United States Department of Labor
Employees' Compensation Appeals Board

C.N., Appellant	)	
and	)	**Docket No. 16-1637**
	)	**Issued: April 18, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Dallas, TX, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 9, 2016 appellant filed a timely appeal from a March 23, 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 to consider the merits of this case.[2]

ISSUE

The issue is whether appellant has established permanent impairment of a scheduled member, warranting a schedule award.

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that appellant submitted new evidence in her appeal to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-0176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

FACTUAL HISTORY

On March 10, 2008 appellant, then a 44-year-old vocational nurse, filed a traumatic injury claim (Form CA-1) alleging that on February 14, 2008 she sustained injuries to her neck, legs, lower back, shoulders, lower abdomen, and right hip resulting from when the automobile she was riding in was hit head-on by another vehicle. OWCP initially accepted the claim for neck and lumbar sprains, right thoracic or lumbosacral neuritis or radiculitis, and subsequently expanded acceptance of the claim to include the conditions of brachial neuritis or radiculitis, cervical spinal stenosis, cervical intervertebral disc displacement without myelopathy, lumbar spinal stenosis, other psychogenic pain, post-traumatic stress disorder, and single episode major depressive disorder.

On January 7, 2010 appellant filed a claim for a schedule award (Form CA-7). In support of her claim she submitted a September 29, 2009 report by Dr. Ronnie L. Shade, a treating Board-certified orthopedic surgeon. Dr. Shade noted that the accepted conditions were neck and lumbar sprains, as well as lumbosacral neuritis. He diagnosed acute cervical strain, central canal stenosis, right C5 and left C5-6 radiculopathy, acute lumbar strain with right lower extremity radiculopathy, C4-5 and C5-6 central canal stenosis, L4-5 and L3-4 instability, and C4-5 central disc herniation with central stenosis. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] and referencing *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment (July/August 2009), Dr. Shade determined that appellant had 14 percent left lower extremity permanent impairment, 14 percent right lower extremity permanent impairment, 18 percent left upper extremity permanent impairment, and 18 percent right upper extremity permanent impairment based on motor and sensory deficits. Dr. Shade found that the date of maximum medical improvement (MMI) was September 15, 2009.

On February 3, 2010 an OWCP medical adviser reviewed Dr. Shade's report and the medical evidence of record. He recommended further development of the evidence regarding the issue of appellant's permanent impairment.

On February 10, 2010 OWCP referred appellant to Dr. Arthur Sarris, a second opinion physician Board-certified in orthopedic surgery, for a permanent impairment evaluation. In a March 1, 2010 report, Dr. Sarris concurred with Dr. Shade's date of MMI, but disagreed with the impairment determination made by Dr. Shade. He reported that OWCP had accepted the conditions of cervical, thoracic, and lumbar sprains, brachial radiculitis, and thoracic and lumbosacral radiculitis or neuritis. Using the A.M.A., *Guides* peripheral nerve impairment tables, Dr. Sarris concluded that appellant had zero percent permanent impairment of her bilateral upper and lower extremities.

On April 12, 2010 an OWCP medical adviser reviewed the report of Dr. Sarris and concurred with the permanent impairment rating.

By decision dated April 26, 2010, OWCP denied appellant's claim for a schedule award.

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

In an August 20, 2010 report, Dr. Shade reviewed Dr. Sarris' March 1, 2010 report and noted his disagreement. He suggested that the evidence warranted either that Dr. Sarris perform a new impairment determination or appellant be referred for a referee evaluation.

On February 8, 2011 appellant requested reconsideration of the decision denying her claim for a schedule award.

By decision dated May 19, 2011, OWCP denied modification of its prior decision, finding that appellant failed to submit any new medical evidence establishing permanent impairment of a scheduled member.

In a September 17, 2014 report, Dr. Benjamin C. Dagley, a Board-certified physiatrist, noted that appellant had been referred by Dr. Shade for an electrodiagnostic evaluation. He provided a medical and employment injury history and noted her symptoms. Diagnoses included cervical radiculitis, numbness/tingling, and cervical sprain/strain. In an attached right upper extremity electromyography study dated that day, Dr. Dagley reported a normal study with no evidence of cervical radiculopathy or right ulnar or median neuropathy. A physical examination revealed normal bilateral upper extremity sensation, no tenderness on palpation, and normal neck range of motion. Dr. Dagley did not evaluate appellant's lower extremities.

On January 28 and March 6, 2015 appellant again filed claims for a schedule award (Forms CA-7). She submitted an October 16, 2014 report by Dr. Shade in support of her schedule award claim.

Dr. Shade, in the October 16, 2014 report, provided a history of injury, review of medical records, and examination findings. A physical examination revealed moderately decreased cervical range of motion, decrease C6-8 sensation, a 4/5 motor right lower extremity motor weakness, decreased right sensation S-1, normal sensation left S-1, and positive right straight leg raising. Using *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment, sixth edition (July/August 2009), Dr. Shade determined that appellant had 8 percent right upper extremity permanent impairment, 5 percent left upper extremity impairment, 0 percent left lower extremity permanent impairment, and 27 percent right lower extremity impairment. In reaching this determination, he noted that all impairments for the spine were a class 1. Using Table 1, Dr. Shade found zero percent sensory permanent impairment for the right upper extremity based on normal C-5 findings and eight percent permanent motor impairment, which resulted in a combined eight percent right upper extremity permanent impairment. He found no ratable impairment for the left upper extremity based on normal C-5 findings. Using Table 1 for the C-6 nerve Dr. Shade determined that appellant had five percent sensory impairment and zero percent motor impairment, resulting in a combined five percent impairment for the C-6 nerve. He evaluated the lower extremities using Table 2 for the S-1 and L-5 nerve roots. Dr. Shade determined that appellant had zero percent sensory permanent impairment and 13 percent motor permanent impairment, resulting in a combined 13 percent permanent impairment for the right lower extremity due to the L-5 nerve root. Next, he calculated 3 percent sensory permanent impairment and 13 percent motor permanent impairment, resulting in a combined 16 percent permanent impairment of the S-1 nerve root for the right lower extremity. Combining the impairment ratings for the S-1 and L-5 nerve roots, Dr. Shade found a combined 27 percent right

lower extremity permanent impairment. He also found no permanent impairment for the left lower extremity due to essentially normal findings.

On March 20, 2015 an OWCP medical adviser recommended another referral for an impairment evaluation including date of MMI. He noted that there was a conflict between Dr. Shade and Dr. Dagley on examination findings. Dr. Dagley, in in a September 17, 2014 report, noted 5/5 motor function and normal sensory findings while Dr. Shade noted abnormal findings. OWCP's medical adviser related Dr. Shade's findings that appellant had mild motor deficit of the right upper extremity, moderate sensory deficit of the left upper extremity, moderate motor, and sensory deficits of the right lower extremity

On August 31, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Adam Carter, a Board-certified physiatrist, for a permanent impairment determination.

In a September 22, 2015 report, Dr. Carter reviewed the medical evidence, statement of accepted facts, and conducted a physical examination. A physical examination revealed 5/5 bilateral upper and lower extremity strength, full bilateral shoulder range of motion, knee flexion and extension, and no atrophy. Dr. Carter reported that appellant was at MMI and determined that she had no permanent impairment for her back conditions. He noted that under FECA, no schedule award is payable for spinal injuries unless there was a permanent impairment of the extremities. Dr. Carter reported that no impairment rating had been given for radiculopathy in the regional grids. He found no ratable permanent impairment due to the accepted brachial neuritis, spinal stenosis, and cervical intervertebral disc displacement without myelopathy due to the lack any objective extremity findings.

On November 2, 2015 an OWCP medical adviser reviewed and concurred with Dr. Carter's impairment rating.

In a January 6, 2016 report, Dr. Shade noted that he had reviewed and disagreed with Dr. Carter's permanent impairment rating. He suggested that OWCP should refer appellant for an impartial medical examination due to the conflict between his impairment rating and that of Dr. Carter.

By decision dated March 23, 2016, OWCP denied appellant's claim for a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

all claimants. 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, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[7]

No schedule award is payable for a member, function or organ of the body not specified in the FECA or in the implementing regulations.[8] As neither FECA nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.[9] The Board notes that section 8101(19) specifically excludes the back from the definition of organ.[10] However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders, or spine.[11]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.[12] 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.[13] FECA approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[14]

Section 8123(a) of FECA[15] provides that, if there is 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.[16] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall

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[6] *Id.*

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[8] *S.K.*, Docket No. 08-0848 (issued January 26, 2009); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[9] *See D.N.*, 59 ECAB 546 (2008); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[10] 5 U.S.C. § 8101(19).

[11] *J.Q.*, 59 ECAB 366 (2008); *Thomas J. Engelhart*, *supra* note 8.

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

[13] *See G.N.*, Docket No. 10-0850 (issued November 12, 2010); *see also id.* at Chapter 3.700, Exhibit 1, (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[14] *Supra* note 7 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(c)(3) (February 2013).

[15] 5 U.S.C. § 8123(a).

[16] *J.J.*, Docket No. 09-0027 (issued February 10, 2009); *F.R.*, 58 ECAB 607 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

appoint a third physician to make an examination.[17] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.

ANALYSIS

OWCP accepted appellant's claim for neck and lumbar sprains, right thoracic or lumbosacral neuritis or radiculitis, brachial neuritis or radiculitis, cervical spinal stenosis, cervical intervertebral disc displacement without myelopathy, lumbar spinal stenosis, other psychogenic pain, post-traumatic stress disorder, and single episode major depressive disorder. It denied her claims for a schedule award by decisions dated April 26, 2010, May 19, 2011, and March 23, 2016.

The issue is whether appellant has established permanent impairment of a scheduled member due to her work-related injuries. The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical opinion evidence.

As noted above, appellant is not entitled to a schedule award due to any permanent impairment of her spine, as the spine is not a scheduled member. However, to the extent that the weight of the medical evidence establishes that her back injuries resulted in any permanent impairment of her lower extremity, she may receive a schedule award. As appellant's accepted employment injury was to her spine, any permanent impairment resulting from this condition should be evaluated in accordance with *The Guides Newsletter*.[18]

In support of her claim, appellant submitted reports from Dr. Shade, including the most recent report containing a permanent impairment rating dated October 16, 2014. Dr. Shade determined that she had 8 percent right upper extremity impairment, 5 percent left upper extremity impairment, 0 percent left lower extremity impairment, and 27 percent right lower extremity impairment using *The Guides Newsletter*. An OWCP medical adviser reviewed Dr. Shade's report and requested that appellant be referred for a second opinion evaluation due to conflicting findings with Dr. Dagley, to whom she had been referred by Dr. Shade.[19] OWCP's medical adviser found that while Dr. Shade reported a mild motor deficit of the right upper extremity, a moderate sensory deficit of the left upper extremity, and moderate motor and sensory deficits of the right lower extremity, Dr. Dagley reported normal motor and sensory findings.

Dr. Carter, the second opinion physician selected by OWCP, examined appellant and found 5/5 bilateral upper and lower extremity strength, full bilateral shoulder range of motion, knee flexion and extension, and no atrophy. He opined that she had no ratable impairment due to her accepted conditions. In support of this conclusion, Dr. Carter noted that FECA does not

[17] 20 C.F.R. § 10.321.

[18] *See supra* notes 12 and 13.

[19] As the disagreement arose between two treating physicians and not between a treating physician and a physician for the government as contemplated by 5 U.S.C. § 8123(a) no conflict existed. *See F.S.*, Docket No. 09-2337 (issued September 2, 2010).

provide for impairment ratings for spinal injuries unless there is impairment of the extremities. He also noted that no impairment rating is given for radiculopathy in the regional grids. Dr. Carter found no ratable impairment due to the accepted brachial neuritis, spinal stenosis, cervical intervertebral disc displacement without myelopathy due to the lack of any objective extremity findings. An OWCP medical adviser reviewed this report and agreed that appellant was not entitled to a permanent impairment of her bilateral upper or lower extremities due to spinal injury.

The Board finds that the reports of Dr. Carter and Dr. Shade are in conflict.[20] Both physicians identified findings on physical examination which ostensibly supported their respective opinions.[21] Because there is an unresolved conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a), the case will be remanded to OWCP for referral to an impartial medical examiner to determine the existence and extent of any spinal nerve extremity impairment. After OWCP has developed the case record consistent with the Board's directive, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that this case is not in posture for a decision due to an unresolved conflict in the medical opinion evidence.

[20] *See supra* note 16.

[21] The Board also notes that while Dr. Dagley related that appellant had normal upper extremity electromyography studies on September 17, 2014, he did not evaluate appellant's motor function or perform any testing of appellant's lower extremities.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 23, 2015 is set aside and the case is remanded for further action consistent with the above opinion.

Issued: April 18, 2017
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