

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

M.O., Appellant

and

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

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**Docket No. 16-1414
Issued: November 23, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 27, 2016 appellant filed a timely appeal from a January 12, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (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 is entitled to a schedule award for a permanent impairment of the lower extremities.

¹ Appellant submitted additional evidence with her appeal. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances from the prior decisions are hereby incorporated by reference. The facts relevant to the instant appeal are set forth below.

On September 3, 2008 appellant, then a 49-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 29, 2008 she experienced low back pain in the performance of duty. OWCP accepted her claim for lumbar sprain and thoracic or lumbosacral neuritis or radiculitis.

A Form CA-7 claim for schedule award was filed by appellant. By decision dated September 16, 2010, OWCP denied appellant's claim for a schedule award.³ It found that she had not submitted evidence establishing a ratable impairment to a scheduled member.

A December 2, 2010 electromyogram (EMG) and nerve conduction velocity (NCV) study showed findings "compatible with electrophysiological evidence of a right L3, L5 and left L4 [and] L5 radiculopathies."

On January 25, 2011 appellant requested reconsideration of the schedule award decision. In a February 23, 2011 decision, OWCP denied modification of the September 16, 2010 schedule award decision.⁴

A December 13, 2012 magnetic resonance imaging (MRI) scan of the lumbar spine showed a disc bulge at L5-S1 with mild narrowing of the anterior thecal sac, mild impingement of the L5 nerve roots, and 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 from the December 2, 2010 EMG and December 13, 2012 MRI scan. Citing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he found that she had 12 percent whole person permanent impairment of the lumbar spine due to electrodiagnostic evidence of radiculopathy using Table 17-4 on page 570.

Appellant, on June 23, 2014, filed another claim for a schedule award (Form CA-7). She submitted a July 23, 2014 impairment evaluation from Dr. Elias Benhamou, an attending Board-certified anesthesiologist. Dr. Benhamou diagnosed lumbar radiculitis, lumbar disc displacement, and lumbosacral spondylosis. He noted that the December 13, 2012 MRI scan

³ By decision dated July 19, 2010, OWCP also found that appellant was not entitled to compensation from June 24 to July 16, 2010. On August 16, 2010 it determined that she had received an overpayment of compensation in the amount of \$1,144.65 because she returned to work for eight hours on June 22, 2010. In an August 19, 2011 decision, the Board found that OWCP had not met its burden of proof to terminate appellant's compensation benefits. Docket No. 11-0259 (issued August 19, 2011). The Board further affirmed the fact of overpayment of compensation but found that the case was not in posture for decision regarding the period and the amount of the overpayment.

⁴ On August 26, 2011 appellant appealed the February 23, 2011 decision to the Board. In an order dated July 24, 2012, the Board dismissed her appeal as it was untimely filed. Docket No. 11-1983 (issued July 24, 2012).

study showed impingement of the nerve roots at L5 bilaterally and that a December 2, 2010 EMG/NCV revealed radiculopathy at L3 and L5 on the right and L4 and L5 on the left. Dr. Benhamou agreed with Dr. Rodriguez's finding of 12 percent permanent impairment of the spine.

An OWCP medical adviser reviewed the evidence on September 29, 2014. He noted that impairments of the extremities from the spinal nerves were determined using *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 psychiatrist, for a second opinion examination.

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. 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 advised that the neurological examination was not reliable and noted that the EMG was normal and that the results of the MRI scan did not correlate with the deficits found on examination. Dr. Carter opined that appellant did not have any impairment of either lower extremity.

An OWCP medical adviser reviewed Dr. Carter's report on November 17, 2014 and concurred with his findings.

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 legs.

Appellant appealed to the Board. In a decision dated September 15, 2015, the Board set aside the January 9, 2015 decision.⁵ The Board noted that Dr. Carter relied in part on the 2008 EMG study in determining that appellant had no lower extremity impairment. The Board found that the physician did not explain why he relied upon the negative electrodiagnostic testing performed in October 2008 rather than the more recent testing performed in December 2010 which found evidence of radiculopathy. The Board remanded the case for OWCP to further develop the medical evidence to determine whether appellant was entitled to a schedule award for lower extremity impairment.

On October 22, 2015 OWCP requested that Dr. Carter address whether he considered the 2010 EMG report and, if not, review the report and clarify his findings.

In a supplemental report dated November 9, 2015, Dr. Carter related, "After review of the information submitted, I still have no new information available to reconsider the examinee's

⁵ Docket No. 15-1085 (issued September 15, 2015).

impairment rating. The EMG done in December 2010 was neither available for my review at the time of my evaluation on October 29, 2014 nor is it submitted with this clarification request. Thus, my initial opinion remains unchanged at this time.”

An OWCP medical adviser, on December 28, 2015, reviewed the evidence of record, including Dr. Carter’s November 9, 2015 addendum report, and determined that it supported that appellant had no ratable impairment of the lower extremities. He noted that Dr. Carter found an unreliable physical examination and that the EMG study was normal.

By decision dated January 12, 2016, OWCP denied appellant’s claim for a schedule award. It found that the medical evidence was insufficient to show that she sustained a ratable impairment of the lower extremities.

On appeal appellant argues that Dr. Carter did not adequately examine her or review the 2010 EMG study. She maintains that she submitted sufficient evidence to show that she is entitled to a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA,⁶ and its implementing federal regulations,⁷ 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.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

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’s procedures indicate that *The Guides Newsletter*, “Rating Spinal Nerve Impairment Using the Sixth Edition” (July/August 2009) is to be applied.¹⁰

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹¹ While the claimant has the responsibility to establish entitlement to compensation,

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a).

⁹ 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).

¹⁰ *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹¹ *See Vanessa Young*, 55 ECAB 575 (2004).

OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹² Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹³

ANALYSIS

On a prior appeal, the Board found that Dr. Carter did not explain why he relied upon negative electrodiagnostic testing obtained in 2008 rather than the testing obtained in 2010 that showed evidence of radiculopathy in finding that appellant had no ratable impairment of the lower extremities. On remand, OWCP requested that Dr. Carter review the December 2010 EMG and NCS and provide a supplemental report. Dr. Carter, however, indicated that the evidence provided by OWCP did not contain the December 2010 electrodiagnostic study. Consequently, he advised that his conclusion that appellant had no ratable lower extremity impairment was unchanged. Based on Dr. Carter's report, OWCP denied her schedule award claim.

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.¹⁴ Dr. Carter's report is not based on a complete and accurate medical history and is therefore insufficient to resolve the pertinent issue in this case.¹⁵ On remand, OWCP should refer appellant, the case record including the December 2010 electrodiagnostic study, and a statement of accepted facts, to a physician for a new second opinion examination. Following this and any further development deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹² See *Richard E. Simpson*, 55 ECAB 490 (2004).

¹³ See *R.M.*, Docket No. 16-0147 (issued June 17, 2016); *Melvin James*, 55 ECAB 406 (2004).

¹⁴ *Id.*

¹⁵ See *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001) (medical opinions based on an incomplete or inaccurate history are of limited probative value).

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2016 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: November 23, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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