United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 16-1061**
	)	**Issued: November 18, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Harrisburg, PA, 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 April 26, 2016 appellant filed a timely appeal from a February 17, 2016 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 met her burden of proof to establish that she has reached maximum medical improvement (MMI) regarding her accepted conditions, warranting a schedule award pursuant to 5 U.S.C. § 8107.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This matter has previously been before the Board. In a July 22, 2014 decision, the Board affirmed in part as modified, and set aside, in part, a July 1, 2013 merit decision of OWCP.[2] The Board found that pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[3] (A.M.A., *Guides*) appellant had an additional six percent permanent impairment of her right leg and instructed OWCP to further develop the medical evidence with regard to permanent impairment to other scheduled members. The Board specifically instructed OWCP to refer her to an appropriate specialist to address permanent impairment pursuant to the A.M.A., *Guides* as it pertains to consideration of the urinary and reproductive systems. The facts and circumstances of the case set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to the present appeal are set forth below.

On November 28, 1979 appellant, then a 24-year-old mail handler, injured her low back when she was lifting mail sacks. OWCP accepted an acute lumbosacral strain, displacement of a lumbar intervertebral disc without myelopathy, other urinary incontinence, mononeuritis of the lower limb, decubitus ulcer bilaterally, atony of the bladder, and cauda equine syndrome with neurogenic bladder. It authorized surgery and on February 26, 1986 appellant underwent a left hemilaminectomy at L4-5 with excision of nucleus pulposus fragment and on June 12, 1987 she underwent a total laminectomy, L3-4 with removal of right L3-4 herniated disc fragment. OWCP accepted that she was permanently disabled.

On July 18, 1994 an OWCP medical adviser opined that, under the A.M.A., *Guides* appellant had 20 percent permanent impairment of the right leg for severe S1 nerve injury resulting in loss of function due to strength deficit, and 37 percent permanent impairment of the left leg for severe and significant damage to the L5 nerve resulting in motor deficit. In a decision dated October 31, 1994, OWCP granted her a schedule award for 57 percent permanent impairment of both legs, for the period March 16, 1994 to May 8, 1997.

In a June 14, 1995 decision, OWCP granted appellant a schedule award for 52 percent permanent impairment of the bladder and vulva/vagina. The award ran from May 8, 1997 to May 24, 1999.

On May 5, 2010 appellant filed a claim for an additional schedule award, which was denied by OWCP in a February 16, 2011 decision. Appellant subsequently submitted multiple requests for reconsideration. By decisions dated September 7, 2011 and January 4, 2012, OWCP denied modification. Appellant again requested reconsideration. In a July 10, 2012 decision, OWCP denied her request, finding that it was insufficient to warrant further merit review.

Appellant again requested reconsideration and submitted evidence supporting additional impairment. By decision dated July 1, 2013, OWCP denied her claim for an additional schedule award. Appellant appealed to the Board. As noted above, the Board in its July 22, 2014 decision found that she had an additional six percent permanent impairment of her right leg. The Board

[2] Docket No. 13-1855 (issued July 22, 2014).

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

also required further development with regard to permanent impairment of other scheduled members.

On October 6, 2014 OWCP granted appellant an additional schedule award for six percent permanent impairment of the right lower extremity in conformance with the Board's July 22, 2014 decision. The period of the award was from September 21, 2014 to January 19, 2015. OWCP then referred appellant to Dr. Claude H. Workman, a Board-certified urologist, for a second opinion evaluation regarding the nature and extent of her employment-related impairment. In his November 26 and 27, 2014 reports, Dr. Workman reviewed a statement of accepted facts, appellant's medical history, and conducted a physical examination. He diagnosed neurogenic bladder, urinary tract infection, and urine retention and urge incontinence, noting that she reported self-catheterizing up to five times a day. Dr. Workman recommended a cystometrics and electromyogram (EMG) in order to provide a proper evaluation.

On January 5, 2015 appellant underwent a cystometry and EMG, which revealed atonic bladder and urinary retention. Dr. Workman diagnosed uroflow, unable to void, retention, appropriate filling phase sensations, and bladder capacity, no detrusor over activity or urge urinary incontinence, no stress urinary incontinence and atonic bladder, and insignificant flow -- urinary retention. In a January 6, 2015 report, he noted that appellant injured her back on November 28, 1979 while working and underwent low back surgery in 1980 and a second extensive laminectomy surgery thereafter. Appellant reported a spinal cord injury at L3-5 with lower extremity paralysis. She noted learning to walk again with the use of leg braces and an inability to void and self-catheterization approximately five times a day. Appellant stated that she had mixed urinary urge and stress incontinence, delay in starting to stream, straining to void, post void dribbling, and rare nocturnal enuresis. Dr. Workman noted findings on cystometrics revealed no spontaneous involuntary detrusor contractions on attempt to void, she generated an average flow of 1 cubic centimeter (cc) per second with maximum flow of 1 cc per second with residual urine of 400 cc by aspiration. The cystometrics and EMG revealed poor bladder tone with urinary retention, insignificant flow, and an atonic bladder. Dr. Workman opined that due to appellant's poor bladder tone, she will have to self-catheterize in the future, which would not keep her from her normal work. He recommended intermittent catheterization, use of a new catheter with each catheterization, monitor urine flora, and obtain bi-yearly ultrasounds of the upper and lower extremity. In a work capacity evaluation, Dr. Workman noted that it was unknown whether appellant was able to perform her work duties, return to work part time or full time, and indicated that the work restrictions apply for an indefinite period of time. He noted that she reached MMI although items unrelated to her urologic condition could affect her ability to work.

In a January 23, 2015 report, Dr. Workman diagnosed retention of urine, voiding dysfunction, atony, bladder, urge incontinence, urinary tract infection, neurogenic bladder, and spinal cord injury at L3-5, which resulted in lower extremity paralysis, voiding dysfunction, and neurogenic bladder that required intermittent self-catheterization. He noted that he was unable to determine if appellant had greater than 52 percent impairment attributable to the accepted conditions related to the uterus/cervix or vulva/vagina due to the fact that he provided a urological evaluation not a gynecological evaluation. Dr. Workman noted that as it related to her urological system she had 85 percent permanent impairment based on the A.M.A., *Guides*. He

noted that all the listed diagnoses except urge incontinence were related to appellant's work injury.

In a report dated March 16, 2015, OWCP's medical adviser noted that on January 23, 2015 Dr. Workman found that appellant had a neurogenic bladder and an impairment rating greater than 52 percent. However, the medical adviser noted that Dr. Workman did not specify that his rating was based on extremity impairment. Further, Dr. Workman noted that the A.M.A., *Guides* would allow 85 percent impairment, but specific organ assignments pages and tables of the A.M.A., *Guides* were not provided. The medical adviser indicated that appellant had a neurogenic bladder, and pursuant to the A.M.A., *Guides*, page 337, Table 13-14, Criteria For Rating The Neurogenic Bladder, she had 20 percent whole person permanent impairment. He referenced impairment with respect to her legs. The medical adviser did not address impairment with respect to loss of urinary function.

In a report dated March 4, 2015, Dr. Workman noted that appellant was self-catheterizing about six times per day. He recommended that she monitor the flora in her urine three to four times a year. Dr. Workman diagnosed atonic neurogenic bladder, spinal cord injury, cauda equina syndrome, and urinary tract infection.

On May 18, 2015 OWCP noted that the uterus/cervix and vulva/vagina were members for which schedule awards could be awarded based on Chapter 7 of the A.M.A., *Guides* as it pertains to consideration of the urinary and reproductive systems. It requested that the medical adviser provide an impairment rating of the uterus/cervix and/or vulva/vagina using Chapter 7 of the A.M.A, *Guides*. OWCP requested that the medical adviser address whether appellant should be referred to a gynecologist for evaluation.

On May 19, 2015 OWCP's medical adviser agreed that appellant should be examined by a gynecologist for consideration of an additional schedule award for sexual dysfunction and the permanent impairment of the uterus/cervix and vulva/vagina under Chapter 7 of the A.M.A., *Guides*.

On September 8, 2015 OWCP referred appellant to a second opinion physician, Dr. Barry Jarnagin, a Board-certified gynecologist, for an evaluation of permanent impairment of the uterus/cervix and vulva/vagina under the A.M.A., *Guides*. In a report dated October 9, 2015, Dr. Jarnagin noted that she had urinary retention requiring self-catheterization, which developed after loading and unloading mail at work. Appellant underwent surgery at L3-4 and L4-5 on two occasions which did not restore lower extremity function. She reported learning to walk with braces and self-catheterizing herself. Appellant stated that she had frequent urinary tract infections, painful urination, self-catheterization, urinary urgency, numbness and tingling, and pain going down both legs. Dr. Jarnagin noted findings of a hypermobile urethra, cystocele, rectocle, bilateral levator tenderness, bilateral pudental nerve tenderness, and prolapse cervix. He diagnosed urinary retention, primary, neurogenic bladder, cystocele, reetoccle, uterine prolapse, and incomplete uterine prolapse. Dr. Jarnagin noted that appellant had greater than 52 percent permanent impairment related to urinary retention, which was chronic and required self-catheterization five to six times a day. He advised that this condition was unrelated to the uterus, cervix, vulva, and vagina. Dr. Jarnagin noted that appellant was able to perform job functions

with restrictions. He noted that her medical records were not available, but recommended a trial of interstim.

In a supplemental report dated December 31, 2016,[4] Dr. Jarnagin reviewed the entire chart, notes, and criteria for rating permanent impairment for bladder and vulvar/vaginal disease. He noted that appellant had been previously rated at 52 percent permanent impairment due to urinary retention. Dr. Jarnagin opined that the vulvar and vaginal disease warrants a 20 percent impairment rating for dyspareunia, not being able to have sexual intercourse. He indicated that the previous ratings indicated that all treatment options have failed, but he opined that there were treatments that have the potential to help appellant's conditions. Dr. Jarnagin recommended an interim trial for relief of urinary retention with an 83 percent statistical chance of improvement of greater than 50 percent. He further recommended palingen allograft to the affected pudendal nerve and Botox injections to affected pelvic floor muscles that were tender. Dr. Jarnagin noted that these treatments would need to be repeated episodically. He reported success with many patients with similar conditions and recommended the treatments for appellant.

In a decision dated February 17, 2016, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish that her accepted conditions had reached MMI.

LEGAL PRECEDENT

FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs, or functions of the body.[5] Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the sixth edition of the A.M.A., *Guides*.[6]

Permanent impairment may only be rated according to the A.M.A., *Guides* and only after MMI has been achieved. Impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur. This will depend on the nature of underlying pathology, as the optimal duration for recovery may vary considerably from days to months. The clinical findings must indicate that the medical condition is static and well stabilized for the person to have reached MMI.[7]

A preliminary element for considering a schedule award is establishing that the claimant has attained MMI.[8] The A.M.A., *Guides* explain that impairment should not be considered

[4] This appears to be a typographical error and should be December 31, 2015 not 2016, as indicated on the report.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (February 2013).

[7] A.M.A., *Guides* 24 (6th ed. 2009); *see Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until MMI -- meaning that the physical condition of the injured member of the body has stabilized and will not improve further -- has been reached).

[8] *See J.D.*, Docket No. 12-481 (issued November 17, 2012).

permanent until the clinical findings indicate that the medical condition is static and well stabilized. The A.M.A., *Guides* note that an individual's condition is dynamic. MMI refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once impairment has reached MMI, a permanent impairment rating may be performed.[9]

The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the injury. The question of when MMI has been reached is a factual one that depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.[10] The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.

ANALYSIS

OWCP accepted that appellant developed an acute lumbosacral strain, displacement of a lumbar intervertebral disc without myelopathy, other urinary incontinence, mononeuritis of the lower limb, decubitus ulcer bilaterally, atony of the bladder, and cauda equine syndrome with neurogenic bladder. It authorized surgery and on February 26, 1986 she underwent a left hemilaminectomy at L4-5 with excision of nucleus pulposus fragment and on June 12, 1987 she underwent a total laminectomy, L3-4 with removal of right L3-4 herniated disc fragment.[11] In a decision dated October 31, 1994, OWCP granted appellant a schedule award for 57 percent permanent impairment of both legs. Appellant appealed her case to the Board and in a July 22, 2014 decision[12] the Board found that she had an additional six percent permanent impairment of her right leg pursuant to the A.M.A., *Guides* and instructed OWCP to further develop the medical evidence with regard to permanent impairment of other scheduled members, specifically, the urinary and reproductive systems.[13]

To further develop the claim pursuant to the Board's decision, OWCP referred appellant to Dr. Jarnagin, a Board-certified gynecologist, for a second opinion evaluation to determine the nature and extent of her employment-related impairment. In a report dated October 9, 2015, Dr. Jarnagin noted that she had a work-related lifting injury, which required surgery at L3-4 and L4-5. Subsequently, appellant developed a urinary retention condition, which required self-

[9] A.M.A., *Guides* 20, Table 2-1 (6th ed. 2009); *Orlando Vivens, supra* note 7.

[10] *See D.S.*, Docket No. 15-1244 (issued August 24, 2015).

[11] Docket No. 13-1855 (issued July 22, 2014).

[12] *Id*.

[13] OWCP failed to properly make awards in terms of impairment to each part of a member. FECA provides that in case of loss of use of more than one member or parts of more than one member the compensation is for loss of use for each member or part thereof, and the awards run consecutively; 5 U.S.C. § 8107(c)(20); *see Erma L. Moore*, Docket No. 99-1554 (issued September 25, 2000) (the fact that appellant established that she had 10 percent impairment of the left arm in 1996 and was evaluated as having 2 percent impairment of that arm in 1998 did not mean that OWCP could deny her claim for a permanent impairment of the right arm because she received a greater total award than she would be entitled to for both arms).

catheterization. She reported frequent urinary tract infections, painful urination, self-catheterization, urinary urgency, numbness and tingling, and radiating pain. Dr. Jarnagin diagnosed urinary retention, primary, neurogenic bladder, cystocele, reetoccle, uterine prolapse, and incomplete uterine prolapse. He noted that appellant had greater than 52 percent permanent impairment related to urinary retention, which was chronic and required self-catheterization five to six times a day, but this was unrelated to the uterus, cervix, vulva, and vagina. Dr. Jarnagin recommended a trial of interstim. In a report dated December 31, 2016,[14] he noted reviewing the entire chart, notes, and criteria for rating permanent impairment for bladder and vulvar/vaginal disease. Dr. Jarnagin indicated that the previous conditions and ratings indicated that all treatment options failed, however, he noted that treatment options were available with the potential to help appellant's conditions. He recommended an interstim trial for relief of urinary retention with an 83 percent statistical chance of improvement of greater than 50 percent. Dr. Jarnagin further recommended palingen allograft to the affected pudendal nerve and botox injections to affected pelvic floor muscles that were tender, tight, and spasming to treat dyspareunia, and pelvic pain. He noted that these treatments would need to be repeated episodically. Dr. Jarnagin reported success with many patients with similar conditions and opined that it may work for appellant.

The Board notes that it is well established that a schedule award cannot be determined and paid until a claimant has reached MMI.[15] In his report, Dr. Jarnagin clearly opined that there were treatments available, which may improve appellant's conditions.[16] He did not indicate that MMI had been reached. OWCP properly determined that appellant's urinary and reproductive systems could not be rated as part of the impairment rating as she had not yet reached MMI at that time.

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

CONCLUSION

The Board finds that appellant has not established that she has reached MMI regarding her accepted conditions, warranting a schedule award pursuant to 5 U.S.C. § 8107.

[14] *See supra* note 4.

[15] *See Joseph R. Waples*, 44 ECAB 936 (1993).

[16] *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 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