United States Department of Labor
Employees' Compensation Appeals Board

H.L., Appellant	)	
and	)	
DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Washington, DC, Employer	)	**Docket No. 14-1891** **Issued: February 12, 2015**

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

Case submitted on the record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 8, 2014 appellant filed a timely appeal from a May 9, 2014 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 appellant's claim.

ISSUE

The issue is whether appellant met her burden of proof to establish that she has more than: two percent impairment of the right arm; two percent impairment of the left arm; or one percent impairment of the left leg, for which she has received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been on appeal before the Board. In a decision dated August 15, 2012, the Board found that appellant did not meet her burden of proof to establish that she had an impairment caused by her accepted employment injuries that would entitle her to receive a schedule award.[2] The facts of the case, as set forth in the prior decision, are incorporated by reference. The relevant facts include that the claim was accepted for aggravation of lumbosacral radiculitis, aggravation of displacement of lumbar intervertebral disc without myelopathy L5-S1, aggravation of cervical radiculitis C6-7, aggravation of degeneration of cervical intervertebral disc C6-7, and aggravation of cervical facet syndrome.

On November 29, 2013 appellant filed a claim for a schedule award. She submitted a November 25, 2013 report from Dr. Robert W. Macht, a Board-certified surgeon, who noted appellant's history of injury and treatment. Examination findings included decreased sensation to light touch about the right thumb and all of the fingers of the left hand; mild weakness of the right hand grip and moderate weakness of the left hand grip; mild weakness at the right elbow; and pain with squeezing. Sensation was intact to two-point discrimination. Dr. Macht diagnosed occupational injury to the neck and back with cervalgia, lumbalgia, and radiculopathy. He noted that April 2011 nerve studies of the lower extremities revealed evidence of moderate acute left L5 radiculopathy. Furthermore, January 2010 nerve studies of the upper extremities revealed evidence of moderate acute right C6 and C7 radiculopathy. Dr. Macht referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2008) (A.M.A., *Guides*) and explained that *The Guides Newsletter* offered an approach to rating spinal nerve impairments consistent with sixth edition methodology. He referred to page four of *The Guides Newsletter* and determined that appellant had a mild class 1 sensory and mild motor deficit of both C6 and C7 as determined by the nerve study in January 2010. Dr. Macht referred to Table 15-7[3] and her *Quick*DASH questionnaire, and assigned grade modifier 2. He found two percent impairment of the right upper extremity due to the mild sensory loss at C6 and one percent impairment of the right upper extremity due to the mild sensory loss at C7. Dr. Macht determined that appellant had nine percent impairment of the right upper extremity due to the mild motor deficit at C6 and nine percent impairment of the right upper extremity due to the mild motor deficit at C7. He combined them for a 21 percent permanent impairment of the right upper extremity. Regarding her left L5 radiculopathy, Dr. Macht determined that appellant had a class 1 impairment using page six of *The Guides Newsletter*. Pursuant to Table 16-6,[4] he assigned a grade modifier 2 for a functional history adjustment score for her left leg. Dr. Macht indicated that appellant had a mild sensory deficit and mild motor deficit of her L5 nerve root and qualified for two percent impairment for sensory deficit of the left leg and 13 percent impairment of her left leg for motor deficit. He combined the values for a 15 percent permanent impairment of her left lower extremity. Dr. Macht opined that appellant did not qualify for a ratable impairment for her right leg or left as the nerve studies did not reveal evidence of

[2] Docket No. 12-510 (issued August 15, 2012).

[3] A.M.A., *Guides* 506.

[4] *Id*. at 516.

radiculopathy in those areas. He indicated that she reached maximum medical improvement on June 30, 2011.

By letter dated December 10, 2013, OWCP informed appellant that it had received Dr. Macht's November 25, 2013 report and advised her of the type of evidence needed to establish a schedule award.

In a February 1, 2014 report, an OWCP medical adviser noted that he had reviewed Dr. Macht's report and explained that it did not include impairment ratings supported by examination findings that were actually reported. As an example, he noted that Dr. Macht indicated that appellant had mild sensory loss but that the examination portion of his report provided no sensory testing of any kind although he offered extensive upper extremity ratings. The medical adviser indicated that Dr. Macht did not report examination findings in the C6 or C7 nerve roots and that, while he noted weakness shown by dynamometer testing, he did not report the numerical values of such testing. He recommended a second opinion examination.[5]

On March 6, 2014 OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Robert Allen Smith, a Board-certified orthopedic surgeon.[6]

In a March 27, 2014 report, Dr. Smith described appellant's history of injury and treatment and examined her. Appellant was alert, oriented, in no acute distress, and her gait and station were normal. Examination of the spine revealed no finding of any spasm, atrophy, trigger points, or deformity. Spurling's sign was negative and active spinal range of motion was satisfactory without spasm or rigidity. Neurologic examination of the arms revealed complaints of paresthetic sensations intermittently with distribution bilaterally at the L5 distribution on the left side. There was no gross sensory loss, atrophy, reflex change or any weakness in either the arms or legs. Dr. Smith diagnosed aggravation of preexisting cervical and lumbar disc disease with low grade paresthetic sensations in the distributions. He indicated that appellant had reached maximum medical improvement. Dr. Smith explained that functional modifier was one, the physical examination modifier was one, and the clinical study modifier for the diagnostic images was zero such that the net modifier for the conditions was zero. He explained that for the right arm, C6 radiculopathy had a default rating of one percent impairment and, with a net modifier of zero, the rating was therefore, one percent for the class 1, grade C condition, C6 radiculopathy. Similarly, for class one, C7 radiculopathy, with a net modifier of zero, the rating was also one percent impairment of the arm. Dr. Smith concluded that the total rating for the right upper extremity was two percent.

Dr. Smith provided a similar analysis for the left arm, noting changes at C6-7 based on an electromyogram (EMG). He explained that the C6 radiculopathy had a default rating of one percent, with a net modifier of zero, which resulted in one percent impairment to the left upper extremity. Dr. Smith advised that the C7 radiculopathy had a default rating of one percent for

[5] In a February 11, 2011 report, OWCP medical adviser noted the second opinion physician should utilize the A.M.A., *Guides* and *The Guides Newsletter*.

[6] An earlier examination was rescheduled.

class 1, grade C. He opined that the total impairment for the left upper extremity was two percent. For the left L5 radiculopathy, Dr. Smith referred to Table 11 for lower extremity impairments in *The Guides Newsletter*. He noted that appellant had a class 1 condition with a default rating of one percent to the lower extremity. Dr. Smith determined that the functional history modifier was one and clinical studies modifier was one, and resulted in a net modifier of zero. He opined that the rating for the left leg was a class 1, grade C condition, resulting in one percent impairment. Dr. Smith concluded that appellant had two percent right upper extremity impairment, two percent left upper extremity impairment and one percent left lower extremity impairment.

On April 21, 2014 an OWCP medical adviser concurred with Dr. Smith's impairment rating. He noted that maximum medical improvement was reached on March 27, 2014.

By decision dated May 9, 2014, OWCP granted appellant a schedule award for two percent impairment of her right arm and two percent impairment to her left arm. It also granted her a schedule award for one percent impairment to her left leg. Appellant was awarded compensation for 15.36 weeks for the period March 27 to July 12, 2014.

LEGAL PRECEDENT

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[7]

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[8] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[9] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[10] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.[11]

Although the A.M.A., *Guide*s includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[12] In

[7] *Veronica Williams*, 56 ECAB 367 (2005).

[8] 5 U.S.C. § 8107.

[9] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[10] 20 C.F.R. § 10.404.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[12] *Pamela J. Darling*, 49 ECAB 286 (1998).

1960, 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. Therefore, as the schedule award provisions of FECA include 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.[13]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology.[14] OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.[15]

ANALYSIS

OWCP accepted appellant's claim for aggravation of lumbosacral radiculitis, aggravation of displacement of lumbar intervertebral disc without myelopathy L5-S1, aggravation of cervical radiculitis C6-7, aggravation of degeneration of cervical intervertebral disc C6-7, and aggravation of cervical facet syndrome.

Appellant claimed a schedule award on November 29, 2013. In support of her claim, she submitted a report from Dr. Macht who determined that she had 21 percent permanent impairment of the right arm and 15 percent permanent impairment of her left leg. Although Dr. Macht indicated that he calculated appellant's impairment using *The Guides* Newsletter for spinal nerve root injuries involving the extremities, it is unclear how he arrived at the findings without specific numeric measurements to support his conclusions.[16] Board precedent is well settled, however, that when an attending physician's report gives an estimate of permanent impairment and mentions the A.M.A., *Guides*, but does not base that estimate upon correct application of specifically identifiable sections, grading schemes, tables or figures, OWCP is correct to follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides.*[17]

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

[14] *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

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

[16] As noted by OWCP's medical adviser, Dr. Macht indicated that appellant had mild sensory loss but that the examination portion did not provide reports of specific testing consistent with this finding. The medical adviser also observed that Dr. Macht did not report examination findings in the C6 or C7 nerve roots and that, while he noted weakness shown by dynamometer testing, he did not report the numerical values of such testing.

[17] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

The Board notes that Dr. Smith examined appellant and provided findings. Dr. Smith utilized *The Guides Newsletter* for spinal nerve impairments to the upper and lower extremities. For the right upper extremity, he explained that a C6 radiculopathy grade C had a default rating of one percent, with a net modifier of zero such that the rating was one percent arm impairment for the class 1, grade C condition.[18] Dr. Smith reported the same findings for the C7 radiculopathy. He determined that the net modifier was zero, and therefore, the rating was one percent for both C6-7, class 1, grade C. Dr. Smith concluded that the total rating for the right arm was two percent impairment.[19] Likewise, he provided a similar analysis for the left arm. Dr. Smith determined that the C6 radiculopathy had a default rating of one percent, with a net modifier of zero, which yielded one percent impairment to the left arm. He determined that the C7 radiculopathy had a default rating of one percent impairment for class 1, grade C, with a modifier of zero. Dr. Smith opined that the total impairment for the left upper extremity was two percent.[20] Furthermore, with regard to the left L5 radiculopathy, he indicated that the rating was obtained utilizing Table 11 for lower extremity impairments. Dr. Smith noted that appellant had a class 1 condition with a default rating of one percent to the lower extremity.[21] He determined that the functional history modifier was one and clinical studies modifier was one, and resulted in a net modifier of zero. Dr. Smith opined that the rating for the left leg, a class 1, grade C condition, was one percent impairment. He concluded that appellant had two percent right arm impairment, two percent left arm impairment and one percent left leg impairment. The Board notes that OWCP medical adviser concurred with the impairment rating of Dr. Smith. The Board finds that the report of Dr. Smith comports with the A.M.A., *Guides.* Appellant did not submit any other medical evidence to support that she was entitled to a greater schedule award, under the sixth edition of the A.M.A, *Guides*, or *The Guides Newsletter*. Accordingly, the Board finds that appellant has not established entitlement to a schedule award.

On appeal, appellant argued that she was getting worse not better and did not believe that all aspects of her injury were taken into consideration. However, as noted above, the medical evidence is insufficient to establish entitlement to a greater award.

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 met her burden of proof to establish that she has more than: two percent impairment of the right arm; two percent impairment of the left arm; or one percent impairment of the left leg, for which she received a schedule award.

[18] *See The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009), Proposed Table 1.

[19] *Id*.

[20] *Id*.

[21] *See id*. at Proposed Table 2.

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2015
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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