United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 14-774**
	)	**Issued: November 3, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 21, 2014 appellant, through his attorney, filed a timely appeal from a December 30, 2013 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 sustained ratable impairments of his upper extremities due to his accepted cervical injuries.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant also filed a claim for a schedule award based on his accepted lumbar condition. As that aspect of the case is before OWCP, it is not an issue in the present appeal. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

By decision dated April 24, 2001, OWCP accepted that on March 20, 2001 appellant, then a 53-year-old letter carrier, sustained a lumbar strain and a cervical strain due to a motor vehicle incident. He returned to work as of March 21, 2001 on limited duty. Appellant retired from the employing establishment on January 2, 2009.

On February 2, 2010 appellant's attorney submitted a report from Dr. William N. Grant, a Board-certified internist, who diagnosed appellant with lumbar, thoracic and cervical strains. Dr. Grant stated that appellant had reached maximum medical improvement (MMI) as of the date of evaluation on January 8, 2010. He examined appellant's cervical spine, noting that the normal curvature had diminished. Appellant had flexion to 10 degrees; extension to 0; left lateral rotation to 20 degrees; right lateral rotation to 20 degrees; left lateral bending to 10 degrees; and right lateral bending to 10 degrees. Dr. Grant also provided examination findings relative to appellant's thoracic spine, lumbar spine and lower extremities. On February 24, 2010 appellant filed a claim for a schedule award.

On March 8, 2010 OWCP forwarded a statement of accepted facts and the medical record to an OWCP medical adviser for review. Appellant was asked to provide a rating if sufficient findings were given and to state a date of MMI.

In a schedule award worksheet dated May 8, 2010, an OWCP medical adviser stated that appellant had a left upper extremity sensory permanent impairment of zero percent and a left upper extremity motor impairment of zero percent, resulting in a zero percent total left upper extremity partial impairment. He based his impairment rating on the examinations of Dr. Grant, noting a default impairment of a C5 nerve impairment with a class 1 grade C (mild) sensory deficit of one percent and a class 1 grade C (mild) motor deficit of four percent. The medical adviser made adjustments to the default impairment based on a grade zero functional history and grade zero clinical studies, noting that no clinical studies had been provided. He stated that the date of MMI was difficult to determine, but that it was his opinion that appellant had obtained MMI by November 19, 2007.

On June 8, 2011 OWCP forwarded the medical adviser's report, the medical record and a statement of accepted facts to another medical adviser for review.

By letter dated June 12, 2011, Dr. Brian M. Tonne, an OWCP medical adviser, explained that the accepted diagnoses were cervical and lumbar strain, which implied there had been no neurologic injury or impairment to any of the extremities. If these were the only allowed diagnoses, determining any extremity impairment would be a moot point because by default the impairment would be zero percent. Dr. Tonne stated that further medical examination was warranted to address whether there was any residual extremity impairment that would justify an expansion of work-related diagnoses to include radiculopathy affecting any of the extremities. If such an expansion were justified, any impairment rating should be based on the A.M.A., *Guides* and the July/August 2009 *The Guides Newsletter*.

On February 13, 2013 OWCP referred appellant for a second opinion examination to determine whether he sustained permanent impairment and the date of MMI.

In a report dated February 28, 2013, Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon, reviewed appellant's medical file, set forth findings on examination and responded to OWCP's queries. On examination appellant's cervical spine and upper extremities revealed 35 degrees of forward flexion of the neck; 25 degrees of extension; 30 degrees each of left and right lateral bending; 50 degrees of left rotation; and 30 degrees of right rotation. He noted poor effort to left rotation of the cervical spine and full range of motion of his elbows and fingers. On examination of the right shoulder, Dr. Ghanma noted 125 degrees of forward flexion, 45 degrees of extension, 100 degrees of abduction, 15 degrees of adduction and 90 degrees each of internal and external rotation of the right shoulder. On examination of the left shoulder, he noted 115 degrees of forward flexion, 45 degrees of extension, 100 degrees of abduction, 15 degrees of adduction and 90 degrees each of internal and external rotation of the right shoulder. Dr. Ghanma opined that appellant was likely at MMI within three months of his work-related injury based on the allowed conditions and placed the date of MMI at June 20, 2001. This date was selected based on normal healing time for similar injuries, as opposed to any specific documentation of record. Dr. Ghanma did not find evidence of radiculopathy on physical examination or on review of the medical record, noting that appellant's diagnoses affecting his extremities were likely related to degenerative changes. He determined that no impairment rating was appropriate for the upper extremities, or appellant's impairment for both upper extremities was zero percent by default.

On March 19, 2013 OWCP forwarded the case file to an OWCP medical adviser for review.

On April 25, 2013 Dr. Nabil F. Angley, an OWCP medical adviser, reviewed Dr. Ghanma's report and agreed that appellant had no upper extremity permanent impairment. Dr. Angley concurred with Dr. Ghanma's date of MMI.

By decision dated May 1, 2013, OWCP denied appellant's schedule award claim. It found that the medical evidence did not establish a ratable impairment of either upper extremity. It noted that Dr. Ghanma and Dr. Angley agreed that appellant did not have a ratable impairment of either upper extremity.

In a May 2, 2013 letter, appellant, through his attorney, requested a telephonic hearing, held on October 23, 2013. At the hearing, counsel noted that OWCP had not yet determined the extent of any impairment to appellant's lower extremities. He requested that the hearing representative remand the case to OWCP to issue a decision regarding the lower extremities.

In a December 30, 2013 decision, an OWCP hearing representative affirmed the May 1, 2013 decision, finding that the medical evidence did not establish any permanent impairment to appellant's upper extremities. There was no evidence of radiculopathy or spinal nerve root damage that would cause a permanent 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 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.[5]

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.[6] Neither FECA nor the implementing federal regulations provide for the payment of a schedule award for the permanent loss of use of the back and spine.[7] No claimant is entitled to such an award.[8] In 1966 amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provision of FECA includes the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[9]

The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment, set forth in the July/August 2009 *The Guides Newsletter*.[10] It was designed for situations 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

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*.; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[6] *Henry B. Floyd, III*, 52 ECAB 220 (2001).

[7] FECA specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

[8] *Thomas Martinez*, 54 ECAB 623 (2003).

[9] *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

[10] The methodology and applicable tables were published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009).

[11] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[12]

ANALYSIS

OWCP accepted that appellant sustained lumbar and cervical sprain. Appellant claimed that he sustained permanent impairment of the upper extremities. Although FECA does not provide a schedule award for the back or spine, impairment of the extremities due to a spinal injury may be compensable.[13] The Board finds appellant did not submit sufficient medical evidence to establish permanent impairment of either upper extremity due to the accepted cervical conditions.

OWCP forwarded Dr. Grant's report to an OWCP medical adviser, who determined that the findings on physical examination did not reveal any sensory or motor impairment to either arm due to the accepted cervical strain. Dr. Tonne, the second medical adviser, recommended that appellant be referred for a second opinion examination on the issue of permanent impairment.

After reviewing the medical record and statement of accepted facts, Dr. Ghanma did not find evidence of cervical radiculopathy on examination or on examinations of the medical record, noting that appellant's diagnoses affecting his extremities were likely related to degenerative changes instead. He determined that no impairment rating was appropriate for the upper extremities and that as such, appellant's upper extremity impairment for both upper extremities was zero percent by default. Dr. Angley, a medical adviser, reviewed Dr. Ghanma's report and agreed there was no evidence of neuropathy or radiculopathy affecting the arms. Appellant had zero percent impairment of his upper extremities.

The Board finds that OWCP properly afforded Dr. Ghanma the weight of the medical evidence, his opinion on permanent impairment as was rendered in conformance with the sixth edition of the A.M.A., *Guides*.[14] As noted, FECA precludes ratings for the spine, but allows for impairment of the extremities.

Dr. Ghanma and Dr. Angley explained that there was no evidence of radiculopathy to either arm based on appellant's physical examination and a review of the medical evidence with the applicable protocols and tables of the A.M.A., *Guides*.[15] Therefore, OWCP's December 30, 2013 decision denying a schedule award was proper under the law and facts of the case.

[12] *D.S.*, Docket No. 14-12 (issued March 18, 2014); *D.S*, Docket No. 13-2011 (issued February 18, 2014).

[13] *See supra* note 9.

[14] The Board notes that, while some documents refer to Dr. Ghanma as an independent medical examiner, others refer to him as a second opinion physician. The Board finds that Dr. Ghanma was a second opinion physician in this case. Dr. Ghanma's reports are entitled to their own intrinsic value, as they were fully rationalized and stated in conformance with the A.M.A., *Guides*, but are not afforded the special weight of an independent medical examiner. This is because appellant was advised in a February 14, 2013 letter that Dr. Ghanma was a second opinion physician. *See B.P.*, Docket No. 08-1457 (issued February 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[15] *See S.S.*, Docket No. 13-2044 (issued February 20, 2014).

On appeal, counsel asserts that OWCP's rating methodology for determining impairment originating in the spine amounts to "junk science." The Board has held that OWCP's reliance on the July/August 2009 *The Guides Newsletter* as incorporated into the Federal (FECA) Procedure Manual is a proper exercise of discretion.[16]

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 that he sustained a ratable permanent impairment of either upper extremity causally related to the accepted cervical injuries.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 30, 2013 is affirmed.

Issued: November 3, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[16] *Supra* note 9.