

**United States Department of Labor
Employees' Compensation Appeals Board**

F.G., Appellant)	
)	
and)	Docket No. 16-1482
)	Issued: January 25, 2017
U.S. POSTAL SERVICE, POST OFFICE,)	
Huntersville, NC, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 July 11, 2016 appellant, through counsel, filed a timely appeal from a May 4, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has established more than one percent permanent impairment of her left lower extremity for which she has previously received 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 20, 2011 appellant, then a 58-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 31, 2011 she was exiting her truck while carrying a heavy tray of mail when she fell forward and felt a sharp pain in her back. OWCP accepted appellant's claim for herniated intervertebral disc at L5-S1. It authorized a surgical microdiscectomy which occurred on February 2, 2012. Appellant returned to full duty on May 15, 2012.

In a June 10, 2013 letter, Dr. Mark B. Hartman, appellant's Board-certified orthopedic surgeon, concluded that, based on recent guidelines, he opined that appellant had 12 percent permanent impairment of her left lower extremity. On December 22, 2014 he indicated that appellant had reached maximum medical improvement.

On April 9, 2015 appellant filed a claim for a schedule award (Form CA-7).

On May 6, 2014 Dr. Joseph Nathan Chipman, a Board-certified neurologist, interpreted an electromyogram/nerve conduction velocity (EMG/NCV) study as abnormal, noting that it evinced chronic lumbar radiculopathy, paresthesia, and postlaminectomy syndrome of the lumbosacral region. By letter dated April 28, 2015, OWCP asked that Dr. Chipman provide an impairment rating. In a response dated April 28, 2015, Dr. Chipman declined as he noted that appellant saw him only once for an EMG/NCV study.

By letter dated August 3, 2015, OWCP asked its medical adviser to evaluate appellant's permanent impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). On August 4, 2015 an OWCP medical adviser responded that appellant was status post L5-S1 microdiscectomy on February 2, 2012. He noted that she had done well with some residual numbness in the S1 nerve distribution of her left leg. Applying Table 2 as set forth in the July/August 2009 *The Guides Newsletter*, he determined that appellant had a grade C, class 1 impairment for mild sensory deficit of S1, which would equal one percent permanent impairment of the left lower extremity. The medical adviser noted that Dr. Hartman did not document the support for his conclusion that appellant had 12 percent permanent impairment.

In an August 1, 2015 letter, received by OWCP on August 10, 2015, Keith L. Blankenship, a physical therapist, opined that pursuant to Table 2 of *The Guides Newsletter*, July/August 2009, appellant had one percent left lower extremity sensory impairment and four percent left lower extremity motor impairment for a combined permanent impairment of the left lower extremity of five percent.³

By decision dated August 11, 2015, OWCP issued a schedule award for one percent permanent impairment of the left lower extremity.

³ Although Mr. Blankenship indicated that appellant had four percent right lower extremity motor impairment, this appears to be a clerical error. The Board finds, after reading his entire report, that Mr. Blankenship intended to state that appellant had four percent left lower extremity motor impairment.

On August 17, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. At the hearing held on March 17, 2016, counsel contended that OWCP's August 11, 2015 decision did not mention Mr. Blankenship's report, that Dr. Hartman found 12 percent lower extremity impairment, and that appellant had considerable impairment that was not accurately rated. Appellant testified as to her ongoing issues and noted that her left leg was numb.

By decision dated May 4, 2016, the hearing representative affirmed the August 11, 2015 schedule award decision, noting that the opinion of OWCP's medical adviser constituted the weight of the medical evidence, that there was "no evidence that a qualified physician reviewed Mr. Blankenship's findings or agreed with his assessment," and that Mr. Blankenship's findings were not sufficient to warrant further development.

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.⁴ 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.⁵ 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, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.⁷

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.⁸ 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 schedule 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.⁹

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairment of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter*, July/August 2009, offers

⁴ 5 U.S.C. § 8107.

⁵ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

⁶ 20 C.F.R. § 10.404.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *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).

⁸ *Pamela J. Darling*, 49 ECAB 286 (1998).

⁹ *Thomas J. Englehart*, 50 ECAB 319 (1999).

an approach to rating spinal nerve impairments consistent with sixth edition methodology.¹⁰ OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.¹¹

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical consultant for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical consultant providing rationale for the percentage of impairment specified.¹²

ANALYSIS

OWCP accepted appellant's claim for herniated intervertebral disc at L5-S1. Appellant underwent a surgical microdiscectomy on February 2, 2012, and returned to full duty on May 15, 2012. Subsequently, on April 9, 2015, appellant filed a claim for a schedule award.

The Board finds that appellant has not submitted a well-rationalized opinion by a physician establishing that she has more than one percent permanent impairment of her left lower extremity. Dr. Chipman declined to provide an impairment rating. Dr. Hartman submitted a very brief letter indicating that appellant had 12 percent permanent impairment of her left lower extremity. However, Dr. Hartman did not indicate that he applied the A.M.A., *Guides*, nor did he provide an explanation as to how he arrived at the 12 percent impairment rating. As Dr. Hartman did not reference any tables or pages from the A.M.A., *Guides* or indicate that he actually applied the A.M.A., *Guides*, in making his impairment determination, his opinion is insufficient to establish permanent impairment.¹³

OWCP properly referred appellant's claim to its medical adviser for a determination as to appellant's permanent impairment. OWCP's medical adviser noted that appellant was status post L5-S1 microdiscectomy, and that she had done well with some residual numbness in the S1 nerve distribution of her leg. He applied Table 2 as set forth in the July/August 2009 *The Guides Newsletter*, and determined that appellant had a grade C, class 1 impairment for mild sensory deficit of S1, which would equal one percent permanent impairment of the left lower extremity. The only medical evidence that properly applied the A.M.A., *Guides* is that of OWCP's medical adviser and OWCP based its schedule award decision on that report.¹⁴ There is no rationalized medical evidence of record establishing greater permanent impairment.

¹⁰ *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

¹¹ *Supra* note 7 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹² *See supra* note 7 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

¹³ *See Carl J. Cleary*, 57 ECAB 563 (2006) (an opinion which is not based upon the standards adopted by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of permanent impairment).

¹⁴ *See M.C.*, Docket No. 15-1757 (issued March 17, 2016) (the only medical evidence that demonstrated a proper application of the A.M.A., *Guides* was that of OWCP's medical adviser, who found that appellant had 11 percent permanent right upper extremity impairment).

Counsel contends on appeal that Mr. Blankenship's opinion should have been considered by OWCP's medical adviser when reaching his determination. Mr. Blankenship is a physical therapist. A physical therapist is not considered a physician as defined under FECA, and accordingly, his opinion does not constitute relevant and pertinent medical evidence for purposes of a schedule award.¹⁵ Moreover, there is no evidence that a physician reviewed and certified his report. Therefore, it was unnecessary for the medical adviser to review Mr. Blankenship's report.

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 increase impairment.

CONCLUSION

The Board finds that appellant has not established more than one percent permanent impairment of her left lower extremity, for which she has received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 4, 2016 is affirmed.

Issued: January 25, 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

¹⁵ See *L.J.*, Docket No. 16-1231 (issued November 4, 2016); *C.B.*, Docket No. 13-1734 (issued November 4, 2013).