

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

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M.O., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Houston, TX, Employer )

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**Docket No. 15-1085**  
**Issued: September 15, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 15, 2015 appellant filed a timely appeal from a January 9, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant is entitled to a schedule award for a permanent impairment of the lower extremities.

**FACTUAL HISTORY**

This case has previously been before the Board. OWCP accepted that on September 3, 2008 appellant, then a 49-year-old letter carrier, sustained lumbar sprain and lumbar radiculitis in

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Appellant submitted new evidence with her appeal. The Board, however, has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c)(1).

the performance of duty. Appellant stopped work on October 22, 2008 and returned to work on June 22, 2010. She stopped work again on June 24, 2010 and did not return. In a decision dated August 19, 2011, the Board found that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.<sup>3</sup> OWCP further determined that she received an overpayment of compensation, but that the case was not in posture for decisions regarding the period and the amount of overpayment.<sup>4</sup> Appellant again appealed to the Board from a February 23, 2011 OWCP decision regarding a denial of a schedule award.<sup>5</sup> In an order dated July 24, 2012, the Board dismissed her appeal as it was untimely.<sup>6</sup> The facts and circumstances as set forth in the Board's prior decision and order are hereby incorporated by reference.

Appellant continued to pursue a schedule award claim and submitted a December 2, 2010 electromyogram and nerve conduction study (EMG/NCS) revealing radiculopathy at L3 and L5 on the right and L4 and L5 on the left. A December 13, 2012 magnetic resonance imaging (MRI) scan study of the lumbar spine showed a disc bulge at L5-S1 with no effect at S1, but mild narrowing of the anterior thecal sac and mild impingement of the L5 nerve roots with significant facet joint disease.

In an impairment evaluation dated June 23, 2014, Dr. Rogelio G. Rodriguez, a chiropractor, discussed appellant's history of injury and the findings on the December 2, 2010 EMG and December 13, 2012 MRI scan study. Citing Table 17-4 on page 570 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), the chiropractor found that she had a 12 percent whole person impairment of the lumbar spine due to electrodiagnostic evidence of radiculopathy.

On October 28, 2013 appellant elected to receive retirement benefits in lieu of workers' compensation benefits under FECA from OWCP effective November 17, 2013. On June 23, 2014 she filed a formal claim for a schedule award.

On July 10, 2014 OWCP advised appellant that the medical evidence was currently insufficient to support a schedule award as there was no opinion on the causal relationship between any impairment and her accepted employment injury. It requested that she submit a report from a physician providing an impairment rating of a specific member or function in accordance with the A.M.A., *Guides*.

In an impairment evaluation dated July 23, 2014, Dr. Elias Benhamou, an attending Board-certified anesthesiologist, found that appellant reached maximum medical improvement on April 13, 2010. He diagnosed lumbar radiculitis, lumbar disc displacement, and lumbosacral spondylosis. Dr. Benhamou found that the December 13, 2012 MRI scan showed impingement of the nerve roots at L5 bilaterally and that a December 2, 2010 EMG/NCS revealed

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<sup>3</sup> Docket No. 11-259 (issued August 19, 2011).

<sup>4</sup> The Board further found that it was premature to address the issue of whether OWCP properly denied appellant's request for a preresoupment hearing.

<sup>5</sup> In its February 23, 2011 decision, OWCP denied modification of a September 16, 2010 decision, which denied appellant's claim for a schedule award as no permanent impairment was established.

<sup>6</sup> *Order Dismissing Appeal*, Docket No. 11-1983 (issued July 24, 2012).

radiculopathy at L3 and L5 on the right and L4 and L5 on the left. He advised that the findings on the diagnostic studies were “all concordant with [appellant’s] reported pain complaints of lower back pain with radiation into her bilateral lower extremities.” Dr. Benhamou concurred with Dr. Rodriguez’ finding that appellant had a 12 percent permanent impairment of the spine.

On September 29, 2014 an OWCP medical adviser noted that FECA did not provide schedule awards for the back or the whole person, but instead provided a rating for impairments of the extremities originating in the spinal nerves as set forth in the that *The Guides Newsletter, Rating Spinal Nerve Impairment Using the Sixth Edition* (July/August 2009). The medical adviser recommended referring appellant for an impairment evaluation.

On October 10, 2014 OWCP referred appellant to Dr. Jerome O. Carter, a Board-certified physiatrist, for a second opinion examination. It provided him with a statement of accepted facts which contained a list of relevant medical procedures, including the December 2, 2010 EMG/NCS study.

In a report dated October 29, 2014, Dr. Carter reviewed the December 13, 2012 MRI scan and noted that it showed a disc bulge at L5-S1 with mild narrowing of the thecal sac, but no effect on the nerve roots at S1 and “mild impingement upon both exiting L5 nerve roots.” He opined that an October 29, 2008 EMG/NCS revealed no evidence of lumbar radiculopathy. Dr. Carter discussed appellant’s complaints of back pain and pain and weakness of the lower extremities, and noted that she “ambulated into the examination room with a staggered, slow and guarded gait.” On examination he found decreased motion of the spine due to lack of effort and “severely decreased sensation from the L3 through S1 nerve distribution bilaterally.” Dr. Carter further found 4/5 motor strength testing after a “poor effort secondary to pain.” He noted that *The Guides Newsletter* was used in rating lower extremity impairments caused by injuries to spinal nerves. Dr. Carter concluded that appellant did not have any impairment of either lower extremity. He stated:

“The neurological exam[ination] was considered unreliable secondary to significant differenc[s] observed in the severity of the sensory and motor changes on my physical exam[ination]. The EMG is normal and the MRI [scan study] findings do not correlate with the significant neurological deficits noted on exam[ination] without any specific dermatomal pattern. Thus, it is considered invalid and [appellant] receives [a zero] bilateral lower extremities impairment.”

On November 17, 2014 an OWCP medical adviser reviewed Dr. Carter’s report and concurred with his findings. He noted that Dr. Carter supported his conclusion that the physical examination findings were unreliable by citing appellant’s guarded and staggered gait, significant sensation loss from L3 to S1 bilaterally, and loss of motor strength due to poor effort.

By decision dated January 9, 2015, OWCP denied appellant’s claim for a schedule award. It determined that the opinion of Dr. Carter constituted the weight of the evidence and established that she did not have an employment-related permanent impairment of the lower extremities.

On appeal appellant contends that Dr. Carter did not perform a proper examination and did not review the abnormal December 2010 EMG study. She notes that the October 2008 EMG

study was incomplete due to complications and thus not reliable. Appellant submits a February 9, 2015 letter from Dr. Benhamou in support of her contentions.

### **LEGAL PRECEDENT**

The schedule award provision of FECA,<sup>7</sup> and its implementing federal regulations,<sup>8</sup> 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.<sup>9</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>10</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter, Rating Spinal Nerve Impairment Using the Sixth Edition* (July/August 2009) is to be applied.<sup>11</sup>

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.<sup>12</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>13</sup> Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.<sup>14</sup>

### **ANALYSIS**

OWCP accepted that appellant sustained lumbar sprain and lumbar radiculitis due to a September 3, 2008 employment injury. It paid her compensation for total disability. On October 28, 2013 appellant elected to receive retirement benefits.

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<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> *Id.* at § 10.404(a).

<sup>10</sup> 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 3.700.2 and Exhibit 1 (January 2010).

<sup>11</sup> *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, *id.* at Chapter 3.700, Exhibit 1, note 6 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>12</sup> *Vanessa Young*, 55 ECAB 575 (2004).

<sup>13</sup> *Richard E. Simpson*, 55 ECAB 490 (2004).

<sup>14</sup> *Melvin James*, 55 ECAB 406 (2004).

Appellant filed a claim for a schedule award and submitted an impairment evaluation dated June 23, 2014 from Dr. Rodriguez, a chiropractor. Under section 8101(2) of FECA, chiropractors are considered physicians and their reports are probative medical evidence only to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.<sup>15</sup> Dr. Rodriguez' report is of no probative value on the issue of the extent of permanent impairment to appellant's lower extremities.<sup>16</sup>

On July 23, 2014 Dr. Benhamou diagnosed lumbar radiculitis, lumbar disc displacement, and lumbosacral spondylosis. He determined that the findings on the December 13, 2012 MRI scan study and the December 2, 2010 electrodiagnostic studies supported appellant's complaints of radiculopathy into the lower extremities bilaterally. Dr. Benhamou agreed with Dr. Rodriguez' finding that she had a 12 percent whole person impairment of the lumbar spine under the A.M.A., *Guides*. FECA, however, does not provide for impairment of the whole person.<sup>17</sup> It further specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award.<sup>18</sup>

An OWCP medical adviser reviewed Dr. Benhamou's report and recommended that OWCP refer appellant for a second opinion evaluation. In an impairment evaluation dated October 29, 2014, Dr. Carter, an OWCP referral physician, discussed the findings on the December 13, 2012 MRI scan study of a bulging disc at L5-S1 with mild impingement of the L5 nerve roots bilaterally. He also noted that electrodiagnostic studies performed on October 29, 2008 did not show evidence of radiculopathy. On examination, Dr. Carter found a loss of spinal motion and reduced lower extremity strength due to suboptimal effort. He further indicated that appellant complained of significant sensory loss from L3 through S1 bilaterally in no "specific dermatomal pattern." Dr. Carter opined that the examination results were invalid. Citing *The Guides Newsletter*, he concluded that given the normal results of the EMG study and the lack of correlation between the MRI scan findings and his examination, appellant had no impairment of either lower extremity. On November 17, 2014 an OWCP medical adviser reviewed Dr. Carter's report and concurred with his findings.

The Board finds that Dr. Carter did not adequately support his finding that appellant had no impairment of either lower extremity. Dr. Carter based his finding that she had no ratable impairment, in part, on the negative results from a 2008 EMG/NCS. He failed to explain, however, why he relied upon electrodiagnostic testing performed in October 2008 rather than the more recent study in December 2010 which found evidence of bilateral radiculopathy. The Board has held that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of limited probative value.<sup>19</sup> As it is not apparent whether Dr. Carter considered the

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<sup>15</sup> 5 U.S.C. § 8101(2).

<sup>16</sup> See *R.C.*, Docket No. 12-377 (issued July 5, 2012); *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

<sup>17</sup> *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>18</sup> 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

<sup>19</sup> See *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

December 2010 EMG study, his opinion is insufficient to establish that appellant had no impairment of either lower extremity.<sup>20</sup>

Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do in a manner that will resolve the relevant issues in the case.<sup>21</sup> As it undertook development of the medical evidence, it has an obligation to secure a report adequately addressing the relevant issue and based on a complete and accurate factual history. On remand, OWCP should further develop the evidence to determine whether appellant is entitled to a schedule award for a permanent impairment of either lower extremity, to be followed by a *de novo* decision.

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 9, 2015 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: September 15, 2015  
Washington, DC

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

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

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

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<sup>20</sup> *D.S.*, Docket No. 13-29 (issued April 3, 2013).

<sup>21</sup> *See supra* note 14.