United States Department of Labor
Employees' Compensation Appeals Board

C.D., Appellant	)	
	)	
and	)	**Docket No. 16-1489**
	)	**Issued: April 12, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Lyons, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 12, 2016 appellant, through counsel, filed a timely appeal from a March 30, 2016 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.

[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.*

ISSUE

The issue is whether appellant met her burden of proof to establish ratable permanent impairment, warranting a schedule award.

FACTUAL HISTORY

On May 19, 2009 appellant, a 32-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging an injury on May 18, 2009 in the performance of duty while repositioning a patient in bed. OWCP accepted the claim for extruded disc at C6-7 and authorized cervical surgery, which she underwent on July 8, 2009. Appellant was placed on the periodic rolls on August 30, 2009 and then returned to full-time, full-duty work on November 15, 2009.

On August 8, 2013 appellant, through counsel, filed a claim for a schedule award (Form CA-7).

In a May 6, 2013 report, Dr. David Weiss, a Board-certified orthopedic surgeon, diagnosed chronic post-traumatic cervical strain and sprain, herniated cervical discs at C4-5 and C6-7, bulging cervical discs at C3-6, status post cervical discectomy at C6-7, and left-sided cervical radiculopathy. He opined that appellant had reached maximum medical improvement on May 6, 2013, the date of the examination. Dr. Weiss opined that she had 16 percent permanent impairment to the left upper extremity based on the class 1 diagnoses of mild motor strength deficit left biceps, severe sensory deficit left C7 nerve root, and severe sensory deficit left C8 nerve root under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

In a July 22, 2014 letter, OWCP advised appellant of the deficiencies of her schedule award claim and afforded her 30 days to submit additional evidence and respond to its inquiries. It specifically requested an impairment rating from a physician which would reflect permanent impairment from the originally accepted work-related cervical extruded disc and surgery based on the July/August 2009, *The Guides Newsletter*.

On August 23, 2013 Dr. Morley Slutsky, a Board-certified occupational medicine specialist and OWCP's district medical adviser (DMA), reviewed the medical evidence and recommended a second opinion examination to determine the nature and extent of appellant's employment-related conditions.

In a March 10, 2014 report, Dr. Thomas R. Peterson, a Board-certified neurosurgeon, asserted that appellant's "cervical symptoms [were] all causally related to a November 25, 2013 motor vehicle accident" when she was driving her own car in Cranford, New Jersey when the moving vehicle was broadsided on the driver's side, just behind the driver's door. He noted appellant's employment injury and reported that appellant "said that she achieved 100% relief of symptoms and as of the November 25, 2013 motor vehicle accident, she had absolutely no preexisting neck pain or cervical radiculopathy."

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

Appellant submitted a magnetic resonance imaging (MRI) scan of the lumbar spine dated February 21, 2014 and a computerized tomography (CT) scan of the lumbar spine dated April 9, 2014. She further submitted electromyogram (EMG) and nerve conduction velocity (NCV) studies dated March 20, 2014 consistent with acute left-sided C6, right-sided L5-S1, and left-sided S1 radiculopathies.

In reports dated February 11 through May 13, 2014, Dr. Steven P. Waldman, a Board-certified anesthesiologist, noted that appellant was injured on or about November 25, 2013 during a motor vehicle accident. On March 7, 2014 he diagnosed chronic intractable pain syndrome caused by motor vehicle accident, herniated nucleus pulposus (HNP) at C5-6 with spinal canal and neural foraminal stenosis, previous anterior fusion at C6-7, HNP at L3-4 and L4-5 and a bulging at L5-S1, clinical radiculopathy at C5-6, and clinical radiculopathy at L4, L5, and S1 levels bilaterally. Appellant underwent an anterior cervical discectomy and fusion (ACDF) surgery at C5-6 on May 5, 2014.

On March 20, 2014 Dr. Arthur C. Rothman, a neurosurgeon, reported that he had performed an electrodiagnostic study that day and found that appellant's left upper extremity and both lower extremities and associated paraspinal muscles were consistent with acute left-sided C6, right-sided L5-S1, and left-sided S1 radiculopathies.

OWCP referred appellant to Dr. Lawrence G. Splitter, a Board-certified occupational medicine specialist, for a second opinion examination to determine the nature and extent of her permanent impairment. In his February 16, 2015 report, Dr. Splitter reviewed a statement of accepted facts, appellant's medical history, and the medical evidence of record. He conducted a physical examination and found that appellant's reflexes were present and symmetric at C5 and C6, and C7 was reduced on the left in comparison to the right. Pinwheel was decreased over the left upper extremity in a global fashion. The shoulder was spared. The Pain Disability Questionnaire (PDQ) was completed and the total score was 128. Dr. Splitter diagnosed status post anterior cervical surgery and nonverifiable left upper extremity radicular complaints. He advised that "[b]efore assigning an impairment, [he] would recommend an updated electrodiagnostic study to verify any nerve root involvement."

In response, OWCP referred appellant to Dr. Donald Stone, a Board-certified neurologist, for second opinion diagnostic testing to determine the nature and extent of her employment-related conditions. Dr. Stone found that EMG/NCV studies dated June 29, 2015 were normal and revealed no evidence of left cervical radiculopathy, median or ulnar neuropathy, or generalized polyneuropathy involving the left upper extremity.

In a supplemental report dated August 4, 2015, Dr. Splitter reviewed the June 29, 2015 EMG/NCV studies and found no evidence of radiculopathy or entrapment neuropathy. He noted that on examination there was no muscle wasting, Spurling's sign was negative, and there was no weakness that would support an ongoing radiculopathy. There was subjective sensory loss in a nondermatomal pattern and inconsistent with two-point discrimination. Dr. Splitter concluded that given the results of the diagnostic studies and physical examination there was no permanent impairment of the left upper extremity secondary to the cervical spine.

On October 9, 2015 counsel suggested that there was a conflict in the medical opinion evidence between Dr. Weiss and the EMG findings dated March 20, 2014 identifying left-sided C6 cervical radiculopathy and requested a referee examination pursuant to 5 U.S.C. § 8123(a). Appellant further submitted reports dated May 18 through September 21, 2015 from her chiropractor, Dr. Ellen L. Wicklund, who diagnosed cervical subluxation, thoracic subluxation, lumbar subluxation, sacral nonallopathic lesions, pelvic nonallopathic lesions, scapula subluxation, cervical neck pain, thoracic pain, extremity pain, numbness, and low back pain.

On October 23, 2015 OWCP medical adviser Dr. Slutsky reviewed the medical evidence and found no basis for left upper extremity impairment consistent with Dr. Splitter's second opinion examination. He found that Dr. Splitter performed a complete evaluation which allowed him to determine that appellant's accepted condition had stabilized and required no further medical treatment. Dr. Slutsky reported that x-rays postoperatively demonstrated placement of interbody graft was stabilized by anterior plate and screws traversing through C6 and C7. The alignment was anatomical. There was no significant paravertebral soft tissue swelling. Dr. Slutsky asserted that Dr. Splitter found no objective upper extremity sensory or motor deficits reflecting specific cervical nerve root involvement and appellant's EMG/NCV studies were negative for cervical radiculopathy. He concluded that there was no basis for finding left upper extremity impairment using the July/August 2009, *The Guides Newsletter*, as he had been instructed. Dr. Slutsky determined that appellant had reached maximum medical improvement on February 16, 2015, the date of the impairment examination performed by Dr. Splitter.

By decision dated October 26, 2015, OWCP denied appellant's schedule award claim as the medical evidence of record failed to establish ratable permanent impairment of a scheduled member.

On November 4, 2015 counsel requested an oral hearing before a representative with OWCP's Branch of Hearings and Review which was held on February 17, 2016.

Subsequently, appellant submitted a March 7, 2016 narrative statement reiterating the factual history of her claim.

By decision dated March 30, 2016, OWCP's hearing representative affirmed the denial of appellant's award claim.

LEGAL PRECEDENT

The schedule award provision of FECA,[4] and its implementing federal regulation,[5] 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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.[8] Furthermore, the back is specifically excluded from the definition of organ under FECA.[9] The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, the July/August 2009, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.[10]

The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.[11]

ANALYSIS

OWCP accepted appellant's claim for extruded disc at C6-7 and authorized cervical surgery, which she underwent on July 8, 2009. The Board finds that the medical evidence of record fails to establish that appellant sustained permanent impairment to a scheduled member of the body causally related to the May 18, 2009 employment injury.

OWCP properly referred appellant to Dr. Splitter, a Board-certified occupational medicine specialist, to determine the nature and extent of any employment-related impairment. Dr. Splitter noted that on examination there was no muscle wasting, Spurling's sign was negative, and there was no weakness that would support an ongoing radiculopathy. He concluded that given the results of the diagnostic studies and physical examination there was no impairment of the left upper extremity secondary to the cervical spine.

On October 23, 2015 Dr. Slutsky reviewed the medical evidence and found no basis for left upper extremity permanent impairment consistent with Dr. Splitter's second opinion examination. He reported that x-rays postoperatively demonstrated placement of interbody graft was stabilized by anterior plate and screws traversing through C6 and C7. The alignment was

[6] *Id.* at § 10.404(a).

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013).

[8] *See N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[9] *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[10] *Supra* note 7 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[11] *See Veronica Williams*, 56 ECAB 367 (2005).

anatomical. There was no significant paravertebral soft tissue swelling. Dr. Slutsky noted that Dr. Splitter found no objective upper extremity sensory or motor deficits reflecting specific cervical nerve root involvement and appellant's EMG/NCV studies were negative for cervical radiculopathy. He concluded that there was no basis for a left upper extremity impairment using the July/August 2009, *The Guides Newsletter*. Dr. Slutsky determined that appellant had reached maximum medical improvement on February 16, 2015, the date of the impairment examination performed by Dr. Splitter.

The Board finds that OWCP properly concluded that there was no medical evidence of record establishing permanent impairment of the left upper extremity resulting from the accepted condition and that, therefore, there was no ratable impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.[12]

In his May 6, 2013 report, Dr. Weiss opined that appellant had 16 percent permanent impairment to the left upper extremity based on the diagnoses of mild motor strength deficit left biceps, severe sensory deficit left C7 nerve root, and severe sensory deficit left C8 nerve root. He rated appellant's impairment based on conditions which have not been accepted by OWCP. In its July 22, 2014 schedule award development letter, OWCP specifically requested an impairment rating based on the accepted work-related cervical extruded disc and surgery. FECA does not authorize schedule awards for loss of use of the spine.[13] A claimant may still be entitled to an award for loss of use of a limb where the cause of the impairment originated in the spine. Because the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities, OWCP has adopted the standard set forth in *The Guides Newsletter*.[14] Dr. Weiss failed to utilize the proper standard. Thus, the Board finds that Dr. Weiss' impairment rating is inconsistent with FECA and has little probative value. Consequently, appellant failed to establish that she has ratable permanent impairment of a scheduled body member.[15]

Appellant has submitted no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides*, or the July/August 2009, *The Guides Newsletter*, establishing ratable permanent impairment of a scheduled body member. For the reasons stated above, the Board finds that OWCP properly denied appellant's schedule award claim.

On appeal, counsel contends that the second opinion physician failed to reference the sixth edition of the A.M.A., *Guides* when arriving at his opinion that there was no related impairment to the left upper extremity. Based on the findings and reasons set forth above, the Board finds counsel's argument is not substantiated. Counsel further contends that there is a conflict in the medical evidence and OWCP improperly referred appellant to Dr. Stone for

[12] The Board notes that it is appropriate for an OWCP medical adviser to review the clinical findings of the examining physician to determine the permanent impairment. *See supra* note 7 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (January 2010); *J.C.*, Docket No. 15-1780 (issued March 17, 2016).

[13] *See M.R.*, Docket No. 14-833 (issued September 9, 2014).

[14] *See supra* note 10.

[15] *See J.Q.*, 59 ECAB 366 (2008) (when the examining physician does not provide an estimate of impairment that conforms to the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by an OWCP medical adviser).

second opinion diagnostic testing. The Board has explained above that Dr. Weiss failed to base his impairment rating on the accepted conditions.

Appellant may request a schedule award or increased schedule award at any time 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 met her burden of proof to establish any ratable impairment related to her accepted cervical condition entitling her to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board