United States Department of Labor
Employees' Compensation Appeals Board

K.B., Appellant	)	
and	)	**Docket No. 17-0109**
	)	**Issued: August 8, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, 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 October 25, 2016 appellant filed a timely appeal from a September 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 over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she has permanent impairment of her upper extremity due to her accepted conditions thereby warranting a schedule award.

FACTUAL HISTORY

On November 18, 1996 appellant, then a 41-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she injured her lower back and her trapezoid and deltoid

[1] 5 U.S.C. § 8101 *et seq.*

muscles on November 8, 1996 while working on a conveyor belt. The claim was adjudicated by OWCP under File No. xxxxxx290. The employing establishment controverted the claim. On January 10, 1997 OWCP denied the claim. By decision dated July 7, 1998, a hearing representative with OWCP's Branch of Hearings and Review affirmed the January 10, 1997 decision.

On October 14, 1997 appellant filed an occupational disease claim (Form CA-2) alleging that degenerative discs in her neck were due to years of carrying a mailbag as a letter carrier.[2] OWCP adjudicated this claim under File No. xxxxxx474. On January 26, 1998 it accepted aggravation of cervical spondylosis under File No. xxxxxx474.

Appellant appealed the July 7, 1998 decision to the Board.

In an order dated March 6, 2000 regarding File No. xxxxxx290, the Board set aside OWCP's July 7, 1998 decision and remanded the case to OWCP to combine File Nos. xxxxxx290 and xxxxxx474.[3] The claims were administratively combined by OWCP, with File No. xxxxxx474 serving as the master file. It later accepted the claim for a neck sprain. In 2001 appellant was employed privately as a sales representative.

On January 23, 2006 appellant filed a schedule award claim (Form CA-7) under File No. xxxxxx474.[4] By letter dated February 7, 2006, OWCP informed her that, while schedule awards were not paid for impairment to the spine, she may submit an impairment rating of her upper extremities in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[5]

Thereafter, OWCP received an electrodiagnostic study dated February 1, 2005, which indicated borderline right carpal tunnel syndrome, and no electrodiagnostic evidence of right ulnar or cervical radiculopathy.

On May 19, 2006 OWCP asked appellant's attending family physician, Dr. O'Connor, to rate appellant's impairment under the fifth edition of the A.M.A., *Guides*. In an October 13, 2006 report, Dr. O'Connor reported that maximum medical improvement was reached in 1997. He advised that appellant was right-arm dominant, and had diminished biceps and triceps

[2] The record indicates that appellant began a casual appointment as a letter carrier on August 24, 1992 and worked as a noncareer employee for various periods through November 3, 1996. On November 9, 1996 appellant began a career appointment as a mail handler and was terminated during the probationary period on December 26, 1996 for failure to meet the requirements of the position and failure to follow instructions.

[3] Docket No. 99-0018 (issued March 6, 2000).

[4] Appellant had previously filed two CA-7 claims for compensation on October 9, 2002, one for wage-loss compensation and one for a schedule award. OWCP sent her a development letter on October 25, 2002. Appellant did not respond or forward medical evidence until December 23, 2003 when she submitted a February 3, 2003 report in which Dr. T.A. O'Connor, a family physician, discussed her current condition, but did not provide an impairment evaluation. She also submitted a January 17, 2003 magnetic resonance imaging (MRI) scan of the cervical spine that demonstrated degenerative changes at C5-6 and C6-7, resulting in left neural foraminal encroachment and bulging disc.

[5] A.M.A., *Guides* (5th ed. 2001).

reflexes, diminished right hand grasp, and progressive right upper extremity atrophy. Dr. O'Connor indicated that appellant was unemployable due to C6-8 radiculopathy and had daily stiffness, muscle contraction, and pain that required medication. He opined that she had 100 percent right arm permanent impairment.

In a report dated August 28, 2007, Dr. Jerome Lerner, an attending Board-certified physiatrist, noted appellant's complaints of cervicalgia, right shoulder, mid, and low back pain. He reported that she developed neck pain while working for the employing establishment in the 1990s which progressed to right arm radiculopathy in approximately 2004. Dr. Lerner further indicated that appellant had been in a motor vehicle accident in 2005 where she tore her right rotator cuff and aggravated her other conditions. He described physical examination findings of cervical spine tenderness with moderately reduced range of motion and mild weakness of right biceps and triceps. Dr. Lerner diagnosed displacement of cervical disc without myelopathy, cervical radiculopathy, and myalgia/myositis, not otherwise specified. He recommended epidurals and physical therapy.

In a July 16, 2008 report, Dr. Amon Ferry, a Board-certified orthopedic surgeon and an OWCP medical adviser, related his review of the record including the reports of Dr. O'Connor and Dr. Lerner. He noted the dramatic discrepancies in their physical examinations and recommended an impairment evaluation by an orthopedic surgeon as the existing evidence was not in posture for an impairment rating.

A statement of accepted facts (SOAF) dated May 7, 2010 indicated that the accepted conditions were cervical spondylosis without myelopathy, closed dislocation first cervical vertebral, brachial neuritis or radiculitis, cervicalgia, and neck sprain.

Appellant moved from Wisconsin to Arkansas in 2013. She contacted OWCP regarding her schedule award claim in February 2015.

By decision dated September 23, 2016, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish upper extremity impairment in accordance with the sixth edition of the A.M.A., *Guides.*[6]

LEGAL PRECEDENT

It is the claimant's burden of proof to establish a permanent impairment of a scheduled member or function as a result of any employment injury.[7]

The schedule award provisions of FECA,[8] and its implementing federal regulations,[9] set forth the number of weeks of compensation payable to employees sustaining permanent

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

[7] *See Tammy L. Meehan*, 53 ECAB 229 (2001).

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

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.[10] For decisions issued after May 1, 2009, the sixth edition will be used.[11]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.[12] 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.[13]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.[14] OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in a July-August 2009 *The Guides Newsletter*.[15] Specifically, OWCP will address lower extremity impairments originating in the spine through Table 16-11[16] and upper extremity impairment originating in the spine through Table 15-14.[17]

ANALYSIS

The Board finds that this case is not in posture for decision regarding appellant's permanent impairment due to the accepted conditions. Under File Nos. xxxxxx474 and xxxxxx290, OWCP accepted cervical spondylosis without myelopathy, closed dislocation first cervical vertebra, brachial neuritis or radiculitis, cervicalgia, and neck sprain.

[10] *Id.* at § 10.404(a).

[11] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

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

[13] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[14] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[15] FECA Transmittal No. 10-04 (issued January 9, 2010); *supra* note 11 at Chapter 3.700, Exhibit 1, note 5 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

[16] *Supra* note 6 at 533.

[17] *Id*. at 425.

Dr. O'Connor, an attending family physician, advised that appellant was right arm dominant, and had diminished biceps and triceps reflexes, diminished right hand grasp, and progressive right upper extremity atrophy. He indicated that appellant was unemployable due to C6-8 radiculopathy and had daily stiffness, muscle contraction, and pain that required medication. Dr. O'Connor opined that appellant had 100 percent right arm permanent impairment.

Dr. Lerner, an attending physiatrist, described examination findings of cervical spine tenderness with moderately reduced range of motion and mild weakness of right biceps and triceps. He diagnosed displacement of cervical disc without myelopathy, cervical radiculopathy, and myalgia/myositis, not otherwise specified.

A review of the case record shows that Dr. Ferry, an OWCP medical adviser, noted on July 16, 2008 that there were discrepancies in the physical examinations of Dr. O'Connor and Dr. Lerner and recommended that appellant have an impairment evaluation by an orthopedic surgeon. OWCP, however, did not refer appellant for a second opinion evaluation, and the case was thereafter dormant for several years. Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. Once it has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible. OWCP has an obligation to see that justice is done.[18]

Accordingly, the Board finds this case is not in posture for decision. Further development is required on the issue of whether appellant is entitled to schedule awards for the accepted cervical and brachial conditions. On remand OWCP shall prepare an updated SOAF and refer appellant to an appropriate specialist for an opinion on appellant's permanent impairment due to the accepted conditions, in accordance with section 3.700 of OWCP procedures, which memorializes proposed tables outlined in a July-August 2009 *The Guides Newsletter*.[19] Following this and other development deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for a schedule award for the accepted conditions.[20]

CONCLUSION

The Board finds this case not in posture for decision.

[18] *A.A.*, 59 ECAB 726 (2008).

[19] *Supra* note 15.

[20] *See M.D.*, Docket No. 13-503 (issued September 19, 2013).

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: August 8, 2017
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