United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 16-1299**
	)	**Issued: May 5, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Grand Island, NE, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 30, 2016 appellant filed a timely appeal from the December 3, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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 claim.

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of OWCP's decision. An appeal is considered filed upon receipt by the Clerk of the Appellant Boards. *See* 20 C.F.R. § 501.3(e)-(f). The 180th day from OWCP's December 3, 2015 decision was May 31, 2016. Because using June 6, 2016, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is May 30, 2016, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met her burden of proof to establish more than 11 percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

This case has previously been on appeal before the Board.[3] On February 9, 2011 appellant, then a 49-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging an injury in the lower back in the performance of duty. OWCP accepted L3-4 disc herniation and lumbar radiculopathy. On June 9, 2011 appellant underwent OWCP-approved lumbar surgery for a left leg hemilaminectomy. She received wage-loss compensation and was released to resume regular duty effective July 5, 2011.

By decision dated October 19, 2012, OWCP granted appellant a schedule award for 15 percent permanent impairment for her left leg. The period of the award was from September 22 to October 20, 2012, a period of 43.2 weeks. OWCP explained that the schedule award began to run on September 22, 2012 because she was in receipt of wage-loss compensation through September 21, 2012 because a schedule award is not paid concurrently with wage-loss compensation for the same injury.

In an August 15, 2013 decision, the Board set aside the October 19, 2012 schedule award, finding that the case was not in posture for decision. The Board determined that none of the physicians had properly explained how they arrived at their respective impairment ratings. The Board noted that FECA precluded impairment ratings for the spine, but referred to *The Guides Newsletter*, which offered an approach to rating spinal nerve extremity impairment consistent with sixth edition methodology. The Board further explained that OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury. The Board remanded the case for a proper application of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (6th ed. 2009) regarding the extent of impairment of the left lower extremity. The facts contained in the Board's August 15, 2013 decision are incorporated herein by reference.

On remand, OWCP referred appellant for a second opinion evaluation, to Dr. Morgan LaHolt, a Board-certified orthopedic surgeon, along with a statement of accepted facts, a set of questions, and the medical record.

In a report dated November 6, 2013, Dr. LaHolt, described appellant's history of injury and provided results on examination. He referenced the A.M.A., *Guides* and *The Guides Newsletter*, and explained that, pursuant to Table 16-11,[4] he rated the residual sensory deficits due to L4 radiculopathy as grade 3 or six percent permanent impairment, given her impaired/sharp/dull recognition with retrained protective sensibility. Dr. LaHolt rated the motor

[3] Docket No. 13-0928 (issued August 15, 2013).

[4] A.M.A., *Guides* 533.

deficits as grade 1, or five percent permanent impairment given appellant's weakness with dorsiflexion. He referred to Table 16-6[5] for functional history adjustment of the lower extremities and found a grade modifier of 1, as she had some difficulties with ambulating longer distances, but she was able to perform activities of daily living without difficulty. Dr. LaHolt explained that, although appellant did not complete the American Academy of Orthopedic Surgeons lower limb instrument, her social history was consistent with the medical records and he recommended a grade modifier of 1. He referred to Table 16-7[6] and found no adjustment due to physical examination. Dr. LaHolt also referred to Table 16-8[7] and found a grade modifier of 1 for clinical studies. He explained the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) warranted no adjustments due to grade modifiers.[8]

Dr. LaHolt concluded that appellant had reached maximum medical improvement (MMI) on December 6, 2011 and had 11 percent permanent impairment of the left lower extremity.

In a November 29, 2013 report, OWCP's medical adviser reviewed the findings of Dr. LaHolt and concurred that the 11 percent permanent impairment finding was correct.

Accordingly, on December 4, 2013, OWCP determined that there was no increase in permanent impairment as appellant had previously been awarded 15 percent permanent impairment to the right leg and the medical evidence of record reflects only 11 percent impairment.

On January 2, 2014 appellant requested a hearing before an OWCP hearing representative, which was held on July 15, 2014. In a separate letter of the same date, she also disputed the amount of compensation she received and argued that she had been incorrectly paid.

On January 29, 2014 OWCP found preliminary overpayment of schedule award compensation in the amount of $7,721.28 due to the reduction in the schedule award.

On March 5, 2014 OWCP finalized an overpayment of compensation in the amount of $7,721.28, which represented the difference between the previously paid 15 percent left lower extremity schedule award and the latest award for 11 percent.

In a June 4, 2014 report, Dr. Frederick Catlett, a Board-certified family practitioner, indicated that appellant's rating had been reduced from 15 percent to 11 percent. He explained in his examination that there was obvious flattening of the shin muscles on the left leg compared to the right, as well as decreased sharp and dull differentiation and reduced dorsiflexion of the foot. Dr. Catlett explained that appellant had a noticeable slap sound from the left foot when she walked and it was unlikely that a determination of disability could be reduced from 15 percent to 11 percent, due to the way she walks.

[5] *Id.* at 516.

[6] *Id.* at 517.

[7] *Id.* at 519. (1-1) + (NA) + (1-1) = 0.

[8] *Id.* at 521.

By decision dated September 24, 2014, OWCP's hearing representative remanded the case to Dr. LaHolt to clarify the rating regarding new evidence of either a foot slap or foot drop. Furthermore, the hearing representative requested clarification from the employing establishment of whether appellant's pay rate was fixed or fluctuated.

In a report dated November 12, 2014, Dr. LaHolt explained that he was providing clarification with regard to his impairment rating, in which he determined that appellant had an 11 percent permanent impairment of the left lower extremity. He explained that the presence of foot drop or foot slap would not alter his opinion. Dr. LaHolt explained that he rated appellant as if the symptom was present. He referenced the A.M.A., *Guides* and *The Guides Newsletter*, and explained that, pursuant to Table 16-11,[9] motor deficit severity was determined based upon strength against gravity. Dr. LaHolt explained that, in appellant's case, she was given a motor deficit rating of 1 given her 4/5 strength on examination. He confirmed that he did not notice a foot slap or foot drop on examination. However, Dr. LaHolt explained that the impairment rating would not change as appellant had not exhibited 3/5 strength. He explained that even if she experienced a decline in motor strength, this would not be expected after an appropriately treated lumbar radiculopathy, which was not a progressive condition. Dr. LaHolt indicated that 4/5 strength in dorsiflexion could lead to intermittent foot slap as the leg fatigued. He referred to Table 16-11[10] and explained that appellant had been rated a severe, class 3, for sensory deficit due to the examination findings of impaired sharp/dull recognition. Dr. LaHolt explained that, due to the lack of the cutaneous findings, it was his opinion that she was most appropriately rated at a severity level of 3. He further indicated that a severe sensory deficit was equivalent to a six percent lower extremity impairment rating maximum. Dr. LaHolt explained that, as no adjustments were made for the grade modifiers, the deficits of sensory and motor were combined to yield a total lower extremity impairment rating of 11 percent.

In a January 6, 2015 report, OWCP's medical adviser, verified the findings and calculations provided by Dr. LaHolt. He explained that he agreed with the 11 percent impairment of the left lower extremity of Dr. LaHolt. The medical adviser reiterated that the foot slap was "subsumed" in the weakness rating process, *i.e.*, the 4/5 strength on the left leg.

By decision dated January 21, 2015, OWCP determined that appellant had no more than an 11 percent permanent impairment of the left leg.

On February 16, 2015 appellant requested a telephonic hearing, which was held on September 10, 2015. She confirmed that she was not appealing the pay rate, but rather she was appealing the reduction of her schedule award. Appellant argued that she was not properly examined by Dr. LaHolt. She indicated that it was obvious that she had a foot drop and he did not see her walk and the examination was "so brief it was ridiculous." Appellant argued that the other physicians noticed her foot drop.

By decision dated December 3, 2015, OWCP's hearing representative affirmed the January 21, 2015 decision.

[9] *Id.* at 533.

[10] *Id.*

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.[11] 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.[12] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[13]

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.[14] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[15] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment.[16] 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.[17]

ANALYSIS

In this case, OWCP accepted appellant's traumatic injury claim for L3-4 disc herniation and lumbar radiculopathy. It also authorized a June 9, 2011 left L3-4 hemilaminectomy on June 9, 2011. Appellant filed a claim for a schedule award on April 16, 2012. On October 19, 2012 OWCP granted a schedule award for 15 percent permanent impairment to the left leg. The Board remanded the claim for a proper application of the A.M.A., *Guides*.

In a November 6, 2013 report, Dr. LaHolt provided results on examination. He utilized the A.M.A., *Guides* and *The Guides Newsletter*. Dr. LaHolt referred to Table 16-11,[18] regarding

[11] 5 U.S.C. § 8107(c). For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

[12] 20 C.F.R. § 10.404.

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

[14] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[15] *Supra* note 13 at Chapter 2.808.5c(3).

[16] 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.*

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

[18] A.M.A., *Guides* 533.

sensory deficits and placed appellant in grade 3 due to her impaired/sharp/dull recognition with retrained protective sensibility. As to motor deficits, he placed her in grade 1 given her weakness with dorsiflexion which was not consistent during his examination. Dr. LaHolt found a grade modifier of 1 for functional history, no adjustment due to the physical examination grade modifier, and a grade modifier of 1 for clinical studies. He explained that the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) rendered no adjustment.[19] Dr. LaHolt found six percent lower extremity rating for sensory deficits and five percent for appellant's motor deficits. He concluded that she reached MMI on December 6, 2011 and that she had an 11 percent permanent impairment of the left lower extremity.

On November 12, 2014 Dr. LaHolt clarified that the presence of foot drop would not alter his opinion. He indicated that he rated appellant as if the symptom was present and explained his opinion utilizing the A.M.A., *Guides* and *The Guides Newsletter*. Dr. LaHolt explained that, once adjustments were made using the modifiers, the deficits of sensory and motor were combined to yield a total lower extremity impairment rating of 11 percent. He advised that there was no mathematical way to combine the numbers from a mild motor deficit with a severe sensory deficit to obtain a 15 percent rating.

In a January 6, 2015 report, OWCP's medical adviser, he concurred with the report of the second opinion physician, Dr. LaHolt, regarding the 11 percent impairment to the left leg. He explained that the foot slap was "subsumed" in the weakness rating process, *i.e.*, the 4/5 strength on the left leg. The Board finds that Dr. LaHolt properly explained his findings as noted above, under the A.M.A., *Guides* and *The Guides Newsletter*. OWCP's medical adviser concurred that the rating was proper pursuant to *The Guides Newsletter*.

On appeal, appellant argued that she never appealed the amount of her award, but rather the date of September 21, 2012. She also argued that Dr. LaHolt was "incompetent" as he did not see her foot slap or atrophy in her left leg and no one could explain why she was sent to him. Furthermore, Dr. LaHolt did not make appellant walk, which was necessary to evaluate her. The Board notes that OWCP's medical adviser and Dr. LaHolt properly explained how they arrived at an 11 percent left leg permanent impairment utilizing *The Guides Newsletter*. The date of MMI was December 6, 2011.[20] Furthermore, appellant also argued that she was not fully compensated from her initial claim for compensation dated June 19, 2012 according to the ¾ rate. However, the only issue before the Board is whether she met her burden of proof to establish more than an 11 percent permanent impairment of her left leg, for which she already received a schedule award.

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.

[19] *Id.* at 521.

[20] As noted above, the schedule award began to run on September 22, 2012 because appellant was in receipt of wage-loss compensation through September 21, 2012 and a schedule award is not paid concurrently with wage-loss compensation for the same injury. *See S.W.*, Docket No. 10-2071 (issued July 11, 2011); *J.B.*, Docket No. 08-1178 (issued December 22, 2008). *See also supra* note 13 at Part 2 -- Claims, *Entitlement to Schedule Awards*, Chapter 2.808.4a(3) (issued February 2013).

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she has more than 11 percent permanent impairment of her left lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 5, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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