United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 16-0558**
	)	**Issued: August 5, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

Appearances:
Lenin V. Perez, for the appellant[1]
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 February 3, 2016 appellant, through her representative, filed a timely appeal from a December 16, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 established permanent impairment due to her work-related injuries, warranting a schedule award.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 18, 2011 appellant, then a 51-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained cervical and lumbar injuries as of July 11, 2011 due to repetitive lifting, casing, throwing packages, and standing on concrete floors. She stopped work on July 11, 2011. Appellant sought treatment with her treating physician, Dr. Samy F. Bishai, Board-certified in emergency medicine.

By decision dated November 9, 2011, OWCP accepted the claim for cervical radiculitis; lumbosacral radiculitis; closed dislocation of fourth, fifth, sixth, and seventh cervical vertebra; herniated cervical disc at C4-5; herniated lumbar disc at L5-S1; and headache. Appellant received retroactive compensation on the periodic rolls as of July 11, 2011.

On December 14, 2012 OWCP proposed terminating appellant's medical benefits for the accepted conditions of cervical and lumbar radiculitis; headache; and closed dislocation of the fourth, fifth, sixth, and seventh cervical vertebrae.[3] It found that the weight of the medical evidence rested with the reports of the second opinion and referee physicians who opined that her accepted conditions had resolved and she was not experiencing any residuals or disability connected to the July 11, 2011 employment injury.[4] The termination was finalized on January 18, 2013.

Appellant disagreed with the January 18, 2013 decision and requested an oral hearing before the Branch of Hearings and Review.

By decision dated April 9, 2013, an OWCP hearing representative reversed the January 18, 2013 termination decision, finding that OWCP failed to meet its burden of proof to terminate medical compensation benefits. It remanded the case for further development of the medical evidence and requested OWCP obtain an addendum report from Dr. Dinenberg seeking clarification. The hearing representative noted that the medical evidence of record clearly supported that appellant continued with residuals and disability as a result of the accepted herniated disc condition.[5]

[3] The notice of proposed termination related that not all of appellant's medical benefits would be terminated. Appellant's claim would be accepted for the conditions of cervical spine strain, aggravation of cervical disc herniation at C4-5 mild disc protrusion, lumbar spine strain, and aggravation of lumbar disc herniation at L5-S1, with minimal disc herniation, which would remain open for medical treatment.

[4] On April 27, 2012 OWCP referred appellant for a second opinion examination with Dr. William Dinenberg, a Board-certified orthopedic surgeon. Due to a conflict of medical opinion between Dr. Dinenberg and Dr. Bishai, the primary treating physician regarding her diagnosis, residuals and disability status, OWCP referred her for an independent medical examination (referee) with Dr. Fabio Fiore, a Board-certified orthopedic surgeon, on October 2, 2012. Dr. Fiore opined that there was no evidence of cervical dislocations and/or cervical and lumbar radiculitis, but noted that appellant had chronic cervical and lumbar sprain and L5-S1 and C4-5 disc herniations, as well as preexisting degenerative disc disease in the cervical and lumbar spine. Based upon the cervical and lumbar disc herniations, Dr. Fiore advised she continue with permanent restrictions as she could not resume her date-of-injury position.

[5] The hearing representative noted that OWCP should not have terminated wage-loss compensation benefits at any point, as the decision stated that medical benefits only were being terminated.

Upon further development of the medical evidence on remand, OWCP issued a June 19, 2013 *de novo* decision accepting appellant's claim for herniated cervical disc at C4-5, herniated lumbar disc at L5-S1, and headache.[6] It noted that the evidence did not show that the conditions of cervical and lumbar radiculitis and closed dislocation of the fourth, fifth, sixth, and seventh cervical vertebrae should be added to her claim.

On December 31, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a December 23, 2013 impairment rating evaluation, Dr. Bishai provided findings on physical examination and review of diagnostic studies. He reported that a nerve conduction study of the lower extremities showed evidence of L5 nerve root radiculopathy on both the right and left sides. An electrodiagnostic study of the upper extremities showed C6 nerve root radiculopathy on both the right and left sides. Dr. Bishai diagnosed cervical disc syndrome, herniated cervical disc at C5-6 with bilateral radiculopathy, chronic cervical strain, lumbar disc syndrome, chronic lumbosacral strain, disc protrusion (herniation) at L5-S1, facet arthropathy at L4-5, bilateral radiculopathy of the lower extremities, bilateral radiculopathy of the upper extremities, muscle strain of the thoracic region of the spine, and synovial cyst or restrospinal ganglion just posterior inferior to the right L4-5 facet joint.

Dr. Bishai referred to *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment*, based on impairment resulting from the radiculopathy, *i.e.*, the spinal nerve injury.[7] He determined the class of diagnosis, provided grade modifiers, and applied the net adjustment formula for bilateral radiculopathy of the lower extremities using the lumbar spine regional grid to calculate 16 percent impairment of each lower extremity. Dr. Bishai then applied the net adjustment formula for bilateral radiculopathy of the upper extremities using the cervical spine regional grid to calculate 12 percent permanent impairment of each upper extremity.

OWCP routed the case record, along with Dr. Bishai's report, to Dr. Howard P. Hogshead, an OWCP district medical adviser (DMA) and Board-certified orthopedic surgeon, for review and determination on whether appellant sustained a permanent impairment of the right arm and date of maximum medical improvement (MMI). It informed the DMA that the accepted work-related conditions were displacement of cervical intervertebral disc without myelopathy, displacement of lumbar intervertebral disc without myelopathy, and headache.

In a January 5, 2015 report, Dr. Hogshead reviewed Dr. Bishai's impairment evaluation and noted that the report contained no date of MMI and MMI was not established in the case record. He disagreed with Dr. Bishai's assessment that appellant had radiculopathy involving the bilateral upper and lower extremities, noting that the multiple diagnostic studies performed all differed in findings and interpretation. Moreover, none of the studies identified a radiculopathy in order to establish an impairment rating to the spinal nerve deficit. Dr. Hogshead reported that numerous magnetic resonance imaging scan studies of the cervical and lumbar spine did not mention the findings which might normally be expected to result in a radicular motor or sensory loss. He concluded that the recommendations for impairment by

[6] OWCP based its decision on Dr. Dinnenberg's May 31, 2013 addendum report.

[7] *The Guides Newsletter*, 6th ed. (July/August 2009).

Dr. Bishai were without substance or medical credibility and concluded that appellant did not establish any permanent impairment to a member or function of the body.

By letter dated January 9, 2015, OWCP advised appellant that it had received Dr. Bishai's December 23, 2013 medical report, but that the medical evidence of record did not indicate that she had reached MMI. It attached the DMA Dr. Hogshead's January 5, 2015 report and requested that she submit an impairment evaluation from her attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). OWCP afforded her 30 days to submit the requested impairment evaluation. Appellant did not respond within the allotted time.

By decision dated February 25, 2015, OWCP denied appellant's claim for a schedule award as the evidence of record was insufficient to establish that she sustained any permanent impairment to a member or function of the body. It noted that her claim was accepted for herniated cervical disc at C4-5, herniated lumbar disc at L5-S1, and headache. OWCP based its decision on Dr. Hogshead's January 5, 2015 report, which found that there were no objective findings to support impairment of the upper or lower extremities attributable to her spinal condition.

On March 2, 2015 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In support of her claim, appellant submitted an updated January 20, 2015 impairment evaluation from Dr. Bishai. Dr. Bishai provided findings on physical examination and reported that appellant reached MMI on January 20, 2015. He noted that her diagnosis of radiculopathy was based on symptomatology, physical findings, and clinical examination. Dr. Bishai explained that eletrodiagnostic studies performed revealed radiculopathy of the L5 nerve root on both the right and left sides, as well as C6 nerve root radiculopathy on both the right and left sides. He based his impairment ratings on bilateral radiculopathy of the lower extremities and bilateral radiculopathy of the upper extremities. Using the sixth edition of the A.M.A., *Guides*[8] and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment*, Dr. Bishai calculated 16 percent impairment of each lower extremity and 12 percent impairment of each upper extremity.

A hearing was held on October 13, 2015 before an OWCP hearing representative. Appellant's representative argued that she had radiculopathy of both the upper and lower extremities, yet the claims examiner failed to upgrade her conditions. He noted that Dr. Bishai diagnosed multiple conditions which were not addressed by OWCP and the physician's report established permanent impairment of both the upper and lower extremities. The hearing representative noted that Dr. Bishai's January 20 and December 23, 2015 reports were very similar other than identifying a date of MMI in the latter report. She noted that the DMA reviewed the initial December 23, 2015 report and found that the results of the studies provided different findings, none of which identified radiculopathy. Counsel argued that the DMA failed to review appellant's nerve conduction velocity and electromyography studies. The record was held open for 30 days. No reply was received by appellant.

[8] A.M.A., *Guides* (2009).

By decision dated December 16, 2015, the OWCP hearing representative affirmed OWCP's February 25, 2015 schedule award decision, finding that the medical evidence of record was insufficient to establish that she sustained any permanent impairment to a member or function of the body. It noted that there was no objective radiographic evidence of radiculopathy affecting the upper or lower extremities to establish entitlement to a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations 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.[9] 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (6th ed. 2009) has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[10]

It is the claimant's burden to establish that she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.[11] OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence, which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[12]

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.[13] 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.[14]

[9] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[10] *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

[11] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (February 2013).

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

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

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.[15] For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment* using the sixth edition (July/August 2009) is to be applied.[16] FECA approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[17]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[18]

ANALYSIS

The issue is whether appellant established permanent impairment due to her work-related injuries. The Board finds this case is not in posture for decision.

On November 9, 2011 OWCP accepted the claim for cervical radiculitis; lumbosacral radiculitis; closed dislocation of fourth, fifth, sixth, and seventh cervical vertebra; herniated cervical disc at C4-5; herniated lumbar disc at L5-S1; and headache. On January 18, 2013 it proposed to terminate medical benefits for the following medical conditions: cervical radiculitis; lumbosacral radiculitis, closed dislocation of the fourth, fifth, sixth, and seventh cervical vertebrae, and headache. The termination was finalized on January 18, 2013. By decision dated April 9, 2013, the OWCP hearing representative reversed the January 18, 2013 decision finding that OWCP failed to meet its burden of proof to terminate medical compensation benefits and remanded the case for further development. In a June 19, 2013 *de novo* decision, OWCP accepted appellant's claim for herniated cervical disc at C4-5, herniated lumbar disc at L5-S1, and headache. However, it briefly noted that the evidence did not show that the conditions of cervical and lumbar radiculitis and closed dislocation of the fourth, fifth, sixth, and seventh cervical vertebrae should be added to her claim.

Subsequently, appellant filed a claim for a schedule award and submitted a December 23, 2013 impairment evaluation from Dr. Bishai, her treating physician. On January 5, 2015 OWCP routed the case record, along with Dr. Bishai's report, to Dr. Hogshead serving as the DMA, for review and a determination on whether appellant sustained a permanent partial impairment and date of MMI. However, OWCP failed to provide Dr. Hogshead an accurate statement of accepted facts (SOAF) or proper instructions pertaining to appellant's impairment rating for schedule award purposes.

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

[16] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also id.*, at Chapter 3.700, Exhibit 1, note 6 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[17] *Supra* note 12 at Chapter 2.808.5(c)(3) (February 2013).

[18] *Id.* at Chapter 2.808.6(d) (February 2013).

The Board notes that OWCP's January 5, 2015 request for review of an impairment rating advised Dr. Hogshead that the accepted work-related conditions were displacement of cervical intervertebral disc without myelopathy, displacement of lumbar intervertebral disc without myelopathy, and headache. It did not include the previously accepted conditions of cervical radiculitis; lumbosacral radiculitis; and closed dislocation of fourth, fifth, sixth, and seventh cervical vertebra. While OWCP's previously issued June 19, 2013 decision determined that the aforementioned conditions had resolved, this does not in itself preclude a claimant from establishing an employment-related permanent impairment.[19]

The Board has held that termination of benefits due to a finding of no residuals of the accepted conditions does not bar a subsequent schedule award; rather, the claims examiner should consider the schedule award matter separately from the termination of benefits.[20] The procedure manual provides that impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function. If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.[21]

The Board notes that OWCP did not rescind acceptance of cervical radiculitis; lumbosacral radiculitis; and closed dislocation of fourth, fifth, sixth, and seventh cervical vertebra. While OWCP determined that these additional conditions had resolved, this does not bar appellant from receiving a schedule award for those conditions.[22]

Dr. Bishai related appellant's impairment rating to radiculopathy of the cervical and lumbar spine based on physical examination findings and diagnostic studies. Appellant's claim was accepted for cervical radiculitis and lumbosacral radiculitis. Yet these conditions, among others, were not listed on the memorandum and questionnaire provided to the DMA. Identifying the accepted work-related conditions is an essential element of the SOAF.[23] OWCP procedures further indicate that, when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[24] While Dr. Hogshead disagreed with

[19] *See W.J.*, Docket No. 08-2409 (issued September 11, 2009).

[20] *Supra* note 12 at Chapter 2.808.11 (February 2013).

[21] *Id.* at Chapter 2.808.5(d) (February 2013). *See also Raymond E. Gwynn*, 35 ECAB 247, 253 (1983).

[22] Similarly, in *A.A.*, Docket No. 08-951 (issued September 22, 2008) appellant's benefits were terminated as of December 12, 1994 due to no continuing disability resulting from her accepted injury. The Board explained that a determination that she was not disabled as of December 12, 1994 did not preclude the possibility that she might become disabled or develop an impairment related to her accepted condition at a later date. Appellant also had no prior schedule award determination. The Board remanded the case for further development on the issue of whether she had a permanent impairment which would entitle her to a schedule award.

[23] *Supra* note 12 at Chapter 2.809.5 (September 2009); *see also Darletha Coleman*, 55 ECAB 143 (2003).

[24] FECA Procedure Manual, *id.*, at Chapter 2.809.4. *See also A.C.*, Docket No. 07-2423 (issued May 15, 2008). The Board held that the SOAF did not accurately reflect the conditions OWCP accepted as employment related and, therefore, the physician's report was of diminished probative value, and insufficient to resolve the conflict in medical opinion.

Dr. Bishai's impairment rating, he was not provided an accurate framework regarding appellant's accepted employment-related conditions.[25] Thus, his report is of limited probative value.[26]

The Board further notes that OWCP's memorandum to the DMA requested he determine whether appellant sustained a permanent impairment of the right arm. The Board has defined a "leading question" as one which suggests or implies an answer to the question posed.[27] When questions are posed which influence a medical examiners answers to OWCP, material prejudice to appellant's claim results. The Board notes that it is unclear why OWCP requested review and determination pertaining to the right arm only given appellant's accepted work-related conditions. The question posed to the DMA suggests a desired response that only the right upper extremity sustained potential permanent impairment and that the left upper extremity, right lower extremity, and left lower extremity did not warrant entitlement for a schedule award. The Board has held that inquiry into such issues must be phrased in a manner which is neutral and does not lead the physician in his or her response.[28]

It is well established that proceedings under FECA are not adversarial in nature,[29] and while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[30]

As the medical evidence developed in this case is insufficient to determine whether appellant had permanent impairment due to the accepted medical conditions, the Board will remand the case for further development.[31] OWCP shall refer appellant, together with a SOAF and her medical record, to a second opinion physician for a proper evaluation of impairment.[32] After this and such further development as deemed necessary, OWCP shall issue an appropriate *de novo* decision on appellant's schedule award claim.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant is entitled to a schedule award for permanent impairment.

[25] *L.J.*, Docket No. 14-1682 (issued December 11, 2015).

[26] *C.C.*, Docket No. 13-2082 (issued May 15, 2014). *See also T.G.*, Docket No. 07-2231 (issued June 2, 2008). ECAB held that the physician's report was not entitled to the special weight of the medical opinion evidence because it was based on an inaccurate SOAF.

[27] *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

[28] *See generally Brenda C. McQuiston*, Docket No. 03-1725 (issued September 22, 2003).

[29] *John J. Carlone*, 41 ECAB 354 (1989).

[30] *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[31] *Supra* note 24.

[32] *R.R.*, Docket No. 15-1055 (issued December 16, 2015).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated December 16, 2015 is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: August 5, 2016
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