United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No. 17-0754**
	)	**Issued: June 21, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 20, 2017 appellant, through counsel, filed a timely appeal from a January 20, 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 this case.

ISSUE

The issue is whether appellant met her burden of proof to establish permanent impairment of her upper extremities due to her accepted work-related injuries.

[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 29, 2009 appellant, then a 29-year-old letter carrier, was struck on the top of her head by an all-purpose container while in the performance of duty. OWCP accepted her traumatic injury claim (Form CA-1) for cervicalgia, neck sprain, and postconcussion syndrome (OWCP File No. xxxxxx180). Appellant received continuation of pay, followed by wage-loss compensation benefits until returning to work on February 1, 2010. She also has an accepted traumatic injury claim for neck, thoracic, lumbar, and sacroiliac ligament sprains, left hip pain, and postconcussion syndrome, conditions which arose as a result of a September 1, 2010 work-related motor vehicle accident (OWCP File No. xxxxxx146). On May 26, 2011 appellant sustained another work-related traumatic injury, which OWCP accepted for bilateral upper arm/shoulder sprain (OWCP File No. xxxxxx500)[3] and on May 4, 2012 she was reaching above shoulder to place mail in a mailbox when she felt a sharp pain in between her neck and shoulder on the left side. OWCP accepted her May 4, 2012 traumatic injury claim for cervical and lumbar intervertebral disc displacement(s), without myelopathy (OWCP File No. xxxxxx252).[4]

The findings of a May 24, 2012 magnetic resonance imaging (MRI) scan of appellant's cervical spine showed minimal degenerative changes and no evidence of disc herniation, spinal stenosis, or interval change. Electromyogram (EMG) and nerve conduction velocity (NCV) testing of the upper extremities, performed on March 20, 2013, contained an impression of positive results for inactive cervical radiculopathy without abnormalities of the sensory nerve action potentials. It was noted that the results mainly affected the medial nerves and involved the C5 to C7 levels.[5] The findings of a December 29, 2014 MRI scan of appellant's cervical spine showed minimal annular bulges at the C3-4 through C6-7 levels without evidence of disc protrusion or central spinal stenosis.

In a May 23, 2014 report, Dr. Bruce J. Montella, an attending Board-certified orthopedic surgeon, indicated that appellant reported her cervical spine condition had been flaring up with pain radiating into both shoulders. He detailed the findings of his physical examination, noting that her cervical alignment appeared normal to inspection and that she had 5/5 strength in her upper extremities bilaterally upon testing of the deltoids, biceps, triceps, wrist extensors, wrist flexors, and hand intrinsics. Dr. Montella noted that sensation was intact and symmetrical in both upper extremities and that appellant exhibited decreased range of cervical motion on flexion, extension, axial rotation, and right/left lateral bending.

In October 2014, OWCP referred appellant for a second opinion examination to Dr. Allan Brecher, a Board-certified orthopedic surgeon. Dr. Brecher was asked to evaluate whether she continued to have residuals of her accepted work injuries.

[3] Appellant reported having felt a sharp pain in the back of her neck while reaching up to place mail in a box.

[4] The four above-mentioned traumatic injury claims have been administratively combined under OWCP Master File No. xxxxxx180.

[5] In the findings portion of the report, it was noted that there were no abnormal spontaneous activities in any of the muscles examined and that all insertional activities were within normal limits.

In a report dated December 18, 2014, Dr. Brecher discussed appellant's factual and medical history, including her several accepted employment injuries and her past findings upon physical examination and diagnostic testing. He reported the findings of the physical examination he conducted on December 18, 2014 noting that she cried during the examination and exhibited very limited active cervical motion. Dr. Brecher listed range of motion findings for appellant's neck and shoulder and noted that she reported she could "go further with time." Appellant had 5/5 strength in her grip and in her biceps and triceps muscles and she exhibited intact sensibility. Dr. Brecher posited that her work-related cervical sprain, lumbar sprain, and shoulders sprains had resolved. He advised that appellant's cervical and lumbar problems appeared "to be disproportionate to essentially normal MRI scans."[6] Dr. Brecher believed that she had a very significant psychological overlay and advised that it was difficult to evaluate her medical condition because she did not want to move her neck or shoulders. He felt that appellant could perform her usual work as a letter carrier from an orthopedic standpoint, but noted that she could not perform her usual job due to depression and fibromyalgia.

In a report dated March 18, 2015, Dr. Ankur Chhadia, an attending Board-certified orthopedic surgeon, noted that appellant presented complaining of neck, upper trapezius, and low back pain. He reported that, upon physical examination of the upper extremities, she exhibited no atrophy, tenderness to palpation, swelling, or instability. Appellant had 5/5 muscle strength and her sensation to light touch was intact.

Appellant previously filed a claim for a schedule award (Form CA-7) in July 2011. On March 15, 2016 OWCP received a February 5, 2016 report detailing a functional capacity evaluation (FCE) in which she participated and a February 8, 2016 report rating the permanent impairment of her upper extremities based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter A.M.A., *Guides*). The reports were signed by Dr. Montella and by Brian Trembly, an attending physical therapist.

In their February 5, 2016 report, Dr. Montella and Mr. Trembly reported the findings from the FCE. They determined that she made a full and consistent effort during the FCE and that she demonstrated the ability to work in the light-work category. Appellant's two-point discrimination testing was normal and she exhibited 5/5 strength throughout her upper and lower extremities.

In their February 8, 2016 report, Dr. Montella and Mr. Trembly noted appellant's diagnoses of cervical and lumbar intervertebral disc displacement, described her history of symptoms, and detailed her current symptoms reported in connection with the February 5, 2016 FCE. They also detailed physical examination findings from January 18, 2016 and the results of prior diagnostic tests. Dr. Montella and Mr. Trembly noted that on January 18, 2016 sensation was intact bilaterally in all dermatomal distributions in the left and right upper extremities to soft and sharp touch. They indicated that the cervical examination also showed deceased motor function "in affected areas." Dr. Montella and Mr. Trembly noted that, without evidence of radiculopathy, the diagnosis of lumbar disc displacement was not ratable, or zero percent.

[6] Dr. Brecher indicated that appellant's MRI scans only showed mild bulging discs without stenosis at two levels and did not show anything to support continued cervicalgia.

Proposed Table 1 of *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) (hereinafter *The Guides Newsletter*) was used and it was reported that appellant would fall into the C5 to C7 impairment class. They advised that sensory testing, including EMG and physical examination findings, were unremarkable and resulted in zero percent impairment for the sensory deficit at each nerve root level. Dr. Montella and Mr. Trembly noted that motor function weakness yielded a class 1 default value of four percent permanent impairment of each upper extremity. They assigned 2 for functional history grade modifier and 1 for physical examination grade modifier, noting the clinical studies modifier was not used. Application of the net adjustment formula resulted in six percent permanent impairment for the motor deficit for each left and right side. Similar ratings, assignments, and calculations for motor function at the C6 and C7 levels were then outlined, resulting in seven percent for each side at each level. They reported that, using the Combined Values Chart on page 604, combining 7, 7, and 6 percent resulted in a combined value of 19 percent permanent impairment of the right upper extremity and 19 percent permanent impairment of the left upper extremity.

On March 23, 2016 OWCP referred the case file to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser.

In a March 31, 2016 report, Dr. Slutsky discussed his belief that the evidence of record was insufficient to support a finding that appellant had permanent impairment of her upper extremities. He explained that *The Guides Newsletter* was not properly used by Dr. Montella and Mr. Trembly. Dr. Slutsky advised that there was no basis for an upper extremity impairment rating using *The Guides Newsletter* because there were no objective sensory or motor deficits consistent with individual cervical nerve roots. He noted that the 2012 and 2014 cervical MRI scans showed no evidence of disc protrusions, herniations, or spinal stenosis, and that a 2013 EMG/NCV was positive for inactive cervical radiculopathy without abnormalities of sensory nerve action potentials. Dr. Slutsky further noted that on May 23, 2014 appellant had 5/5 upper extremity strength, and that a December 16, 2014 second opinion examination with Dr. Brecher revealed no upper extremity sensory, motor, or reflex deficits related to the cervical spine. He noted another more specific examination carried out on March 18, 2015 by Dr. Chhadia revealed no sensory, motor, or reflex deficits associated with the nerve roots related to the cervical spine.

In his March 31, 2016 report, Dr. Slutsky further explained that while Dr. Montella and Mr. Trembly indicated that appellant had decreased motor function "in affected areas," they did not discuss what this meant or identified the affected areas. Also, a grade modifier for physical examination was incorrectly assigned, which was not allowed under *The Guides Newsletter*, and that a grade modifier was not assigned for clinical studies, which was required per the protocols for the nerve root ratings of *The Guides Newsletter*. Dr. Slutsky indicated that Dr. Montella and Mr. Trembly appeared to have confused the diagnosis-based impairment rating method with the rating method associated with *The Guides Newsletter*. He explained that the clinical testing was a key factor and that EMG/NCV testing could only be used as a grade modifier when there was reliable clinical evidence of sensory or motor deficits from cervical nerves in the medical evidence. Dr. Slutsky advised that, in this case, there was no reliable specific clinical testing and no clinical evidence of specific nerve roots or specific muscles affected by the accepted work-related conditions of appellant's cervical spine. He concluded that, therefore, there was no basis

for findings that appellant had permanent impairment of her upper extremities due to employment factors using *The Guides Newsletter.*

By decision dated April 4, 2016, OWCP determined that appellant did not meet her burden of proof to establish permanent impairment of her upper extremities due the accepted work-related injuries. It found that the weight of the medical evidence regarding her entitlement to schedule award compensation rested with the opinion of Dr. Slutsky, OWCP's medical adviser.

Appellant disagreed with the April 4, 2016 decision and requested, through counsel, a telephone hearing with a representative of OWCP's Branch of Hearings and Review.

During the telephone hearing held on November 8, 2016, appellant testified that her work injuries caused her to have daily symptoms extending down from her neck and through both shoulders and arms, including sharp shooting pain and pins and needles sensation. She indicated that she was currently working in a limited-duty position for the employing establishment and that she participated in physical therapy sessions two to three times a week. Counsel requested that the record be held open for 30 days so he would have an opportunity to submit additional medical evidence.

The record was held open for 30 days after the hearing, but appellant did not submit new medical evidence regarding issue of the permanent impairment of her upper extremities.

By decision dated January 20, 2017, OWCP's hearing representative affirmed the April 4, 2016 decision denying appellant's schedule award claim, finding that she did not meet her burden of proof to establish permanent impairment of her upper extremities due to the accepted work-related injuries.

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.[7] 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.[8] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[9]

[7] 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).

[8] 20 C.F.R. § 10.404.

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

Neither FECA nor its implementing 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.[10] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[11] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment.[12] It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. 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.[13]

Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.[14] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[15]

ANALYSIS

Appellant's accepted conditions include, *inter alia*, cervicalgia, neck sprain, and cervical intervertebral disc displacement without myelopathy. She filed a claim for a schedule award and submitted a February 8, 2016 impairment rating from Dr. Montella, who found a combined 19 percent bilateral upper extremity impairment based on motor deficits involving the C5, C6, and C7 nerve roots.[16]

On March 31, 2016 OWCP's district medical adviser, Dr. Slutsky, reviewed the relevant medical evidence, including Dr. Montella's bilateral upper extremity permanent impairment rating, and found no evidence of either sensory or motor deficits affecting appellant's upper extremities. Consequently, he advised that she did not have any spinal nerve upper extremity impairment due to her employment-related cervical spine condition(s).

The Board finds that Dr. Slutsky correctly identified the deficiencies in Dr. Montella's February 8, 2016 report and properly applied *The Guides Newsletter* to determine that appellant did not have permanent impairment of her upper extremities. In some instances, a medical adviser's opinion can constitute the weight of the medical evidence. This occurs in schedule

[10] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[11] *Supra* note 9 at Chapter 2.808.5a(3).

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

[13] *See supra* note 9 at Chapter 3.700, Exhibit 4.

[14] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[15] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. *Supra* note 9 at Chapter 2.805.3a(1) (January 2013).

[16] Dr. Montella did not find evidence of any sensory deficits involving the bilateral upper extremities.

award cases where an opinion on the percentage of permanent impairment and a description of physical findings is on file from an examining physician, but the percentage estimate by this physician is not properly based on the A.M.A., *Guides*. In this instance, a detailed opinion by OWCP's medical adviser may constitute the weight of the medical evidence. As long as the medical adviser explains his or her opinion, shows values and computation of impairment based on the A.M.A., *Guides*, and considers each of the reported findings of impairment, his or her opinion may constitute the weight of the medical evidence of record.[17] The Board notes that Dr. Slutsky complied with these requirements by explaining his opinion, showing values and computation of impairment based on the A.M.A., *Guides*, and considering each of the reported findings of impairment with respect to appellant's upper extremities.

In his March 31, 2016 report, Dr. Slutsky explained that *The Guides Newsletter* was not properly used by Dr. Montella. He advised that there was no basis for an upper extremity impairment rating using *The Guides Newsletter* in appellant's case because there was no clinical and diagnostic evidence of sensory and motor deficits consistent with individual cervical nerve roots. Because Dr. Slutsky fully explained why sensory or motor deficits from cervical nerves were not documented in this case, OWCP properly determined that there was no basis for establishing permanent impairment of appellant's upper extremities stemming from the cervical spine. A preexisting impairment may be included in the calculation of percentage of loss referable to a work-related injury.[18] However, where there is no demonstrated permanent impairment due to an accepted workplace injury, the claim is not ripe for consideration of any preexisting impairment.[19] Dr. Slutsky noted that 2012 and 2014 cervical MRI scans showed no evidence of disc protrusions, herniations, or spinal stenosis, and a 2013 EMG/NCV study showed an inactive cervical radiculopathy without abnormalities of sensory nerve action potentials. He noted that on May 23, 2014 appellant had 5/5 upper extremity strength, and that a December 16, 2014 second opinion examination with Dr. Brecher revealed no upper extremity sensory, motor, or reflex deficits related to the cervical spine. Dr. Slutsky noted that another more specific examination carried out on March 18, 2015 by Dr. Chhadia, an attending physician, revealed no sensory, motor, or reflex deficits associated with the nerve roots related to the cervical spine.

Dr. Slutsky further explained that while Dr. Montella indicated that appellant had decreased motor function "in affected areas" he did not discuss what this meant or identify the affected areas. He noted that a grade modifier for physical examination was incorrectly assigned, which was not allowed under *The Guides Newsletter*, and that a grade modifier was not assigned for clinical studies, which was required per the protocols for the nerve root ratings of *The Guides Newsletter*. Dr. Slutsky advised that, in this case, there was no reliable specific clinical testing and no clinical evidence of specific nerve roots or specific muscles affected by the accepted work-related conditions of appellant's cervical spine. He properly concluded that,

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6f(2)(e); *M.P.*, Docket No. 14-1602 (issued January 13, 2015).

[18] *M.F.*, Docket No. 16-1089 (issued December 14, 2016); *Thomas P. Lavin*, 57 ECAB 353 (2006).

[19] *Id.*

therefore, there was no basis for findings that appellant had permanent impairment of her upper extremities due employment factors using *The Guides Newsletter*.

As Dr. Slutsky, OWCP's medical adviser, considered all the reported findings and gave sufficient supportive explanation for his determination that appellant did not have permanent impairment of her upper extremities under the relevant standards, the weight of the medical opinion evidence on this matter rests with him.[20]

For these reasons, the Board finds that appellant did not establish work-related permanent impairment of her upper extremities.

Appellant may request a schedule award or increased schedule award at any time based on evidence of 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 did not meet her burden of proof to establish permanent impairment of her upper extremities due the accepted work-related injuries.

[20] *See supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 21, 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