United States Department of Labor
Employees' Compensation Appeals Board

I.S., Appellant	)	
and	)	**Docket No. 17-1257**
	)	**Issued: December 21, 2017**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Sanford, FL, Employer	)	

Appearances:
Alan J. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 19, 2017 appellant, through counsel, filed a timely appeal from a February 6, 2017 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 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 permanent impairment of a scheduled member, warranting a schedule award.

On appeal counsel asserts that OWCP's medical adviser did not properly read and evaluate the report of appellant's attending physician.

FACTUAL HISTORY

On April 25, 2011 appellant, then a 45-year-old transportation security officer (screener) filed a traumatic injury claim (Form CA-1) alleging that she injured her mid to lower back when pulling and loading luggage on April 23, 2011. On June 13, 2011 OWCP accepted sprain of back, lumbar region, and lumbosacral spondylosis without myelopathy. Appellant missed intermittent periods of work thereafter and was paid appropriate compensation. On June 18, 2012 she filed a claim for compensation (Form CA-7) for total disability beginning June 3, 2012. Appellant was then placed on the periodic compensation rolls.

A March 25, 2013 magnetic resonance imaging (MRI) scan of the thoracic spine demonstrated disc degeneration at multiple levels of the mid and upper thoracic sine.

Appellant began treatment with Dr. Samy F. Bishai, an orthopedic surgeon, on March 26, 2013. Following examination, he diagnosed lumbosacral spondylosis and degenerative disc disease of the cervical spine and recommended additional studies.

An April 4, 2013 electromyography (EMG) and nerve conduction velocity (NCV) study of the lower extremities was abnormal with findings suggestive of L2-3 radiculopathy. An April 15, 2013 cervical spine MRI scan showed osteophyte complexes associated with disc degeneration, facet arthropathy, and hypertrophy at C5-6 and C6-7 with bilateral neural foraminal narrowing. April 30, 2013 EMG/NCV studies of the arms were essentially normal.

OWCP referred appellant to Dr. Jonathan D. Black, a Board-certified orthopedic surgeon, for a second opinion examination. In an August 27, 2013 report, Dr. Black noted his review of the medical evidence and found that she was neurologically intact on examination. He diagnosed lumbar degenerative disc disease and opined that appellant's subjective complaints outweighed objective findings. Dr. Black concluded that she had no employment-related disability and could return to work as a transportation security officer.

November 6, 2013 upper extremity EMG/NCV studies demonstrated mild right carpal tunnel syndrome. On December 23, 2013 appellant began treatment with Dr. Robert Reppy, an osteopath and an associate of Dr. Bishai. Dr. Reppy provided examination findings and diagnosed lumbosacral spondylosis, spinal stenosis of the cervical spine, and degenerative disc disease of the cervical and lumbar spines. Appellant also began pain management in March 2014 with Dr. Padmaja Yatham, an anesthesiologist.

OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Reppy and Dr. Black regarding the accepted conditions and whether appellant

continued to be totally disabled. It referred her to Dr. Emmanuel D. Scarlatos, a Board-certified orthopedic surgeon, for an impartial evaluation.

In an April 29, 2014 report, Dr. Scarlatos noted physical examination findings and diagnosed cervicalgia with multilevel degenerative arthrosis and disc disease at C5-6 and C6-7, preexisting and unrelated; multi-level degenerative disc disease and lumbosacral spondylosis at L3 through S1 without spinal stenosis or nerve root impingement, preexisting, and acute lumbosacral myofascial strains, resolved. He opined that objective examination findings supported that appellant had a soft tissue low back injury on April 23, 2011 that had resolved and noted some degree of symptom magnification. Dr. Scarlatos indicated that any disabling residuals were not employment related and that the preexisting degenerative disc disease was not totally disabling. He concluded that appellant was physically capable of resuming her former duties as a transportation security officer with no restrictions.

In an April 29, 2014 report, Dr. Richard M. Blecha, a Board-certified orthopedic surgeon, noted diagnoses of lumbar spondylosis, foraminal stenosis at L4-5 and L5-S1, moderate to severe, cervical spondylosis, cervical stenosis at C5-6 and C6-7, and cervical degenerative disc disease at C5-6.

On June 3, 2014 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. It found that the special weight of the medical evidence rested with the referee opinion of Dr. Scarlatos.

In correspondence dated May 28, 2014, received by OWCP on June 5, 2014, appellant maintained that additional conditions of foraminal stenosis at L4, L5, and S1, moderate to severe cervical spondylosis, cervical stenosis at C5, C6, and C7, and cervical degenerative disc disease at C5 and C6 should be accepted. On June 16, 2014 she disagreed with the proposed termination of benefits.

Dr. Reppy also responded to the proposed termination. In a June 16, 2014 report, he disagreed with the findings and conclusions of Dr. Black and Dr. Scarlatos and reiterated diagnoses of lumbar disc disease with radiculopathy, sacroiliitis, cervical stenosis, and degenerative disc disease of the cervical spine.

In a supplemental report dated August 14, 2014, Dr. Scarlatos reiterated his prior findings and conclusions.

Dr. Yatham and Dr. Reppy continued to treat appellant.

On August 29, 2014 OWCP again proposed to terminate appellant's wage-loss compensation and medical benefits. Appellant again disagreed with the proposed termination and submitted copious medical evidence. This included a September 15, 2014 report in which Dr. Harvey Bishow, an orthopedic surgeon, advised that appellant's many cervical and lumbar diagnoses were caused by the April 23, 2011 employment injury. Dr. Reppy also again disagreed with the proposed termination in a September 19, 2014 report.

On October 2, 2014 OWCP finalized the termination of wage-loss compensation and medical benefits effective October 3, 2014. Appellant, through counsel, timely requested a hearing with OWCP's Branch of Hearings and Review.

In reports dated October 21, 2014 and May 27, 2015, Dr. Reppy reiterated his findings and conclusions.

A hearing was held on May 12, 2015 regarding the termination of appellant's wage-loss compensation and medical benefits.

In an impairment evaluation dated June 9, 2015, Dr. Reppy advised that, for diagnoses of radiculopathy of the upper and lower extremities and degenerative spondylosis, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[3] appellant had 22 percent whole person impairment. He specifically indicated that, regarding her lower extremities, in accordance with Table 16-11 she had class 1 impairments for motor and sensory loss. Dr. Reppy found modifiers of 1 for functional history and clinical studies, and applied the net adjustment formula, finding a class C sciatic nerve impairment. He determined that, under Table 16-12, Peripheral Nerve Impairment, a class C impairment yielded nine percent permanent impairment of each leg. Dr. Reppy also found that, under Table 15-21, Peripheral Nerve Impairment, appellant had 13 percent permanent impairment of each arm. He further found that, in accordance with Table 17-4, Lumbar Spine Regional Grid, she had a class 1 impairment for the diagnosis of degenerative spondylosis, she had nine percent whole person impairment. Dr. Reppy then converted all impairment to whole person impairment, concluding that appellant had a total 22 percent whole person impairment.

On July 28, 2015 an OWCP hearing representative affirmed the October 2, 2014 termination decision.

In correspondence dated September 28, 2016, counsel inquired about appellant's impairment evaluation. By letter dated November 2, 2016, OWCP notified him that it had no record of receiving a schedule award claim. On December 1, 2016 appellant submitted one page only of a schedule award claim (Form CA-7). On January 24, 2017 OWCP notified her of the evidence needed to support her claim for permanent impairment.

By report dated January 25, 2017, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the record including Dr. Reppy's June 9, 2015 report and found that maximum medical improvement had been reached that day. OWCP's medical adviser noted that a September 2, 2010 MRI scan of the lumbar spine demonstrated lumbar disc protrusion at L5-S1. He concluded that, in accordance with the A.M.A., *Guides*, appellant had zero percent permanent impairment of the right lower extremity and zero percent impairment of the left lower extremity. The medical adviser explained that Dr. Reppy did not rate her spinal nerve impairments in accordance with the approach outlined in *The Guides Newsletter* July/August 2009 and, instead, utilized the charts for peripheral nerve impairments.

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

OWCP requested that Dr. Harris further explain his impairment opinions. In a February 6, 2007 report, Dr. Harris advised that, in accordance with *The Guides Newsletter*, for the disc protrusion at L5-S1, based on Dr. Reppy's report that appellant had mild symptoms which interfered with activity, she had a functional history modifier of 1 bilaterally. He found that, with no evidence of either right or left lower extremity neurologic deficit, the physical examination modifier was 0, and with no electrodiagnostic testing demonstrating lumbar radiculopathy, clinical studies were also consistent with a 0 modifier bilaterally. OWCP medical adviser then applied the net adjustment formula and concluded that appellant had zero percent permanent impairment of each lower extremity.

In a decision dated February 6, 2017, OWCP denied appellant's schedule award claim, finding the medical evidence of record insufficient to establish lower extremity permanent impairment in accordance with the sixth edition of the A.M.A., *Guides.*

LEGAL PRECEDENT

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of any employment injury.[4]

The schedule award provision of FECA,[5] and its implementing federal regulations,[6] 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.[7] For decisions issued after May 1, 2009, the sixth edition will be used.[8]

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.[9] 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

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

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

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

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

schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[10]

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.[11] 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 the July/August 2009, *The Guides Newsletter*.[12]

ANALYSIS

OWCP accepted sprain of back, lumbar region, and lumbosacral spondylosis without myelopathy. Dr. Reppy, an attending physician, submitted an impairment evaluation dated June 9, 2015. This was reviewed by Dr. Harris, OWCP's medical adviser on January 25 and February 1, 2017. The medical adviser advised that Dr. Reppy did not properly follow the July/August 2009, *The Guides Newsletter*. The Board finds that appellant has not established permanent impairment of a scheduled member of her body.

In his June 9, 2015 impairment evaluation, Dr. Reppy concluded that appellant had 22 percent whole person impairment. However, whole person impairment is not permitted under FECA.[13] Furthermore, Dr. Reppy also rated appellant for a diagnosis of degenerative spondylosis under Table 17-4, found in The Spine and Pelvis chapter of the A.M.A., *Guides*.[14] As noted, under FECA a schedule award is not payable for injury to the spine.[15] Dr. Reppy also provided an upper extremity impairment rating based on cervical diagnoses which have not been accepted. Therefore, his ratings for the upper extremity and that specifically for the cervical spine will be disregarded.[16] Dr. Reppy, however, did rate appellant's lower extremities, finding nine percent permanent impairment of both legs based on lower extremity radiculopathy. He reported that, under Table 16-11, she had a mild motor deficit of each lower extremity for a class 1 impairment, identified modifiers of 1 for functional history and clinical studies, and applied the net adjustment formula. However, rather than utilizing proposed Table 2, he rated appellant under Table 16-12, Peripheral Nerve Impairment, finding a class 1 impairment of the sciatic nerve, for nine percent permanent impairment of both legs lower extremities.

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

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

[12] FECA Transmittal Docket No. 10-0004 (issued January 9, 2010); *supra* note 8 at Chapter 3.700, Exhibit 1, note 5 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

[13] *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

[14] A.M.A., *Guides*, *supra* note 3 at 557-601.

[15] *Supra* note 9.

[16] *See Veronica Williams*, 56 ECAB 367 (2005) (a schedule award can be paid only for a condition related to an employment injury).

The Board has long held that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment.[17] Thus, Dr. Reppy's opinion is of limited probative value regarding impairment due to the accepted lumbar conditions.

Dr. Harris, OWCP's medical adviser, utilized the proposed table and identified a lumbar disc protrusion at L5-S1 for a class 1 impairment. He then followed the process identified in *The Guides Newsletter* and applied grade modifiers, concluding that appellant had no impairment of either lower extremity based on no electrodiagnostic evidence of radiculopathy and mild symptoms which did not interfere with activity.[18] The Board concludes that appellant has not established permanent impairment due to the accepted conditions.[19]

Contrary to counsel's assertion on appeal, the Board finds that Dr. Harris properly applied the appropriate portions of *The Guides Newsletter* as reflected in OWCP procedures, to Dr. Reppy's physical findings. There is no probative medical evidence of record to establish permanent impairment. Therefore, OWCP's February 6, 2017 decision finding that appellant had not established permanent impairment to a scheduled member was proper under the facts and circumstances of this case.[20]

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 failed to establish permanent impairment of a scheduled member, warranting a schedule award.

[17] *Carl J. Cleary*, 57 ECAB 563 (2006).

[18] The Board notes that the record contains an April 4, 2013 EMG/NCV study that demonstrated L2-3 radiculopathy. However, *The Guides Newsletter* instructs that, to be of rating value, electrodiagnostic testing must be done when a claimant is near maximum medical improvement. The April 4, 2013 study was done more than two years before Dr. Reppy's evaluation on June 9, 2015, when Dr. Harris found appellant to be a maximum medical improvement.

[19] *See supra* note 16.

[20] *See H.S.*, Docket No. 16-1624 (issued January 13, 2017).

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 21, 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