United States Department of Labor
Employees' Compensation Appeals Board

L.Y., Appellant	)	
and	)	**Docket No. 16-0012**
	)	**Issued: May 17, 2016**
U.S. POSTAL SERVICE, PROCESSING & DELIVERY CENTER, Kansas City, MO, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 2, 2015 appellant, through counsel, filed a timely appeal from an August 13, 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 met his burden of proof to establish that he is entitled to a schedule award for permanent impairment of his lower extremities.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. The facts as set forth in the prior Board decisions are incorporated herein by reference.[2] The facts relevant to this appeal are as follows. OWCP accepted that on July 6, 2005 appellant, then a 47-year-old clerk, sustained a lumbar strain/sprain while sorting mail. Appellant initially stopped work and received continuation of pay, he returned to full duty on July 20, 2005.

Appellant filed a claim for a schedule award (Form CA-7) on September 23, 2011. By decision dated November 10, 2011, OWCP denied his schedule award claim as he had not submitted medical evidence establishing permanent impairment.

On November 11, 2011 Dr. M. Stephen Wilson, appellant's treating orthopedic surgeon, applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2009) and *The Guides Newsletter* (July/August 2009) and found that appellant had a seven percent permanent impairment of both lower extremities.

By decision dated April 30, 2012, an OWCP hearing representative affirmed OWCP's November 10, 2011 decision, as Dr. Wilson had not explained how appellant's accepted condition of lumbar sprain/strain caused a permanent impairment. Appellant requested reconsideration and provided a June 8, 2012 report wherein Dr. Wilson provided further support for his conclusion.

OWCP referred appellant's case to an OWCP medical adviser who, in an April 14, 2012 report, concluded that Dr. Wilson's report was deficient, and that his findings did not provide a reliable basis upon which to rate impairment. By decision dated September 21, 2012, it denied modification of the April 30, 2012 decision. Appellant appealed to the Board.

On appeal, the Board found that Dr. Wilson's impairment rating was in conformance with the protocols of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, and that the medical adviser rejected his opinion largely because other physicians who had examined appellant had not reported radicular pain, sensory deficit, or weakness. The Board remanded the case for OWCP to refer appellant to an appropriate medical specialist for examination and an opinion as to whether he sustained permanent impairment of either leg due to the residuals of his accepted injury.[3] The Board did not remand the case for an impartial medical evaluation.

On June 20, 2014 OWCP referred appellant to Dr. David Clymer, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict between the medical adviser and appellant's treating physician, Dr. Wilson. In an August 4, 2014 medical report, Dr. Clymer summarized his physical findings and concluded that appellant probably did sustain a low back sprain or strain as a result of the lifting injury in 2005, and that this probably resulted in some temporary aggravation of the degenerative disc process as there was evidence of

[2] Docket No. 13-106 (issued March 18, 2014); Docket No. 10-1647 (issued March 1, 2011); Docket No. 09-1736 (issued January 22, 2010).

[3] Docket No. 13-106 (issued March 18, 2014).

back irritability and magnetic resonance imaging (MRI) scan evidence of some disc bulging at the L4-5 and L5-S1 levels. He noted that although appellant had ongoing subjective discomfort, there was no clear evidence of significant objective radiculopathy. In addition, subsequent MRI scan studies have revealed no progression of the degenerative disc disease and, in fact they demonstrated significant improvement in the appearance of the discs in the low back. Dr. Clymer noted that appellant's most recent MRI scan of October 3, 2013 revealed some facet degenerative change at L5-S1, but only a tiny signal irregularity in the annulus without any significant disc protrusion or disc extrusion which might cause any ongoing nerve root impingement. He concluded that appellant sustained only a temporary aggravation and that he would expect the lumbar disc pathology and his subjective symptoms to gradually improve and return to preinjury status. Dr. Clymer opined that, based on appellant's normal MRI scan study of October 3, 2013, appellant's temporary aggravation had ceased. He noted that he did not find objective evidence of ongoing radicular residuals in the lower extremities and noted that appellant had only moderate vague dysesthesia in the lower extremities which appeared to be in a nondermatomal distribution. Dr. Clymer noted no objective evidence of radiculopathy. He noted that as he did not find evidence of recurrent radicular signs and symptoms which could be related specifically to a current and active lumbar condition resulting from the July 6, 2005 work injury, he would not offer any opinion with regard to a permanent impairment rating which would correlate with specific radiculopathy at this time.

By decision dated October 28, 2014, OWCP denied appellant's claim for a schedule award.

By letter dated November 3, 2014 appellant, through counsel, requested a telephonic hearing.

In an April 23, 2015 report, Dr. Wilson opined that appellant sustained 11 percent permanent impairment to the right lower extremity due to chronic radicular symptoms in his right lower extremity causing mild sensory and mild motor deficits of the L5 spinal nerve. He noted that spinal impairment for the right lower extremity is based on the use of Table 2 of the A.M.A., *Guides*, Spinal Nerve Impairment, based on lower extremity impairments and factors causing sensory and motor deficits. Dr. Wilson observed permanent anatomical abnormalities and loss of function, which resulted in a class 1 (mild sensory deficit) of the L5 nerve with a mid-range default value of one percent, and a class 1 (mild motor deficit) of the L5 nerve with a mid-range default value of five percent, determined by appellant's history of injury with continued complaints of pain, neuropathy, and weakness present at the time of the examination. He found grade modifiers 1 for functional history secondary to a pain disability questionnaire, a grade 2 modifier for physical examination with a positive straight leg raising test, and a grade 1 modifier for clinical studies. Dr. Wilson noted that the total score for the modifiers was (2-1)+(2-1)+(1-1) =2, which shifted the rating to the E position of 2 percent for mild sensory deficit and 9 percent for mild motor deficit per proposed Table 2 of the A.M.A., *Guides*, and yielded an impairment of 11 percent to the right lower extremity due to L5 radiculopathy.

At the hearing held on June 12, 2015 appellant's counsel argued that Dr. Clymer's opinion was unclear and that OWCP should have requested clarification. He also argued that the medical adviser could not serve as a second opinion therefore a conflict remained in the medical evidence between Dr. Wilson and Dr. Clymer necessitating an impartial medical examination.

Appellant also testified that Dr. Clymer did not perform a thorough evaluation. He indicated that he has constant irritating pain in his lower back and had problems with his right knee, right ankle, and right thigh.

In a decision dated August 13, 2015, the hearing representative noted that Dr. Clymer was not an impartial medical examiner (IME) because he had not examined appellant and therefore could not create a conflict in the evidence. However, he affirmed the denial of the schedule award as he found that the referee opinion of Dr. Clymer was better rationalized and based on an accurate factual and medical background.

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.[4] 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[5] The A.M.A., *Guides*, has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.[7]

Although the A.M.A., *Guides* include 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 impairment of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter*, (July/August 2009), offers an approach to rating spinal nerve impairments consistent with sixth edition

[4] 5 U.S.C. § 8107.

[5] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[6] 20 C.F.R. § 10.404.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

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

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

methodology.[10] OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.[11]

Section 8123(a) of FECA provides, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.[12] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[13]

ANALYSIS

OWCP accepted that appellant sustained a lumbar strain/sprain on July 6, 2005 during the course of his federal employment. It denied his claim for a schedule award based on the opinion of Dr. Clymer who found no objective evidence of ongoing radicular residuals in the lower extremities and only moderate vague dysesthesia in the lower extremities which appeared to be in nondermatomal distribution. The Board finds that the case is not in posture for decision.

Appellant's treating physician, Dr. Wilson, initially found that appellant had seven percent permanent impairment to both of his lower extremities. The medical adviser found this report deficient and OWCP denied appellant's claim for a schedule award. However, the Board on prior appeal, remanded the case finding that Dr. Wilson's impairment rating was in conformance with the sixth edition of the A.M.A., *Guides*, and instructed OWCP to further develop the medical evidence by referral to an appropriate medical specialist. No conflict existed in the medical opinion evidence at the time of the remand because, as explained by the hearing representative in the August 13, 2015 decision, the district medical adviser's opinion that appellant had no physical examination findings to substantiate a schedule award did not create a conflict with Dr. Wilson's opinion, as the medical adviser had not examined appellant.[14]

On remand, OWCP referred appellant to Dr. Clymer as an IME physician. Dr. Clymer determined that although appellant had ongoing subjective discomfort, there was no clear evidence of significant objective radiculopathy and noted that subsequent MRI scan studies revealed no progression of his disc problems and actually demonstrated significant improvement in the appearance of the discs of the low back. He noted that appellant's most recent MRI scan revealed some facet degenerative change at L5-S1, but only a tiny signal irregularity in the annulus without any significant disc protrusion or disc extrusion which might cause any ongoing nerve root impingement. Dr. Clymer found no objective evidence of ongoing radicular residuals

[10] *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

[11] *Supra* note 7 at Chapter 3.700, Exhibit 4 (January 2010).

[12] 5 U.S.C. § 8123(a).

[13] *Barbara J. Warren*, 51 ECAB 413 (2000); *see also B.C.*, Docket No. 15-0992 (issued August 11, 2015).

[14] *See generally A.A.*, Docket No. 15-0898 (issued July 28, 2015); *supra* note 7 at Chapter 2.810.8g (September 2010).

in the lower extremities and noted that appellant had only moderate vague dysesthesia in the lower extremities which appeared to be in a nondermatomal distribution. He noted no objective evidence of radiculopathy and found no evidence of recurrent radicular signs and symptoms which could be related specifically to a current and active lumbar condition resulting from the July 6, 2005 employment injury. Accordingly, Dr. Clymer stated that he would not offer any opinion with regard to permanent impairment rating which would correlate with specific radiculopathy.

The Board finds that a conflict did not exist at the time of OWCP's referral to Dr. Clymer as an IME physician. The Board in its March 18, 2014 decision found that Dr. Wilson's findings were in fact within the protocols of the A.M.A., *Guides* and *The Guides Newsletter* and remanded the case to OWCP to refer appellant to an appropriate specialist for examination. Following the Board's decision, OWCP sent appellant to Dr. Clymer for an IME examination to resolve the conflict between Dr. Wilson and the DMA, Dr. Daniel D. Zimmerman.

In his April 14, 2012 report, the DMA, Dr. Zimmerman, stated generally that Dr. Wilson's ratings were clouded by concerns regarding reliability and credibility and that as such, based on his general conclusions, his rating should be rejected. Chapter 2.810 of the Federal (FECA) Procedural Manual, *Developing and Evaluating Medical Evidence* makes clear that at a times when the opinion of the DMA is not strong enough to constitute a conflict with the opinion of the treating physician, but which is nevertheless of sufficient value, is sufficient to warrant further action. The Board finds that DMA, Dr. Zimmerman's opinion did not contain a strong enough opinion to create a conflict. As such, the Board finds that Dr. Clymer should be converted to a second opinion physician and the case be referred to a new IME.

The Board finds that the report from Dr. Clymer as a second opinion physician is now in conflict with the opinion of Dr. Wilson, who initially opined in a November 11, 2011 report that appellant had seven percent permanent partial impairment of both his lower extremities, pursuant to the A.M.A., *Guides*, as well as Dr. Wilson's new report dated April 23, 2015, wherein Dr. Wilson opined that appellant sustained 11 percent permanent impairment to the right lower extremity due to chronic radicular symptoms in his right lower extremity.

Therefore, the case must be remanded to OWCP for further development. This development shall include the appointment of an IME in accordance with 5 U.S.C. § 8123(a) to obtain a report regarding the percentage of permanent impairment of appellant's lower extremities, according to a correct application of the sixth edition of the A.M.A., *Guides*. After this and any other development deemed necessary, OWCP shall issue an appropriate merit decision in the case.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 13, 2015 is set aside and the case is remanded for further development consistent with this opinion.

Issued: May 17, 2016
Washington, DC

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

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

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