United States Department of Labor
Employees' Compensation Appeals Board

D.P., Appellant	)	
and	)	**Docket No. 16-1550**
	)	**Issued: May 5, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN, 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 July 27, 2016 appellant, through counsel, filed a timely appeal from an April 22, 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 to consider the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish permanent impairment to a scheduled member, 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

Appellant, a 42-year-old mail handler, filed an occupational disease claim (Form CA-2) on June 2, 2006, alleging that she developed a sciatica/lumbar nerve condition causally related to factors of her federal employment. OWCP accepted the claim for lumbar strain and lumbar radiculopathy.

The Board notes that the instant claim was administratively combined with two other claims: a May 3, 2009 injury assigned File No. xxxxxx785, which OWCP accepted for lumbar sprain, lumbosacral joint/ligament sprain and lumbosacral neuritis and/or radiculitis; and a June 20, 2007 injury assigned File No. xxxxxx421 which OWCP accepted for lumbar sprain.

On May 1, 2012 appellant underwent a magnetic resonance imaging (MRI) scan, the results of which showed stenotic changes at the L4-5 level, with evidence of disc protrusion at that level; L5-S1 moderate central and left posterolateral disc osteophyte bulge with moderate mass effect on the left lateral recess and the S1 nerve root; L3-4 left lateral recess stenosis, possibly affecting the L4 nerve root; and moderate left neural foraminal stenosis; possibly affecting the L3 nerve.

On July 25, 2012 appellant filed a claim for a schedule award (Form CA-7) based on a partial loss of use of her right and left lower extremities.

By decision dated January 25, 2013, OWCP denied appellant's claim for a schedule award finding that she had not established permanent impairment causally related to her accepted lumbar conditions.

By letter dated January 31, 2013, appellant, through counsel, requested an oral hearing before OWCP's Branch of Hearings and Review, which was held on May 16, 2013.

In a June 14, 2013 report, Dr. Martin Fritzhand, a Board-certified urologist, advised that appellant had well documented L4 and S1 radiculopathies. He noted on examination that she walked with a limp gait and had some difficulty forward bending. Dr. Fritzhand further noted that she had nerve root damage shown by a diminished right Achilles tendon reflex, atrophy involving the right leg, and reduced muscle strength in both lower extremities. He advised that he utilized Table 16-11, page 535 of the American Medical Association, *Guides to the Evaluation of Impairment* (6th ed. 2009) (A.M.A., *Guides*), to find an impairment of severity level 1, for a mild motor deficit for each lower extremity. Dr. Fritzhand also relied on Proposed Table 2 of the July/August 2009 *The Guides Newsletter*, finding that appellant had documented involvement of both the L4 and S1 nerve roots, class 1 impairments. He found that appellant had a grade modifier for Functional History (GMFH) of 1 according to Table 16-6,[3] and a grade 2 modifier for Clinical Studies (GMCS) at Table 16-8.[4] Applying the net adjustment formula of (GMFH-CDX) + (GMCS-CDX), or (2-1) + (1-1) resulted in a net modifier of +1, raising the

[3] Table 16-6, page 516 of the sixth edition of the A.M.A., *Guides* is titled "Functional History Adjustment: Lower Extremities."

[4] Table 16-8, page 519 of the sixth edition of the A.M.A., *Guides* is titled "Clinical Studies Adjustment: Lower Extremities."

default CDX from C to D, equaling seven percent permanent impairment of the left and right upper extremities, secondary to the L4 impairment rating, in addition to four percent permanent impairment of each lower extremity, secondary to the S1 impairment for each lower extremity. Dr. Fritzhand concluded, based on the Combined Values Chart that appellant had 11 percent lower extremity permanent impairment.

By decision dated August 1, 2013, OWCP's hearing representative set aside the January 25, 2013 decision, finding that Dr. Fritzhand's June 14, 2013 report constituted sufficient evidence to warrant further development of the medical evidence. She remanded to the district office for referral of appellant's medical records, to an OWCP medical adviser to determine whether appellant had any impairment from her accepted lumbar conditions.

In a report dated August 24, 2013, Dr. Morley Slutsky, Board-certified in occupational medicine and an OWCP medical adviser, found that the medical evidence appellant submitted did not provide a basis for a ratable impairment under FECA. He reviewed appellant's lumbar MRI scans of May 17, 2011 and April 30, 2010 and noted that the report of her recent electromyelogram (EMG) testing, which was reported to be positive for chronic bilateral radiculopathy, was unavailable for review. Dr. Slutsky advised that the majority of physicians of record either found no motor deficits in appellant's lower extremities or reported motor strength deficits that were nonspecific or limited by pain. OWCP's medical adviser further opined that the majority of physicians of record found that she had no specific lower extremity sensory loss and normal lower extremity reflexes.

With regard to Dr. Fritzhand's finding of motor loss in appellant's bilateral L4 and S1 distributions, Dr. Slutsky advised that such a finding was inconsistent with her diagnostic test results and the examination findings of the other physicians of record. He concluded that, based on the medical evidence of record, and on appellant's normal lower extremity strength and sensation, there was no basis for a rating of lower extremity impairment under the July/August 2009 *The Guides Newsletter*.

By decision dated October 3, 2013, OWCP denied appellant's claim for a schedule award, finding that she had not established permanent impairment causally related to her accepted lumbar radiculopathy condition.

By letter dated October 7, 2013, appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 12, 2014.

A May 22, 2013 report indicated that appellant underwent EMG and nerve conduction velocity (NCV) testing. The tests showed findings that were consistent with chronic bilateral L5 and S1 radiculopathy; reinnervation changes were more severe on the left L5 muscles; and no nerve entrapment was demonstrated.

By decision dated April 30, 2014, OWCP's hearing representative set aside the October 3, 2013 decision, finding that Dr. Slutsky's August 24, 2013 report did not merit the weight of the medical evidence of record, as he did not consider the findings set forth in appellant's May 1, 2012 lumbar MRI scan or her May 22, 2013 EMG/NCV test. He remanded

to the district office for referral of appellant's medical records, including Dr. Fritzhand's June 14, 2013 report, to an OWCP medical adviser to consider these diagnostic tests and determine whether she had any impairment from her accepted lumbar conditions, and whether the medical evidence of record was sufficient to demonstrate appellant's entitlement to a schedule award.

In a May 23, 2014 report, Dr. Slutsky noted that he reviewed the May 1, 2012 lumbar MRI scan and the bilateral lower extremity EMG/NCV testing and concluded that these diagnostic tests did not provide any basis for finding ratable impairment under the July/August 2009 *The Guides Newsletter*. He advised that, although the changes shown by the diagnostic MRI scans and the May 22, 2013 EMG/NCV test showed lumbar nerve root involvement, these findings did not translate into physical deficits (sensory/motor/reflex) in the lower extremities. OWCP's medical adviser reiterated that the majority of the physicians of record, including Dr. Fritzhand, found no sensory loss in either lower extremity related to the lumbar spine nerve roots and no lower extremity motor deficits or reflex abnormalities related to the lumbar spine nerve roots. Accordingly, based on these clinical findings, which, he opined, were the key factors used to rate lower extremity deficits related to spinal nerve roots under the July/August 2009 *The Guides Newsletter*, Dr. Slutsky found no basis for a lower extremity impairment rating.

By decision dated June 5, 2014, OWCP denied appellant's claim for a schedule award, finding that she had not established permanent impairment causally related to her accepted lumbar radiculopathy condition.

By letter dated June 11, 2014, appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 15, 2014, an OWCP hearing representative set aside OWCP's June 5, 2014 decision. He noted that, while Dr. Slutsky found no basis for lower extremity impairment because Dr. Fritzhand's examination findings were inconsistent with those made by prior physicians of record, he did not examine her and made no findings based on his own examination. The hearing representative, therefore, found that Dr. Slutsky's opinion regarding permanent impairment was insufficient to represent the weight of medical opinion. He remanded the case and instructed the district office to refer appellant to a second opinion physician for an impairment evaluation, to determine whether she had permanent impairment causally related to her accepted lumbar conditions in accordance with the July/August 2009 *The Guides Newsletter*.

In order to determine whether appellant had sustained any ratable permanent impairment from his accepted conditions, OWCP referred appellant to Dr. Norman Mindrebo, Board-certified in orthopedic surgery, for a second opinion examination and impairment evaluation. In a February 19, 2015 report, Dr. Mindrebo found that appellant had no ratable permanent impairment causally related to her accepted lumbar radiculopathy condition. He advised on examination that there was no palpable paravertebral muscle spasm of the lumbar spine and no buttock spasm. Dr. Mindrebo noted that the straight leg raise examination was negative in both legs and that there were no motor deficits to strength testing of the hips, knees, or ankles including her feet and great toes. He advised that appellant had preexisting cervical and lumbar

spondylosis with severe facet joint arthropathy and associated degenerative disc disease, and opined that there was no specific injury date to explain the disc bulge on the left side at L5-S1, a finding which was often associated with degenerative disc changes and lumbar spondylosis as a natural progression of her disease. Dr. Mindrebo concluded that her work-related injuries were temporary exacerbations of her underlying degenerative disc disease, which had obviously progressed, based on the MRI scan studies which were basically serial in nature from 2007 until 2012.

Dr. Mindrebo concurred with Dr. Slutsky's opinion that because appellant had no motor deficits, deep tendon reflex deficits, and no sensory deficits to the lower extremities, she did meet the criteria for a permanent impairment secondary to her underlying degenerative lumbar spondylosis. He advised that, as she had severe lumbar spondylosis at multiple levels which appeared degenerative in nature, she had a preexisting, worsening condition which was temporarily exacerbated, but had long since resolved. As a result Dr. Mindrebo opined that while her underlying disease process had progressed, her objective, diagnostic findings were not related to her employment.

In a May 21, 2015 report, Dr. Daniel D. Zimmerman, a specialist in internal medicine and an OWCP medical adviser, concurred with Dr. Mindrebo's findings and conclusions and found that appellant had no ratable permanent impairment of either lower extremity due to a lumbar spine condition, pursuant to the July/August 2009 *The Guides Newsletter*.

By decision dated June 19, 2015, OWCP denied appellant's claim for a schedule award, finding that she had not established any permanent impairment causally related to her accepted lumbar radiculopathy condition.

By letter dated June 30, 2015, counsel requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated April 22, 2016, an OWCP hearing representative affirmed the June 19, 2015 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. It, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has

[5] 5 U.S.C. § 8107

concurred in such adoption.[6] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.[7]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[8] Under the sixth edition, the evaluator identifies the impairment for the Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History, Physical Examination (GMPE), and Clinical Studies.[9] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.[10] Furthermore, the back is specifically excluded from the definition of organ under FECA.[11] The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that July/August 2009 *The Guides Newsletter* is to be applied.[12]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.[13]

ANALYSIS

OWCP accepted that appellant sustained the conditions of lumbar strain and lumbar radiculopathy. On July 25, 2012 appellant claimed a schedule award for impairment of the extremities originating in the spine. She provided a June 14, 2013 report from Dr. Fritzhand, who rated 11 percent bilateral lower extremity permanent impairment under the A.M.A., *Guides*

[6] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[7] *See* 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).

[8] A.M.A., *Guides* at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement" (6th ed. 2009).

[9] *Id*. at 494-531 (6th ed. 2009).

[10] *See N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[11] *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[13] *Id*. at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

and the July/August 2009 *The Guides Newsletter*, finding that she had mild motor deficit for each lower extremity based on documented involvement of both the L4 and S1 nerve roots. OWCP obtained a second opinion from Dr. Mindrebo, who found in his February 19, 2015 report that appellant had no ratable permanent impairment causally related to her accepted lumbar radiculopathy condition. Dr. Mindrebo based this opinion on the fact that she had no motor deficits, deep tendon reflex deficits, and no sensory deficits to the lower extremities. He opined that she had severe, degenerative lumbar spondylosis at multiple levels, but that this was a preexisting, worsening condition which was temporarily exacerbated, and which had long since resolved. Dr. Mindrebo therefore opined that, while her underlying disease process had progressed, the objective, diagnostic findings shown by MRI scan and EMG/NCV test were unrelated to her employment. An OWCP medical adviser concurred with Dr. Mindrebo's rating and methodology.

The Board finds that OWCP properly accorded Dr. Mindrebo's impairment rating the weight of the medical evidence. Dr. Mindrebo's opinion was based on a statement of accepted facts and the complete medical record. He provided a detailed impairment rating, utilizing the appropriate portions of the A.M.A., *Guides* and *The Guides Newsletter*. Dr. Mindrebo described how objective clinical and electrodiagnostic findings did not provide the basis for a ratable impairment attributable to appellant's lumbar radiculopathy condition. OWCP properly found that appellant had no ratable permanent impairment attributable to his accepted lumbar radiculopathy condition and therefore was not entitled to a schedule award under the A.M.A., *Guides.* Therefore, OWCP's April 22, 2016 decision was proper under the law and facts of this case.

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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment to a scheduled member of her body causally related to her accepted lumbar radiculopathy condition, thereby entitling her to a schedule award under 5 U.S.C. § 8107.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 22, 2016 is affirmed.

Issued: May 5, 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