* 533, 425.

[15] *Linda Beale*, 57 ECAB 429, 434 (2006).

findings were not sufficient to determine a rate based on the A.M.A., *Guides.* For these reasons, the Board finds that Dr. Grant's impairment rating is of reduced probative value and insufficient to create a conflict in medical opinion.

OWCP properly referred appellant to Dr. Nickodem for further evaluation. In regard to her lumbar spine, Dr. Nickodem found no tenderness or muscle spasm. He found that appellant had no complaints of radicular pain when she bent over to touch her toes. Dr. Nickodem stated that she had some vague complaints of right buttock pain occasionally when seated. He advised that appellant's range of motion of her hips was symmetrical. Dr. Nickodem reported that sensation was intact to all dermatomes in her right lower extremity and that reflexes were symmetrical. He did not find any ratable impairment in the right lower extremity. Dr. Nickodem reviewed Dr. Grant's findings of lower extremity impairment but stated that appellant had normal motor strength with no complaint of weakness or radicular pain and that her sensory examination was normal. The Board finds that the weight of the medical evidence as represented by Dr. Nickodem establishes that appellant did not sustain permanent impairment to her right leg. Without findings of impairment of the lower extremity based on physical examination, the electrodiagnostic results alone are not sufficient to establish impairment under the A.M.A., *Guides*.

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 a ratable impairment of her right lower extremity entitling her to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2014
Washington, DC

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

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

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