United States Department of Labor
Employees' Compensation Appeals Board

N.B., Appellant	)	
and	)	**Docket No. 15-1390**
	)	**Issued: November 6, 2015**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Anthony, NM, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 8, 2015 appellant filed a timely appeal from a May 19, 2015 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 the case.

ISSUE

The issue is whether appellant has established a claim for a schedule award.

FACTUAL HISTORY

On October 14, 1997 appellant, then a 35-year-old medical records technician, injured her low back when her chair rolled out from beneath her and she fell onto her buttocks. OWCP accepted the claim for lumbar sprain. Appellant did not stop work.

[1] 5 U.S.C. § 8101 *et seq.*

On November 5, 1997 appellant had a magnetic resonance imaging (MRI) scan of the lumbar spine which revealed right paracentral focal disc protrusion of a degenerated disc at L5-S1 with right S1 nerve root compression. She came under the treatment of Dr. Mitchell Smigiel, a Board-certified neurosurgeon, on December 1, 1997, for low back pain after the October 14, 1997 work injury. Dr. Smigiel diagnosed right herniated lumbosacral disc with protracted pain. A January 27, 2006 MRI scan of the lumbar spine revealed degenerative disc disease at L5-S1 with central disc protrusion and right lateral extension with nerve root impingement.

Appellant then came under the treatment of Dr. Dean E. Smith, a Board-certified orthopedic surgeon, on February 20, 2006 for back and right lower extremity pain. Dr. Smith noted a history of injury on October 14, 1997. Physical examination revealed pain radiating down the right buttock into the right lower extremity, intact dorsiflexion bilaterally, and positive straight leg testing on the right side. Dr. Smith recommended physical therapy.

In reports dated June 27 to August 22, 2012, appellant was treated by Dr. David A. Holland, a Board-certified family practitioner, for back pain after an October 14, 1997 work injury. He noted that appellant reinjured her back when she was pulling a cart of charts in August 2011. Dr. Holland diagnosed lumbosacral strain and sciatica and recommended physical therapy.

On August 5, 2014 appellant filed a claim for a schedule award (Form CA-7).

On August 26, 2014 OWCP requested that appellant submit a detailed report from her treating physician which provided an impairment evaluation pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2] It specifically requested an opinion as to whether appellant reached maximum medical improvement (MMI), a diagnosis upon which the impairment was based, including surgery and a detailed description of objective and subjective complaints, a detailed description of any permanent impairment, a final rating of permanent impairment, and a discussion of the rationale for the calculation of impairment with references to the applicable criteria and tables in the A.M.A., *Guides.*

Appellant submitted a December 1, 2014 report from Dr. Holland who noted that appellant returned to regular duty and reached MMI on August 22, 2012. Dr. Holland noted that examination of the lumbar spine revealed no tenderness, pain in the L5 area, no bilateral muscle spasms, full range of motion, intact neurovascular function, upper and lower extremity reflexes were symmetric bilaterally, and intact sensation. He diagnosed lumbosacral strain and sciatica. Dr. Holland referred appellant to another provider for an impairment rating.

In a January 3, 2015 report, Dr. Loverous Whittaker, a chiropractor, noted that MMI occurred on August 22, 2012. Dr. Whittaker diagnosed sprain of the back, lumbar region. He noted findings on examination of tenderness bilaterally at L5-S1 and L2-S1, decreased range of motion of the thoracic and lumbar spine, decreased motor and sensory testing of the spinal dermatome at L3-4, normal range of motion of the hip, knees, ankles, and foot, and noted that

[2] A.M.A., *Guides* (6th ed. 2009).

appellant performed the heel walk with difficulty. Dr. Whittaker opined that pursuant to the A.M.A., *Guides* appellant sustained a sprain/strain with continued nonverifiable radicular symptoms and would be a class 1 impairment based on Table 17-4, page 570, for three percent whole person impairment.

On March 19, 2015 OWCP referred appellant to Dr. Joshua Herzog, a Board-certified orthopedist, to determine if she had work-related permanent impairment. In an April 16, 2015 report, Dr. Herzog noted that he reviewed the records provided and examined appellant. He reported that appellant ambulated into the examining room with normal gait, there was no swelling, bruising, or discoloration, intact deep tendon reflexes, tenderness on palpation of the lumbar spine at L5-S1, no muscular spasm or guarding, negative straight leg testing bilaterally, normal range of motion of the lumbar spine, intact sensation, and heel to toe walking was performed without difficulty. Dr. Herzog noted sensation testing of the lower extremities, specifically, bilateral femoral, obturator, superior gluteal, inferior gluteal, lateral femoral cutaneous, posterior femoral cutaneous, saphenous, lateral plantar, medial plantar, sural, superficial peroneal, common peroneal, sciatic nerves was normal. He noted strength testing of the lower extremities, specifically, the bilateral hip and leg flexors, hip and leg extensors, hip adduction, hip abduction, ankle dorsiflexion, ankle plantar flexion, ankle inversion, ankle eversion, great toe flexion and extension, was normal. Dr. Herzog diagnosed lumbosacral sprain/strain and lower back pain. He noted that appellant reached MMI on August 22, 2012. Dr. Herzog advised that OWCP recognized only extremity impairment resulting from spinal nerve root deficit which are published in *The Guides Newsletter*, July/August 2009.[3] He noted the bilateral lower extremities sensation and motor examination was 5/5 throughout and therefore appellant had no lower extremity impairment.

In a May 15, 2015 report, OWCP's medical adviser reviewed the medical evidence and opined that appellant reached MMI on April 16, 2015. Using Dr. Herzog's findings, the medical adviser applied *The Guides Newsletter*, July/August 2009, using Proposed Table 2, Spinal Nerve Impairment, Lower Extremity. He noted that Dr. Herzog found zero percent right lower extremity and zero percent left lower extremity impairment. The medical adviser noted that Dr. Herzog properly noted that FECA did not permit schedule awards for impairment of the spine, but rather a spine condition may be considered for impairment only if it results in impairment to an extremity. He indicated that spinal nerve injury can be the basis of impairment awards of an extremity using the July/August 2009 "*The Guides Newsletter*." The medical adviser noted that Dr. Herzog determined no motor or sensory deficits in either lower extremity and he documented these findings in detail. He determined that appellant sustained no ratable impairment of any spinal nerve and no ratable impairment pursuant to FECA for the accepted spinal condition.

In a decision dated May 19, 2015, OWCP denied appellant's claim for a schedule award.

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

LEGAL PRECEDENT

Section 8107 of FECA[4] and its implementing federal regulations,[5] 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.[6] For decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[7]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[8] In 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.[9]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.[10] OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures which memorializes proposed tables outlined in the July/August 2009 *The Guides Newsletter*.[11]

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH) and if

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.* at § 10.404(a).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims,* Chapter 2.808.5a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards,* Chapter 3.700, Exhibit 1 (January 2010).

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

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

[10] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[11] *See supra* note 3.

electrodiagnostic testing were done, Clinical Studies (GMCS).[12] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[13]

ANALYSIS

Appellant's claim was accepted by OWCP for sprain of the lumbar region. On August 5, 2014 she filed a claim for a schedule award. The Board finds that the medical evidence of record does not establish that appellant sustained permanent impairment of her lower extremities.

Appellant initially submitted a January 3, 2015 report from Dr. Whittaker, a chiropractor, who noted findings and opined that appellant had three percent whole person impairment. Section 8101(2) of FECA provides that chiropractors are considered physicians "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary."[14] Thus, where x-rays do not demonstrate a subluxation (a diagnosis of a subluxation based on x-rays has not been made), a chiropractor is not considered a "physician," and his or her reports cannot be considered as competent medical evidence under FECA.[15] Dr. Whittaker is not a physician as he did not diagnose a spinal subluxation demonstrated by x-ray. Furthermore, the Board has held that, as a chiropractor may only qualify as a physician in the diagnosis and treatment of spinal subluxation, his or her opinion is not considered competent medical evidence in evaluation of other disorders, including those of the extremities, although these disorders may originate in the spine.[16] As the chiropractor is not an "extremity expert" and there is no schedule award for the spine, a chiropractor's opinion in evaluating an extremity award case is of no probative medical value.[17] Thus, Dr. Whittaker's opinion is not considered competent medical evidence under FECA.

OWCP referred appellant for a second opinion to Dr. Herzog who properly noted that spinal nerve lower extremity impairments are to be rated as provided in *The Guides Newsletter*, July/August 2009. Dr. Herzog referred to the proposed Table 2.[18] He noted sensation testing of the lower extremities for bilateral femoral, obturator, superior gluteal, inferior gluteal, lateral femoral cutaneous, posterior femoral cutaneous, saphenous, lateral plantar, medial plantar, sural,

[12] *Supra* note 2 at 533.

[13] *Id.* at 521.

[14] 5 U.S.C. § 8101(2); *see also* section 10.311 of the implementing federal regulations provide: "(c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. OWCP will not necessarily require submittal of the x-ray, or a report of the x- ray, but the report must be available for submittal on request."

[15] *See Susan M. Herman,* 35 ECAB 669 (1984).

[16] *Pamela K. Guesford*, 53 ECAB 726 (2002).

[17] *George E. Williams*, 44 ECAB 530 (1993).

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

superficial peroneal, common peroneal, sciatic nerves was normal. Strength testing of the bilateral hip and leg flexors, hip and leg extensors, hip adduction, hip abduction, ankle dorsiflexion, ankle plantar flexion, ankle inversion, ankle eversion, great toe flexion and extension was also normal. Dr. Herzog diagnosed lumbosacral sprain/strain and lower back pain. He advised that OWCP recognized only extremity impairment resulting from spinal nerve root deficit which are published in *The Guides Newsletter*, July/August 2009.[19] Dr. Herzog noted that the bilateral lower extremities sensation and motor examination was 5/5 throughout and therefore appellant had no lower extremity impairment.

The OWCP medical adviser, in his May 15, 2015 report, concurred with these findings of Dr. Herzog. Using Dr. Herzog's findings, the medical adviser applied *The Guides Newsletter*, July/August 2009, using Proposed Table 2, Spinal Nerve Impairment, Lower Extremity. He noted that Dr. Herzog found zero percent right lower extremity and zero percent left lower extremity impairment. The medical adviser noted that Dr. Herzog properly noted that FECA did not permit schedule awards for impairment of the spine but rather a spine condition may be considered for impairment only if it results in impairment to an extremity. He indicated that spinal nerve injury can be the basis of impairment awards of an extremity using the July/August 2009 "*The Guides Newsletter*." The medical adviser noted that Dr. Herzog determined no motor or sensory deficits in either lower leg and determined that appellant sustained no ratable impairment of any spinal nerve and no ratable impairment for the accepted spinal condition.

The Board finds that the OWCP medical adviser properly reviewed the medical record and evaluated appellant's condition in accordance with OWCP procedures found in *The Guides Newsletter*, July/August 2009, using Proposed Table 2. There is no medical evidence in conformance with the A.M.A., *Guides* showing a greater impairment. The Board finds that, as the medical adviser properly applied the A.M.A., *Guides* to Dr. Herzog's clinical findings, his opinion represents the weight of the medical evidence in this case.[20]

Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment.

CONCLUSION

The Board finds that appellant failed to establish a claim for a schedule award.

[19] *See id.*

[20] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 6, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board