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

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| **V.B., Appellant** | ) | |
| **and** | ) | **Docket No. 14-1850** |
| | ) | **Issued: January 28, 2015** |
| **DEPARTMENT OF THE NAVY, NAVAL AIR DEPOT, Cherry Point, NC, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On August 21, 2014 appellant filed a timely appeal from a May 12, 2014 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 has more than a 22 percent permanent impairment of the right upper extremity, an 11 percent permanent impairment of the left upper extremity, a 25 percent permanent impairment of the right leg, and a 2 percent permanent impairment of the left leg, for which she received schedule awards.

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

This case has previously been before the Board. OWCP accepted that on May 1, 2007 appellant, then a 47-year-old production controller, sustained a contusion of the scalp or neck, a right elbow contusion, a bilateral hand contusion, a back contusion, neck strain, lumbar strain, concussion, postconcussion syndrome, and an aggravation of cervical spondylosis with myelopathy at C4-5 and C5-6 when she fell down stairs.[2]

On June 15, 2012 appellant requested a schedule award. By letter dated June 15, 2012, OWCP requested that Dr. Brian J. Battersby, a Board-certified orthopedic surgeon, evaluate appellant to determine whether she had a permanent impairment of an extremity due to her work injury using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).

On July 20, 2012 OWCP noted that it had not received a response from appellant's attending physician. It requested that an OWCP medical adviser review a second opinion examination by Dr. James A. Maultsby, a Board-certified orthopedic surgeon, and diagnostic testing dated March 13 and 14, 2012, and opine whether she had a permanent impairment.[3] In a response dated July 20, 2012, the medical adviser noted that appellant had a diagnosed conversion disorder with no evidence of organic disease. He found that she had no impairment of the lower extremities.

By decision dated July 23, 2012, OWCP denied appellant's claim for a schedule award.[4]

On July 17, 2013 appellant, through her attorney, requested reconsideration of the denial of her schedule award claim based on the November 29, 2012 report from Dr. Ashraf Guirgues, a Board-certified orthopedic surgeon, who discussed her complaints of numbness and pain in the right upper extremity and numbness and weakness in the bilateral lower extremities. On examination Dr. Guirgues found a loss of shoulder motion with no impingement or instability. He stated, "The upper extremity neurological examination shows evidence of numbness in the C5 and C6 distribution on the right upper extremity. There is evidence of motor strength weakness of 4/5 in the right triceps and right wrist extensors." For the lower extremities, Dr. Guirgues found a loss of sensation in the L3 to L5 distributions, 3/5 tibialis anterior strength

[2] By decision dated June 17, 2009, OWCP found that appellant had not established a recurrence of disability as of March 17, 2009. In decisions dated February 28, April 2 and 10, and May 7, 2012, OWCP denied her request for disability compensation for periods from February through April 2012.

[3] In a report dated March 14, 2012, Dr. Maultsby, a Board-certified orthopedic surgeon and OWCP referral physician, noted that an electromyogram did not reveal evidence of radiculopathy, carpal tunnel syndrome or nerve root dysfunction. He noted that Dr. Anna Bettendorf, a Board-certified physiatrist, opined that appellant had a conversion disorder. Dr. Maultsby found that she had no further evidence of the accepted work injuries and that her physical complaints resulted from "more of a psychological basis." In an April 18, 2012 duty status report, he found that appellant could perform her usual employment without limitations.

[4] In a decision dated August 6, 2012, OWCP denied appellant's request for compensation for four hours on June 8, 2012 for a medical appointment. By decision dated January 2, 2013, it terminated her compensation and authorization for medical benefits effective January 3, 2013 based on its finding that she had no further disability or need for medical treatment due to her May 1, 2007 employment injury.

on the left, and 2/5 extensor halluces longus strength on the left. Dr. Guirgues found a positive straight leg rest on the left and loss of bilateral hip motion. He noted that a January 26, 2012 electromyogram (EMG) study showed radiculopathy at L4 and L5 and radiculitis at C6 to C8 that did "not match up with the physical examination." Dr. Guirgues diagnosed radiculitis of the right upper extremity, bilateral raidiculitis of the lower extremity, and weakness of the left lower extremity. He found that appellant had a 57 percent whole person impairment under the sixth edition of the A.M.A., *Guides*. Dr. Guirgues indicated that he had included foot drop and arm weakness in the impairment rating.

By decision dated August 6, 2013, OWCP denied appellant's claim after finding that her request for reconsideration was untimely and did not establish clear evidence of error.

In an order dated April 8, 2014, the Board set aside OWCP's August 6, 2013 nonmerit decision denying appellant's request for reconsideration as untimely and insufficient to establish clear evidence of error.[5] The Board found that as she had submitted new medical evidence addressing whether she had a permanent impairment, OWCP erred in adjudicating her claim as a request for reconsideration rather than a claim for a schedule award. The Board remanded the case for OWCP to issue an appropriate decision on the schedule award claim.

On April 18, 2014 an OWCP medical adviser discussed appellant's history of a 2008 discectomy and fusion at C4-5 and C5-6 with residual radiculopathy at C6-8 and motor weakness. She also had discectomy and fusion at L3 through S1 in 2010 with radiculopathy at L4-5 and left food drop. The medical adviser found that Dr. Guirgues' whole person spinal impairment rating could not form the basis for a schedule award under FECA. Dr. Guirgues applied *The Guides Newsletter* and found that, on the right side, appellant had a nine percent motor deficit and three percent sensory deficit at C6, a five percent motor deficit and two percent sensory deficit at C7, and a three percent motor deficit and a one percent sensory deficit at C8. On the left side, the medical adviser found that she had a two percent motor deficit and 2 percent sensory deficit at C6, a 2 percent motor deficit and 2 percent sensory deficit at C7, and a two percent motor deficit and a one percent sensory deficit at C8. For the lower extremities, he found a 5 percent motor deficit and a 3 percent sensory deficit at L4 on the right side and a 13 percent motor deficit and a 7 percent sensory deficit at L5 on the right side. The medical adviser further found a 1 percent motor and sensory deficit at L4 and L5 on the left side. He added the motor and sensory impairments for each extremity and them combined the motor and sensory impairments to find a 22 percent right upper extremity impairment, an 11 percent left upper extremity impairment, a 25 percent right lower extremity impairment and a 2 percent left lower extremity impairment.

By decision dated May 12, 2014, OWCP granted appellant schedule awards for a 22 percent permanent impairment of the right upper extremity, an 11 percent permanent impairment of the left upper extremity, a 25 percent permanent impairment of the right lower extremity and a 2 percent permanent impairment of the left lower extremity. The period of the combined awards ran for 180.72 weeks from November 29, 2012 to May 17, 2016.

[5] *Order Remanding Case*, Docket No. 13-2068 (issued April 8, 2014).

On appeal appellant argues that OWCP should have sent her to an orthopedic surgeon rather than sending her schedule award claim to an OWCP medical adviser. She notes that she submitted claims for compensation and reimbursement of medical expenses.

## ***LEGAL PRECEDENT***

The schedule award provision of FECA,[6] and its implementing federal regulations,[7] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments.[10] OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.[11] The impairment is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[12] In applying *The Guides Newsletter*, the default impairment (grade C) for the Class of Diagnosis (CDX) is "adjusted for functional history and for clinical studies (if electromyogram was performed when [appellant] was near maximum medical improvement."

## ***ANALYSIS***

The Board remanded the case for OWCP to adjudicate appellant's request for reconsideration as a claim for a schedule award. It noted that she had submitted new evidence from Dr. Guirgues addressing the extent of her permanent impairment.

On remand OWCP medical adviser considered the November 29, 2012 report from Dr. Guirgues, who found that appellant had shoulder tenderness bilaterally with reduced motion and sensory loss at C5 and C6 on the right and motor weakness of the right triceps and wrist

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id*. at § 10.404(a).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] Federal (FECA) Procedure Manual, *id.* at Chapter 3.700; *see R.M.*, Docket No. 12-1811 (issued March 14, 2013).

[11] *Id*.

[12] *Id*.

extensors. Dr. Guirgues further found sensory loss from L3 to L5 with loss of strength on the left. He diagnosed radiculitis of the right upper extremity and bilateral radiculitis of the lower extremity and weakness of the left lower extremity. Dr. Guirgues listed findings regarding the cervical and lumbar spine and concluded that appellant had a 57 percent whole person impairment under the sixth edition of the A.M.A., *Guides*. FECA, however, does not provide for impairment of the whole person.[13] Further, Dr. Guirgues did not reference the appropriate tables and pages of the A.M.A., *Guides* in reaching his conclusion, and thus his report is of diminished probative value.[14]

On April 18, 2014 an OWCP medical adviser applied the provisions of the A.M.A., *Guides* to Dr. Guirgues' findings. Using *The Guides Newsletter*, applicable to determining impairments of the extremities originating from the spine, he determined that appellant had a nine percent motor deficit and three percent sensory deficit at C6 on the right, a five percent motor deficit and two percent sensory deficit at C7 on the right, and a three percent motor deficit and a one percent sensory deficit at C8 on the right. For the left side, the medical adviser found a two percent motor deficit and two percent sensory deficit at C6, a two percent motor deficit and two percent sensory deficit at C7, and a two percent motor deficit and a one percent sensory deficit at C8. For the right lower extremity, he determined that appellant had a 5 percent motor deficit and a 3 percent sensory deficit at L4 and a 13 percent motor deficit and a 7 percent sensory deficit at L5. For the left lower extremity, the medical adviser found a 1 percent motor and sensory deficit at L4 and L5. He concluded that appellant had a 22 percent right upper extremity impairment, an 11 percent left upper extremity impairment, a 25 percent right lower extremity impairment and a 2 percent left lower extremity impairment. The medical adviser did not, however, apply grade modifiers under *The Guides Newsletter* or sufficiently explain how he arrived at the percentage of sensory and motor deficits at each level. As noted, *The Guides Newsletter* provides that the examiner should adjust the sensory and motor ratings for functional history and, if applicable, clinical studies.

The Board will thus remand the case for proper application of *The Guides Newsletter* to determine the extent of appellant's impairment of the upper and lower extremities. After such further development as it deems necessary, OWCP shall issue a *de novo* decision.

On appeal appellant raises questions about compensation for disability and medical expenses. OWCP, however, did not adjudicate either issue in its May 12, 2014 decision and thus these issues are not presently before the Board.[15]

## ***CONCLUSION***

The Board finds that the case is not in posture for decision.

[13] *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[14] *See I.F.*, Docket No. 08-2321 (issued May 21, 2009).

[15] *See* 20 C.F.R. § 501.2(c).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 12, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 28, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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