United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 16-0692**
	)	**Issued: February 2, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Portland, ME, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 23, 2016 appellant, through counsel, filed a timely appeal of a December 11, 2015 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.

ISSUE

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

[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.*

FACTUAL HISTORY

On October 25, 2006 appellant, then a 41-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 24, 2006 she sustained an injury to her tailbone and back when she slipped on a step while working. She stopped work on October 24, 2006.

On April 27, 2007 OWCP accepted appellant's claim for gluteal and hamstring sprains. On October 17, 2011 it expanded the claim to include a coccyx sprain. Appellant received compensation benefits.

On March 9, 2012 appellant filed a claim for a schedule award (Form CA-7).

In a September 27, 2012 report, Dr. Karen Garvey, a Board-certified internist, noted appellant's history of injury and treatment. She provided results on examination and provided an impairment rating under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Garvey utilized the range of motion method and referred to Table 16-24 and Table 16-25 of the A.M.A., *Guides* to determine impairment.[3] Findings included limited motion in both hips, tenderness to palpation over the lumbar spine, fullness to palpation of the right sacroiliac (SI) joint, and no tenderness to palpation over the coccygeal region. Dr. Garvey opined that appellant had 20 percent permanent impairment of the right lower extremity and 30 percent permanent impairment of the left lower extremity due to range of motion loss in the hips.

In a February 7, 2013 report, an OWCP medical adviser reviewed Dr. Garvey's report and provided an impairment rating under the A.M.A., *Guides.* He explained that the diagnosis-based impairment (DBI) method was the preferred rating method for the lower extremities.[4] The medical adviser further explained that in this case, he used the DBI method. He determined that the most impairing diagnosis was the hip sprain and would be used for final impairment calculations. The medical adviser determined that appellant had one percent permanent impairment for each leg based upon this method.

On August 7, 2013 OWCP found a conflict in the medical opinion between Dr. Garvey and OWCP's medical adviser regarding the nature and extent of appellant's entitlement to a schedule award and referred appellant, along with a statement of accepted facts and the medical record, to Dr. David N. Markellos, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a September 3, 2013 report, Dr. Markellos noted appellant's history of injury and treatment. He found no visible asymmetry of the paraspinous, gluteal, or lower extremity musculature. Dr. Markellos determined that the Waddell's test was positive for illness behavior including complaints of low back tenderness with light palpation of the skin from the level of the iliac crest (about L2) to the presacrum and laterally to the mid buttocks. He found no pain distal to the gluteal fold and no distal tenderness of the thighs or legs. Furthermore, Dr. Markellos

[3] A.M.A., *Guides* 549, 550 (6th ed. 2009).

[4] *See id*. at 497.

found additional positive Waddell's testing, including complaints of low back pain on light shoulder and skull depression and body rotation. He found right and left tilts on three tests, 25 to 30 degrees, but forward flexes of no more than 20 to 30 degrees, and fingertips well above the knees, which was a nonphysiologic finding. Dr. Markellos determined that appellant had a normal gait and could heel and toe walk "well." He indicated that a sitting examination revealed full range of motion of all joints of the lower extremities, including sitting straight leg raise to 90 degrees. Dr. Markellos explained that this finding did not correlate with the inability to forward flex while standing. He found 5/+5 strength of lower extremity motor groups and brisk knee and ankle deep tendon reflexes at +2/1-2. Dr. Markellos conducted a supine examination, which revealed normal rotation and position of the hips and no evidence of hamstring spasm or tightness. He found that bilateral hip flexion of 95 to 100 degrees without complaints of pain on three tests on each side. Dr. Markellos also found abduction of 25 to 30 degrees, internal rotation to 30 degrees, and external rotation of 45 to 50 degrees bilaterally.

Dr. Markellos determined that there was no restriction of any motion of either hip joint and that both legs had significant soft tissue swelling and pretibial pitting edema. Appellant had normal sensation through all dermatomes. She had a positive supine straight leg test for low back pain at 35 to 40 degrees bilaterally which was inconsistent with the seated examination. Dr. Markellos found that measured range of motion of the hips, with three cycles each side, were equal. He opined that it was "unclear to me the discrepancy between this examination and measurements today to the report provided by Dr. Garvey a year ago." Dr. Markellos indicated that appellant had chronic subjective low back pain without radicular component, preexisting minor L5-S1 degenerative disc disease which was of little to no clinical significance to explain the extent of her back complaints. He opined that she did not sustain a significant sacrococcygeal injury. Dr. Markellos further explained there was no clinical evidence of any residual hamstring injury or current physical findings to substantiate her accepted conditions. He explained that there was no objective evidence that appellant had any impairment directly related to the accepted conditions of coccyx sprain or gluteal hamstring sprain. Dr. Markellos advised that multiple x-rays, and diagnostic reports did not reveal any structural injury or abnormality that would support ongoing pain complaints related to those diagnoses. He advised that his examination findings differed significantly from those of Dr. Garvey and he could not explain the discrepancies. Dr. Markellos explained that the A.M.A., *Guides* used impairment ratings primarily on the DBI estimate. He noted that, while OWCP's medical adviser found a rating of one percent, this was "incongruous" as there was "no indication she has any physical or clinical findings or constraints due to the hamstring/coccygeal sprain that occurred seven years ago and has long since resolved." Dr. Markellos noted that the multiple diagnostic tests and current examination did not reveal any residual limitations from that injury. He opined that there was no basis to assign impairment to either leg.

In an April 9, 2014 report, another OWCP medical adviser concurred that Dr. Markellos had properly applied the A.M.A., *Guides.*

On April 8, 2015 OWCP denied appellant's claim for a schedule award based on the independent medical examination report of Dr. Markellos.

On April 17, 2015 counsel requested a telephonic hearing, which was held before an OWCP hearing representative on November 4, 2015. During the hearing, he argued that the

April 8, 2015 decision should be set aside because neither he nor appellant received a copy of the reports from OWCP's medical advisers. On that same date, OWCP's hearing representative noted that the reports of the medical providers had been provided to appellant and his representative.

By decision dated December 11, 2015, an OWCP hearing representative affirmed the April 8, 2015 decision.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[5] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[6] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[7] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides.*[8]

Section 8123(a) of FECA provides, 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.[9] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[10]

ANALYSIS

The Board finds that the evidence of record is insufficient to establish permanent impairment warranting a schedule award in accordance with the sixth edition of the A.M.A., *Guides*.

OWCP accepted appellant's claim for gluteal and hamstring sprains. On October 17, 2011 it expanded the claim to include a coccyx sprain OWCP determined that a conflict of

[5] 5 U.S.C. § 8107.

[6] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[7] 20 C.F.R. § 10.404.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[9] 5 U.S.C. § 8123(a).

[10] *Barbara J. Warren*, 51 ECAB 413 (2000).

medical opinion existed regarding the nature and extent of appellant's permanent impairment as a result of the work injury of October 24, 2006. OWCP found a conflict between the opinions of Dr. Garvey, appellant's physician, who supported permanent impairment of 20 percent to the right lower extremity and 30 percent to the left lower extremity and OWCP's medical adviser, who opined that appellant had permanent impairment of 1 percent of each leg. Therefore, OWCP referred appellant to Dr. Markellos, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.[11]

In his September 3, 2013 report, Dr. Markellos found that appellant did not have any ratable impairment under the A.M.A., *Guides*. He examined appellant and found that appellant had a positive Waddell's test related to illness behavior. However, Dr. Markellos explained that he found no pain distal to the gluteal fold and no distal tenderness of the thighs or legs. He explained that appellant's complaints of low back pain on light shoulder and skull depression and body rotation were nonphysiologic findings. Dr. Markellos found full range of motion of all joints of the lower extremities, including sitting straight leg raise to 90 degrees. He indicated that his observation did not correlate with appellant's inability to forward flex while standing.

Dr. Markellos opined that there was a discrepancy between his examination and measurements by Dr. Garvey a year prior. He opined that there was no basis to find a significant sacrococcygeal injury as there was no present clinical evidence of "any residual hamstring injury or physical findings to substantiate either diagnosis." Dr. Markellos determined that there was no objective evidence that appellant had any impairment related to her accepted conditions. He explained that multiple x-rays and diagnostic reports did not demonstrate any structural injury or abnormality to support ongoing pain complaints related to those diagnoses. Dr. Markellos referred to the A.M.A., *Guides*, and explained that, while OWCP's medical adviser found one percent permanent impairment of each leg, this was "incongruous" as there was "no indication she has any physical or clinical findings or constraints due to the hamstring/coccygeal sprain that occurred seven years ago and has long since resolved." He opined that the current examination did not demonstrate any residual limitations of her injury and opined that there was no basis to assign any impairment to either leg.

The Board finds that Dr. Markellos's opinion is thorough and well rationalized, as the impartial medical examiner, and represents the special weight of the medical evidence.[12] The Board has carefully reviewed his reports and finds that his opinion has reliability, probative value, and convincing quality with respect to its conclusions regarding the extent of appellant's permanent impairment. Dr. Markello's opinion is based on a proper factual and medical history and he thoroughly reviewed the factual and medical history and accurately summarized the relevant medical evidence.[13] He provided medical rationale for his opinion by explaining that, after careful review of all medical documentation and his clinical examination of appellant, there was no probative medical evidence of impairment. Dr. Markello's opinion is entitled to special

[11] *See supra* note 8.

[12] *Barry Neutuch*, 54 ECAB 313 (2003).

[13] *See Melvina Jackson*, 38 ECAB 443 (1987).

weight as the impartial medical examiner and establishes that appellant does not have a ratable permanent impairment.

Consequently, appellant has not submitted any medical evidence to establish that her accepted conditions of gluteal, hamstring, and coccyx sprains caused a permanent impairment to a scheduled member of the body. As such evidence has not been submitted, she has not established entitlement to a schedule award.

Appellant may request a schedule award or increased schedule award 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 permanent impairment, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the December 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 2, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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