United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 17-0253**
	)	**Issued: February 17, 2017**
DEPARTMENT OF THE NAVY, U.S. MARINE CORPS, Camp Lejeune, NC, Employer	)	

Appearances:
Martin L. Kaplan, *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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 16, 2016 appellant, through counsel, filed a timely appeal from an October 26, 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.

ISSUE

The issue is whether appellant met her burden of proof to establish 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 September 19, 2012 appellant, then a 51-year-old lead human resources assistant, filed an occupational disease claim (Form CA-2) for a cervical and right upper extremity condition that she attributed to the performance of her job duties over time, which included typing, using a calculator, and answering the telephone. She indicated that she first became aware of her claimed condition on August 15, 2012 and first realized on August 22, 2012 that it was caused or aggravated by her employment.[3] Appellant previously sustained an employment-related neck injury on April 21, 2003, which OWCP had accepted for cervical herniated disc (C5-6) (xxxxxx6345). On December 19, 2012 she underwent anterior C6-7 discectomy and fusion.

After development of the medical evidence, OWCP accepted that on or about August 15, 2012 appellant sustained a work-related permanent aggravation of cervical intervertebral disc displacement (C5-6) without myelopathy, permanent aggravation of bilateral cervical radiculitis, and permanent aggravation of cervical intervertebral disc degeneration. Appellant received wage-loss compensation for temporary total disability for the period December 6, 2012 through June 10, 2013.[4]

On May 11, 2016 appellant filed a claim for a schedule award (Form CA-7). In support of her claim she submitted a December 15, 2015 report including an impairment rating from Dr. Samy F. Bishai, a Board-certified orthopedic surgeon. Dr. Bishai reported appellant's medical history and noted that electromyogram (EMG) testing of her upper extremities on July 16, 2015 showed changes most compatible with bilateral C5-6 radiculopathy.[5] He indicated that appellant complained of radiculopathies from the cervical region radiating into the upper extremities, greater on the right side. Dr. Bishai reported the findings of his examination on December 15, 2015 and indicated that appellant had reached maximum medical improvement (MMI) on that date. His diagnoses included herniated cervical disc with bilateral radiculopathy of the upper extremities, cervical degenerative disc disease, bilateral upper extremity brachial neuritis, status postoperative anterior cervical disc excision and fusion, internal derangement of the left shoulder joint, and bilateral C6 nerve root radiculopathy of the upper extremities.

In determining appellant's upper extremity impairment, Dr. Bishai explained that appellant continued to have pain in her neck and radiation down the upper extremities, more

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[3] OWCP previously accepted that on April 23, 2003 appellant sustained a traumatic injury in the form of a herniated disc at C5-6.

[4] On June 10, 2013 appellant advised OWCP that she was returning to work. She accepted a voluntary early retirement (VERA) effective July 31, 2015.

[5] Dr. Bishai also noted that his bilateral upper extremity neurological examination revealed signs and physical findings of a moderate nerve root radiculopathy of the C6 nerve root on both right and left sides. He also reported a motor deficit of moderate degree with diminished muscle and motor power of the biceps and radial wrist extensors on both sides, but more severe on the right side. Additionally, Dr. Bishai noted that the neurological examination revealed a sensory deficit of moderate degree affecting both right and left upper extremities, with the sensory deficit in the region of the lateral forearm and hand, as well as in the thumb on both right and left sides, but more severe on the right side. Lastly, he noted that appellant had reflex compromise of the pronator teres and brachioradialis reflexes, more so on the right side of moderate degree.

severe on the right side. He further explained that the radiculopathy was definitely more severe on the right side, but appellant experienced pain in both upper extremities. Dr. Bishai noted that the diagnoses had been confirmed by EMG/nerve conduction velocity (NCV) studies of the upper extremities showing a bilateral radiculopathy of the C6 nerve root. He advised that he used *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) for his impairment rating calculations. Dr. Bishai indicated that, in each upper extremity, appellant had moderate sensory deficit at grade C, which equaled three percent upper extremity impairment and a moderate motor deficit at grade C, which equaled nine percent upper extremity impairment. The total impairment rating in each upper extremity was calculated by combining the C6 nerve root sensory deficit impairment of 3 percent with the C6 nerve root motor deficit impairment of 9 percent, which equaled 12 percent permanent impairment in each upper extremity. Therefore, appellant had 12 percent permanent impairment of the right upper extremity due to the C6 nerve root radiculopathy of the right side and 12 percent permanent impairment of the left upper extremity due to the C6 nerve root radiculopathy of the left side. Dr. Bishai indicated that these permanent impairments were due to the accepted work injuries.

In a June 23, 2016 report, Dr. Jovito Estaris, a Board-certified occupational medicine physician serving as an OWCP medical adviser, noted that he had reviewed the December 15, 2015 report of Dr. Bishai. He indicated that Dr. Bishai had not adequately supported his finding that the permanent impairments he calculated for the upper extremities were due to the accepted work injuries. Dr. Estaris noted that the record did not contain the July 16, 2015 EMG findings that Dr. Bishai referenced and that the findings of the March 12, 2014 EMG testing of the right upper extremity was negative for peripheral nerve entrapment and negative for muscle denervation from a motor neuropathy or C5-T1 motor radiculopathy. He also noted that he reviewed a medical report from Johnston Pain Clinic on May 6, 2016, and commented that the more recent physical examination was inconsistent with Dr. Bishai's March 30, 2016 physical examination findings.[6] Based on the purported inconsistencies in the diagnostic studies and examination findings, Dr. Estaris recommended that OWCP refer appellant for a second opinion evaluation to determine the existence and extent of any permanent impairment.

In August 2016 OWCP referred appellant to Dr. James A. Maultsby, a Board-certified orthopedic surgeon, for a second opinion examination and impairment rating under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).

In a report produced on September 14, 2016,[7] Dr. Maultsby detailed appellant's factual and medical history, including prior findings on examination and diagnostic testing. He indicated that EMG testing of appellant's upper extremities conducted on July 20, 2016 appeared nonphysiological, and it was noted that no radiculitis was present.[8] Dr. Maultsby indicated that

[6] The referenced May 6, 2016 evaluation was performed by Tiniki White, a certified physician assistant (PA-C). Additionally, the current record does not include a March 30, 2016 examination from Dr. Bishai.

[7] Although the report is dated August 31, 2016, it was actually produced on September 14, 2016.

[8] The referenced July 20, 2016 EMG is not part of the current record.

the findings of EMG testing of the upper extremities conducted on September 13, 2016 showed normal results with no evidence of radiculitis or carpal tunnel syndrome. He noted that, upon examination on August 31, 2016, appellant had full range of motion of her neck and shoulder and that there was no muscle weakness. Dr. Maultsby reported that appellant exhibited a lack of effort during the examination. He found that appellant had reached MMI as of the date of his examination. Dr. Maultsby noted:

> "It is my impression that [appellant] had a great deal of subjective complaints that were not corroborated by physical findings. She has a solid surgical fusion at C5-6. For the impairment rating utilizing [*The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009)], she has no nerve root injury or impairment of the upper extremities. Therefore, she has a 0 impairment utilizing the spinal nerve/extremity impairment using the [sixth edition of the A.M.A., *Guides*]."

In a report dated October 23, 2016, Dr. Estaris, serving as an OWCP medical adviser, indicated that he had reviewed the September 14, 2016 report of Dr. Maultsby and agreed that appellant did not have any permanent impairment in either upper extremity due to the accepted work injuries.

In a decision dated October 26, 2016, OWCP determined that appellant had not established permanent impairment to a scheduled member due to her accepted work injury. It found that the September 14, 2016 report of Dr. Maultsby and the October 23, 2016 report of Dr. Estaris showed that appellant did not have any permanent impairment in her right or left upper extremity due to the accepted work injury.

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.[9] 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[10] Effective May 1, 2009, schedule awards are determined in accordance with the A.M.A., *Guides* (6th ed., 2009).[11]

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[9] 5 U.S.C. § 8107(c). For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[10] 20 C.F.R. § 10.404.

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

Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[12] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[13] The A.M.A., *Guides* (6th ed., 2009) provides a specific methodology for rating spinal nerve extremity impairment.[14] It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the procedure manual.[15]

ANALYSIS

OWCP accepted appellant's occupational disease claim for permanent aggravation of cervical intervertebral disc displacement (C5-6) without myelopathy, permanent aggravation of bilateral cervical radiculitis, and permanent aggravation of cervical intervertebral disc degeneration. Appellant underwent spinal surgery in December 2012, and returned to work in June 2013. In May 2016, she filed a claim for a schedule award (Form CA-7) and submitted a December 15, 2015 impairment rating from Dr. Bishai, who found 12 percent bilateral upper extremity impairment due to motor and sensory deficits involving the C6 nerve root.[16] The district medical adviser (DMA) identified perceived deficiencies in Dr. Bishai's impairment rating, and consequently, recommended that OWCP refer appellant for a second opinion evaluation. In a September 14, 2016 report, Dr. Maultsby, an OWCP-referral physician, found that appellant had no (zero percent) impairment of her upper extremities due to her accepted cervical condition(s). The DMA subsequently reviewed Dr. Maultsby's findings and concurred with the finding of zero percent bilateral upper extremity impairment. OWCP, therefore, denied appellant's claim for a schedule award based on the reports provided by Dr. Maultsby and the DMA.

The Board finds that OWCP properly determined that appellant failed to meet her burden of proof to establish permanent impairment to a scheduled member due to her accepted work injury. The opinions of Dr. Maultsby and Dr. Estaris show that appellant did not have any permanent impairment in her right or left upper extremity due to the accepted work injury.

In his September 14, 2016 report, Dr. Maultsby indicated that EMG testing from July 20, and September 13, 2016 did not support a finding of radiculitis. He also noted that appellant had a great deal of subjective complaints that were not corroborated by physical findings.

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[12] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[13] Federal (FECA) Procedure Manual, Part 2 *supra* note 11 at Chapter 2.808.5c(3).

[14] The methodology and applicable tables were initially published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009). *Id.*

[15] *See* Federal (FECA) Procedure Manual, Part 3, *supra* note 11 at Chapter 3.700, Exhibit 4.

[16] *See* Proposed Table 1, Spinal Nerve Impairment: Upper Extremity Impairments, *The Guides Newsletter* (July/August 2009).

Additionally, Dr. Maultsby commented that appellant's cervical spine had a solid surgical fusion. He properly noted, "For the impairment rating utilizing [*The Guides Newsletter*, 'Rating Spinal Nerve Extremity Impairment Using the Sixth Edition' (July/August 2009)], she has no nerve root injury or impairment of the upper extremities. Therefore, appellant has zero impairment utilizing the spinal nerve/extremity impairment using the [sixth edition of the A.M.A., *Guides*]." Dr. Maultsby's finding of no permanent impairment was supported by the opinion of Dr. Estaris, the DMA. In his October 23, 2016 report, Dr. Estaris explained that he agreed with the assessment of Dr. Maultsby that appellant had no permanent impairment in either upper extremity due to the accepted work injuries. Additionally, he had previously noted that the July 16, 2015 EMG study, which Dr. Bishai relied upon was not part of the record, and a prior right upper extremity EMG from March 2014 was negative for both peripheral nerve entrapment and muscle denervation.

While Dr. Bishai found 12 percent bilateral upper extremity impairment due to C6 motor and sensory deficits, the diagnostic study upon which he relied upon confirmed his physical/neurological findings of cervical radiculopathy were not part of the record and; therefore, the validity of the test results could not be confirmed. Moreover, the more recent physical examination findings and diagnostic studies as outlined by both Dr. Maultsby and the DMA do not support a finding of any permanent upper extremity impairment. Accordingly, the Board finds that appellant has failed to establish 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 failed to meet her burden of proof to establish a schedule.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 17, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board