

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Atlanta, GA, Employer**

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**Docket No. 14-242
Issued: May 9, 2014**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 15, 2013 appellant, through his attorney, filed a timely appeal from a September 6, 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 jurisdictions over the merits of this case.

ISSUE

The issue is whether appellant has established an employment-related permanent impairment to a scheduled member or function of the body entitling him to a schedule award under 5 U.S.C. § 8107.

FACTUAL HISTORY

The case was before the Board on a prior appeal. In a decision dated August 15, 2011, the Board found that a conflict in the medical evidence existed on the issue of an employment-

¹ 5 U.S.C. § 8101 *et seq.*

related permanent impairment.² As the Board noted, the conditions accepted as causally related to the June 4, 2002 motor vehicle accident were cervical and lumbar strains, left knee contusion and herniated discs at L4-5 and L5-S1. The case was remanded to OWCP for resolution of the conflict. The history of the case as provided in the August 15, 2011 Board decision is incorporated herein by reference.

On return of the case record, OWCP selected Dr. Gordon Hardy, a Board-certified orthopedic surgeon, as a referee physician. An August 23, 2011 statement of accepted facts (SOAF) reported the accepted left knee condition as a sprain and indicated that the condition of aggravation of cervical degenerative disc disease was accepted as employment related. In a report dated October 6, 2011, Dr. Hardy provided a history and results on examination. He stated that appellant had some mild paracervical and paralumbar tenderness, with no radicular symptoms and full range of motion of both arms and legs, including both knees. He reported motor function and sensation were intact. Dr. Hardy stated that objective findings were “minimal.” He noted that under FECA no spinal impairment was permitted but impairments could be found under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and, for spinal nerve impairments affecting the extremities, the July/August 2009 *The Guides Newsletter* was used. The referee physician opined:

“[Appellant] does have degenerative disc disease in the cervical and lumbar spine as documented by multiple magnetic resonance imaging (MRI) scans during his treatment course. However upon physical examination the patient has no evidence of radicular signs or symptoms in the upper or lower extremities today. Further, the most recent NOV study does not demonstrate any evidence of radiculopathy or nerve root impairment into the lower extremity as previously noted.

“Therefore, based on the specific parameters as outlined above regarding FECA, Awards for Permanent Impairment in relation to a spinal nerve injury, there is no basis for impairment on upper or lower extremities caused by injury to a spinal nerve. The patient has a zero percent impairment rating at this time regarding his lumbar condition as well as his left knee sprain.”

On January 6, 2012 OWCP prepared a new SOAF that indicated that accepted left knee injury was a contusion, and referred the case to Dr. Hardy for an additional report. By report dated July 16, 2012, Dr. Hardy noted that a left knee contusion was accepted, and reiterated that appellant had full range of motion in the knee. He opined that there was no impairment to the left knee and that the left knee contusion would have resolved during the course of treatment.

By decision dated July 25, 2012, OWCP found appellant was not entitled to any schedule award based on the evidence of record. Appellant requested a hearing and, by decision dated January 22, 2013, OWCP’s hearing representative remanded the case. The hearing representative found that OWCP procedures required referral of the evidence to an OWCP medical adviser for an opinion as to permanent impairment.

² Docket No. 11-270 (issued August 15, 2011).

In a report dated January 25, 2013, OWCP's medical adviser indicated that he had reviewed the evidence. The medical adviser opined that the reports from Dr. Hardy were excellent reports that properly applied the A.M.A., *Guides*.

By decision dated February 4, 2013, OWCP again found that appellant was not entitled to a schedule award.

Appellant requested a hearing before an OWCP hearing representative, which was held on June 11, 2013. He submitted reports dated March 4, April 1 and June 3, 2013 from Dr. Bradley Katz, a Board-certified anesthesiologist, regarding lumbar pain treatment.

In a decision dated September 6, 2013, OWCP's hearing representative affirmed the February 4, 2013 OWCP decision. The hearing representative found the weight of the evidence was represented by Dr. Hardy.

LEGAL PRECEDENT

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.³ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁴ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁵

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of "organ" under FECA.⁶ 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.⁷

³ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(b).

⁴ A. George Lampo, 45 ECAB 441 (1994).

⁵ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁶ See James E. Jenkins, 39 ECAB 860 (1988); 5 U.S.C. § 8101(20).

⁷ 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 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

It is well established that when a case is referred to a referee specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁸

ANALYSIS

In the prior decision, the Board found that a conflict existed with respect to a permanent impairment and the case was remanded for selection of referee physician in accord with 5 U.S.C. § 8123(a). Dr. Hardy was selected as a referee physician and provided reports dated October 6, 2011 and July 16, 2012. The referee physician opined that appellant did not have a permanent impairment under the A.M.A., *Guides* for spinal nerve injuries. Dr. Hardy explained that the objective findings were minimal, there were no radicular symptoms, the motor and sensory functions were intact, and there was full of range of motion. Based on these examination findings, Dr. Hardy found no ratable permanent impairment for spinal nerve injuries.

By report dated July 16, 2012, Dr. Hardy noted that a left knee contusion was accepted, and reiterated that appellant had full range of motion in the knee. He opined that there was no impairment to the left knee and that the left knee contusion would have resolved during the course of treatment.

As noted above, the opinion of a referee physician, if based on a proper factual and medical background and accompanied by medical rationale, is entitled to special weight. Medical rationale is a medically sound explanation for the opinion offered.⁹ Dr. Hardy's opinion was a logical, sound result of his examination findings and review of the evidence of record. The Board finds that the opinion of the referee physician, Dr. Hardy, is entitled to special weight and represents the weight of the evidence. OWCP's medical adviser also concurred with the opinion of Dr. Hardy.¹⁰ Appellant submitted reports from Dr. Katz, who did not address the issue of an employment-related permanent impairment to a scheduled member or function of the body. These reports are of limited probative value to the issue presented.

On appeal, appellant's representative argues that OWCP should not rely on *The Guides Newsletter* for impairment ratings, as the methodology is "pseudoscience" or "junk science." As noted above, OWCP has adopted the use of *The Guides Newsletter* in its procedures for peripheral nerve impairments based on spinal nerve injuries. The Board has recognized that the methodology found in *The Guides Newsletter* should be used to properly determine an impairment to the extremities from spinal injuries.¹¹ The argument that the methodology in *The*

⁸ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

⁹ See *Ronald D. James, Sr.*, Docket No. 03-1700 (issued August 27, 2003); *Kenneth J. Deerman*, 34 ECAB 641 (1983) (the evidence must convince the adjudicator that the conclusion drawn is rational, sound and logical).

¹⁰ The Board notes that while an OWCP medical adviser may review the findings of a referee physician it is the referee who must resolve the conflict. See *Thomas J. Fragale*, 55 ECAB 619 (2004).

¹¹ See *M.W.*, Docket No. 13-928 (issued August 15, 2013).

Guides Newsletter is flawed and represents “junk science” has been considered by the Board and found to be without merit.¹²

The Board finds that OWCP properly determined that appellant was not entitled to a schedule award based on the weight of the medical evidence. Appellant may request a schedule award at any time before OWCP based on the submission of probative evidence as to an employment-related permanent impairment to a scheduled member or function of the body under 5 U.S.C. § 8107 and 20 C.F.R. § 10.404.

CONCLUSION

The Board finds that appellant has not established an employment-related permanent impairment to a scheduled member or function of the body entitling him to a schedule award under 5 U.S.C. § 8107.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated September 6, 2013 is affirmed.

Issued: May 9, 2014
Washington, DC

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

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

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

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