United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 16-0174**
	)	**Issued: April 11, 2016**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Detroit, MI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 9, 2015 appellant, through counsel, timely appealed a September 3, 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 this case.

ISSUE

The issue is whether appellant has a ratable impairment of the lower extremities due to his employment-related lumbar condition.

[1] 5 U.S.C. § *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] Appellant, a 54-year-old custodian, injured his lower back on May 4, 2009 when he lifted a bucket of water and emptied it into a sink. OWCP accepted his claim for sciatica and lumbar radiculopathy. On September 16, 2010 appellant filed a claim (Form CA-7) for a schedule award. OWCP denied the claim on November 1, 2012 and an OWCP hearing representative with the Branch of Hearings and Review affirmed that decision on April 8, 2013.[3] The Board subsequently affirmed the hearing representative's decision.[4] Appellant timely requested reconsideration and submitted a November 19, 2014 impairment rating from Dr. Catherine E. Watkins-Campbell.[5] Dr. Watkins-Campbell found that appellant had 15 percent left lower extremity impairment based on motor and sensory deficits involving the L5 and S1 nerve roots.[6] By decision dated December 16, 2014, OWCP reviewed the merits of the schedule award claim, but denied modification.[7] Appellant appealed to the Board.

In a July 2, 2015 decision, the Board determined that the case was not in posture for decision.[8] The Board found that Dr. Watkins-Campbell's November 19, 2014 report was "probative as to permanent impairment due to appellant's accepted conditions of sciatica and lumbar radiculopathy." OWCP had not previously referred Dr. Watkins-Campbell's impairment rating to its district medical adviser (DMA), and because of the report's probative value, the Board remanded the case to OWCP for proper development of the new medical evidence.

On remand, OWCP referred the case to its DMA, who recommended that appellant undergo a second opinion evaluation.

Dr. Emmanuel N. Obianwu, a Board-certified orthopedic surgeon and OWCP-referral physician, examined appellant on August 7, 2015 and diagnosed mild chronic lumbar disc disease with no evidence of lumbar radiculopathy. He reviewed OWCP's latest amended statement of accepted facts, appellant's history of injury, his occupational history, and his current

[2] Docket Nos. 13-2011 (issued February 18, 2014) and 15-0606 (issued July 2, 2015).

[3] OWCP based its denial on the January 4, 2011 evaluation of Dr. Nathan A. Fogt, a Board-certified orthopedic surgeon and OWCP-referral physician, who found zero percent upper or lower extremity impairment. Dr. Fogt also provided a February 13, 2012 supplemental report in which he reaffirmed his January 4, 2011 opinion.

[4] *Supra* note 2.

[5] Dr. Watkins-Campbell is Board-certified in both family medicine and occupational medicine.

[6] With respect to the left S1 nerve root, Dr. Watkins-Campbell found a moderate sensory deficit two percent and a mild motor deficit three percent for a combined five percent impairment. The left L5 nerve root revealed a mild sensory 2 percent deficit and a mild motor 9 percent deficit for a combined 11 percent impairment. Dr. Watkins-Campbell then combined the multi-level nerve root impairments, resulting in a 15 percent left lower extremity impairment.

[7] OWCP continued to rely on Dr. Fogt's January 4, 2011 second opinion evaluation.

[8] *Supra* note 2. The facts and circumstances outlined in the Board's February 18, 2014 and July 2, 2015 decisions are incorporated herein by reference.

work restriction. Dr. Obianwu also reviewed various medical records, as well as Dr. Watkins-Campbell's report. Appellant's current complaints included left buttocks pain after walking even short distances. He also complained of pain radiating over the posterior aspect of the left thigh to the left calf and ankle. Moreover, appellant reported a burning sensation in the bottom of the left foot. Additionally, he complained of significant symptoms each morning when he awakened, including intense discomfort across the lower back, which spread into the left lower extremity. Dr. Obianwu further noted that bending over was especially painful.

On physical examination, Dr. Obianwu noted that appellant did not have any evidence clinically of an L5 radiculopathy in his lower extremities. There was no objective evidence of any lower extremity sensory or motor deficits. Dr. Obianwu explained that, for FECA impairment rating purposes, there was no spinal nerve injury detected on the current clinical examination. He further noted that the examination was marked by abnormal illness behavior, which included moaning and inappropriate movements. Dr. Obianwu indicated that some of the physical findings definitely did not make sense from an anatomical perspective. In conclusion, he found that there was no work-related spinal nerve injury causing impairment to the lower extremities.[9]

In an August 31, 2015 report, Dr. Morley Slutsky, the DMA Board-certified in occupational medicine, noted that the majority of physicians, including Dr. Obianwu, found no evidence of lower extremity sensory or motor deficits related to appellant's accepted low back conditions.[10] He further noted that this was quite different from Dr. Watkins-Campbell's evaluation where she found left L5 and S1 deficits. Based on the majority view, the DMA found that there was no basis for lower extremity impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) (6th ed. 2009).

By decision dated September 3, 2015, OWCP reviewed the merits of the schedule award claim, but denied modification.[11]

LEGAL PRECEDENT

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.[12] 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* (6th ed. 2009) as the appropriate

[9] Dr. Obianwu also commented on perceived "inconsistencies" in Dr. Watkins-Campbell's examination and the conclusions she drew from her reported findings.

[10] Dr. Slutsky is Board-certified in occupational medicine.

[11] OWCP purportedly denied modification of its December 16, 2014 decision. However, that decision had already been set aside by the Board. *See* Docket No. 15-0606 (issued July 2, 2015).

[12] For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks of compensation. 5 U.S.C. § 8107(c)(2).

standard for evaluating schedule losses.[13] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[14]

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[15] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[16] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment.[17] It was designed for situations where 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.[18]

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[19] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[20] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.[21]

ANALYSIS

The Board finds that the case is not in posture for decision as there is an unresolved conflict in medical opinion. The Board previously found that Dr. Watkins-Campbell's November 19, 2014 report was "probative as to permanent impairment due to appellant's accepted conditions of sciatica and lumbar radiculopathy." Dr. Watkins-Campbell found 15 percent left lower extremity impairment based on a combination of motor and sensory deficits

[13] 20 C.F.R. § 10.404 (2014).

[14] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *see also*, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

[15] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[16] *See supra* note 14 at Chapter 2.808.6a(3).

[17] The methodology and applicable tables were published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009).

[18] *See supra* note 14 at Chapter 3.700, Exhibit 4.

[19] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The DMA, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

[20] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[21] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

involving the L5 and S1 nerve roots. The Board remanded the case for further consideration of this evidence. On remand, OWCP referred appellant to Dr. Obianwu for a second opinion evaluation. Based on his August 7, 2015 examination, Dr. Obianwu found that there was no objective evidence of any lower extremity sensory or motor deficits. Consequently, he concluded that there was no ratable impairment of the lower extremities.

The Board finds that the reports of Dr. Obianwu and Dr. Watkins-Campbell are of virtually equal weight and rationale.[22] Both physicians identified findings on physical examination, or the lack thereof, which ostensibly supported their respective opinions. Because there is an unresolved conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a), the case will be remanded to OWCP for referral to an impartial medical examiner to determine the existence and extent of any spinal nerve extremity impairment. After OWCP has developed the case record consistent with the Board's directive, a *de novo* decision shall be issued.

CONCLUSION

The case is not in posture for decision.

[22] *See supra* note 20.

ORDER

IT IS HEREBY ORDERED THAT the September 3, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 11, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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