

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

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D.B., Appellant )  
and ) Docket No. 17-1845  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: February 16, 2018  
Des Moines, IA, Employer )  
)

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*Appearances:*

*Alan J. Shapiro, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 29, 2017 appellant, through counsel, filed a timely appeal from an August 1, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant has met her burden of proof to establish more than 12 percent permanent impairment of her left upper extremity and more than 9 percent permanent impairment of her left lower extremity, for which she previously received schedule awards.

## **FACTUAL HISTORY**

On November 6, 1999 appellant, then a 40-year-old clerk, filed an occupational disease claim (Form CA-2), assigned OWCP File No. xxxxxx382, alleging that she sustained back and neck problems due to performing her work duties, including putting mail in sacks and pulling sacks weighing up to 100 pounds.<sup>3</sup> OWCP accepted her claim for pelvic region pain, left lower limb pain, aggravation of lumbosacral spondylosis without myelopathy, aggravation of lumbar disc displacement without myelopathy, lumbar sprain, lumbago, chest pain, aggravation of a herniated C6-7 disc and cervical sprain. Appellant began working in a limited-duty position in October 1999 without wage loss, and received compensation from OWCP for later periods of work stoppage.<sup>4</sup>

On July 10, 2008 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to her accepted conditions. By decision dated November 20, 2008, OWCP denied her schedule award claim because she had failed to submit medical evidence establishing permanent impairment of a scheduled member.

On January 5, 2011 appellant again filed a claim for compensation seeking a schedule award due to her accepted conditions.

In an October 1, 2010 report, Dr. Stephen Wilson, an attending Board-certified orthopedic surgeon, determined that appellant had 24 percent permanent impairment of her right lower extremity and 10 percent permanent impairment of her left lower extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup>

In March 2011 OWCP referred the case to an OWCP medical adviser who determined on March 27, 2011 that appellant did not have a diagnosed work-related condition that would cause the permanent impairment found by Dr. Wilson.

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<sup>3</sup> Appellant indicated that she first became aware of her claimed condition on October 19, 1999. OWCP previously accepted that she sustained several conditions under separate claim numbers: traumatic cervical strain on February 28, 1994 (OWCP File No. xxxxxx157), a traumatic cervical strain on May 16, 1995 (OWCP File No. xxxxxx771), occupational displacement of cervical intervertebral disc without myelopathy and lumbosacral spondylosis without myelopathy sustained by March 18, 1997 (OWCP File No. xxxxxx753), traumatic lumbar strain on April 15, 1997 (OWCP File No. xxxxxx332), and traumatic cervical and lumbar strains on October 31, 1997 (OWCP File No. xxxxxx871). The files for all of appellant's claims (including OWCP File No. xxxxxx382) have been administratively combined into OWCP File No. xxxxxx753, which has been designated as the master file.

<sup>4</sup> OWCP paid appellant wage-loss compensation on the daily rolls beginning June 8, 2002.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

In June 2011 OWCP referred appellant to Dr. Peter D. Wirtz, a Board-certified orthopedic surgeon, for a second opinion who determined in reports dated July 18 and 25, 2011 that appellant had nine percent permanent impairment of her left lower extremity. On August 5, 2011 an OWCP medical adviser concurred with this finding.

By decision dated August 11, 2011, OWCP granted appellant a schedule award for nine percent permanent impairment of her left lower extremity. The award ran for 25.92 weeks from July 18, 2011 to January 15, 2012.

On October 9, 2012 appellant filed a claim for compensation seeking an increased schedule award due to her accepted conditions.

In an August 26, 2013 report, Dr. Neil Allen, an attending Board-certified internist and neurologist, determined that appellant had 23 percent permanent impairment of her left upper extremity and 17 percent permanent impairment of her left lower extremity under the standards of the sixth edition of the A.M.A., *Guides*. He made reference to *The Guides Newsletter*, “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” (July/August 2009) in calculating his impairment ratings.<sup>6</sup>

OWCP again referred appellant to Dr. Wirtz for an opinion regarding the extent of her permanent impairment. By report dated November 5, 2013, Dr. Wirtz opined that appellant had zero percent permanent impairment of her upper and lower extremities based upon sensory and motor findings. On November 29, 2013 an OWCP medical adviser concurred with Dr. Wirtz' findings.

By decision dated January 31, 2014, OWCP denied appellant's claim for increased schedule award compensation based on the opinions of Dr. Wirtz and OWCP's medical adviser.

OWCP again referred appellant's claim to OWCP's medical adviser. On March 19, 2014 the medical adviser determined that appellant had 12 percent permanent impairment of her left upper extremity under the sixth edition of the A.M.A., *Guides*.

On April 10, 2014 OWCP made a preliminary determination that appellant received an overpayment of compensation because the previous schedule award for nine percent permanent impairment of the left lower extremity was not based upon permanent impairment due to the accepted claim.

In an August 22, 2014 decision, OWCP granted appellant a schedule award for 12 percent permanent impairment of her left upper extremity. The award ran for 37.44 weeks from November 6, 2013 to July 26, 2014.

Appellant requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review and such a hearing was held on August 1, 2014. In an October 9, 2014 decision, the hearing representative set aside the August 22, 2014 schedule award decision, finding that there was a conflict in the medical opinion evidence, regarding permanent

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<sup>6</sup> See *infra* notes 14 and 15.

impairment, between the government physician, Dr. Wirtz, and the attending physician, Dr. Allen, which required referral of appellant to an impartial medical specialist. The case was remanded to OWCP for that purpose.<sup>7</sup>

On remand, OWCP referred appellant and the case record to Dr. Chris A. Cornett, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on appellant's permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*. OWCP provided Dr. Cornett with a July 16, 2015 statement of accepted facts (SOAF).

By report dated September 30, 2015, Dr. Cornett discussed the history of injury and reported appellant's complaints of bilateral shoulder and arm pain, numbness in the fingers and toes, neck pain, low back pain, bilateral lower extremity pain with tingling and tremors, decreased sleep, and not being able to sit for long periods. Upon physical examination on September 30, 2015, he reported that appellant had a slow gait but was able to walk on her heels and toes. Appellant had decreased thoracolumbar flexion and extension limited by pain, and positive Waddell's signs including pain beyond what would be expected in the examination. Dr. Cornett reported that appellant had diffuse weakness secondary to pain in the upper and lower extremities. He posited that there was no evidence in appellant's chart or history "of any direct injury other than a report of repetitive motion causing her problems" and asserted that "her claim was filed much later after the original reported time of injury which would have been 1997." Dr. Cornett noted that appellant had some pain out of proportion to what would be expected with consistent anatomic and neurologic principles and noted that there are no focal or specific motor or sensory deficits that he could determine upon examination. He concluded that appellant did not have any impairment to the upper or lower extremities based on his physical examination and history taken and his review of her extensive medical records.

In April 2016 OWCP then referred the claim to Dr. Cornett for a supplemental opinion regarding whether appellant's accepted medical conditions had resolved and whether she had permanent impairment. By report dated August 10, 2016, Dr. Cornett indicated that any condition that would have been aggravated by appellant's work would have reverted to baseline within six months of the original aggravation. He noted, "However, I think it is difficult to state that all of those above issues were caused by work or even aggravated by work." Dr. Cornett indicated that he was not changing the opinion expressed in his September 30, 2015 report that appellant did not have any permanent impairment in her upper or lower extremities.

By decision dated October 3, 2016, OWCP determined that appellant did not meet her burden of proof to establish more than 12 percent permanent impairment of her left upper extremity and 9 percent permanent impairment of her left lower extremity, for which she received schedule awards.

Appellant, through counsel, requested a hearing with a representative of OWCP's Branch of Hearings and Review and such a hearing was held on May 17, 2017. She submitted an

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<sup>7</sup> The hearing representative indicated that it was premature to consider whether an overpayment occurred. The record contains a March 9, 2015 decision in which the OWCP hearing representative also set aside OWCP's August 22, 2014 schedule award decision. It is unclear from the record why this decision was issued.

additional medical report, dated February 2, 2017, in which Dr. Allen disagreed with Dr. Cornett's assertions.<sup>8</sup>

In an August 1, 2017 decision, OWCP's hearing representative affirmed OWCP's October 3, 2016 decision. She determined that appellant had not established entitlement to additional schedule award compensation.

### **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.<sup>9</sup> 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.<sup>10</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>11</sup>

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.<sup>12</sup> However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.<sup>13</sup> The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment.<sup>14</sup> 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

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<sup>8</sup> Dr. Allen determined that appellant had 23 percent permanent impairment of her left upper extremity and 19 percent permanent impairment of her left lower extremity under the standards of the sixth edition of the A.M.A., *Guides*. He had previously found 17 percent permanent impairment of appellant's left lower extremity.

<sup>9</sup> 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). With respect to 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).

<sup>10</sup> 20 C.F.R. § 10.404.

<sup>11</sup> 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).

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

<sup>13</sup> *Supra* note 11 at Claims, Chapter 2.808.5c(3).

<sup>14</sup> 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.*

radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the procedure manual.<sup>15</sup>

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>16</sup> For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.<sup>17</sup> Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.<sup>18</sup>

## ANALYSIS

OWCP accepted that appellant sustained multiple cervical, back, and lower extremity conditions both of a traumatic and occupational nature. In an August 11, 2011 decision, it granted appellant a schedule award for nine percent permanent impairment of her left lower extremity. In an August 22, 2014 decision, OWCP granted appellant a schedule award for 12 percent permanent impairment of her left upper extremity. Appellant claimed entitlement to additional schedule award compensation, but OWCP denied her claim in several decisions, including an August 1, 2017 decision of an OWCP hearing representative.

The Board finds that the case is not in posture for decision regarding whether appellant has met her burden of proof to establish more than 12 percent permanent impairment of her left upper extremity and more than 9 percent permanent impairment of her left lower extremity, for which she received schedule awards.

The Board notes that OWCP properly referred appellant to Dr. Cornett, the impartial medical specialist, in order to resolve a conflict in the medical evidence regarding the extent of appellant's permanent impairment.<sup>19</sup> However, the Board finds that the opinion of Dr. Cornett does not have sufficient probative value to resolve the conflict in the medical opinion evidence. In his September 30, 2015 and August 10, 2016 reports, Dr. Cornett provided opinions that were not in keeping with the statement of accepted facts. OWCP provided Dr. Cornett with a statement of accepted facts to use as a frame of reference in forming his independent opinion. The statement of accepted facts made clear that OWCP had accepted appellant's claim for numerous conditions. As a medical professional, Dr. Cornett is entitled to reject such conditions, but if he does so without convincing medical rationale, his opinion has little probative or

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<sup>15</sup> See *supra* note 11 at Chapter 3.700, Exhibit 4.

<sup>16</sup> 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The DMA, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

<sup>17</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>18</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

<sup>19</sup> OWCP properly found that here was a conflict regarding permanent impairment in the medical opinion evidence between the government physician, Dr. Wirtz, and the attending physician, Dr. Allen, which required referral of appellant to an impartial medical specialist. See *supra* notes 16 through 18.

evidentiary value.<sup>20</sup> OWCP's procedures provide that, when the impartial medical specialist does not use the statement of accepted facts as the framework in forming his or her opinion, the probative value of the opinion is diminished or negated altogether.<sup>21</sup>

The Board notes that Dr. Cornett indicated in his reports that he did not accept all of the conditions listed in the statement of accepted facts as valid employment conditions. Dr. Cornett did not provide any notable rationale for this ostensible opinion. In his September 30, 2015 report, he posited that there was no evidence in appellant's chart or history "of any direct injury other than a report of repetitive motion causing her problems." In his August 10, 2016 report, Dr. Cornett noted that any condition that would have been aggravated by appellant's work would have reverted to baseline within six months of the original aggravation. He further indicated, "However, I think it is difficult to state that all of those above issues were caused by work or even aggravated by work." Given his failure to acknowledge all the accepted employment conditions without adequate explanation, Dr. Cornett's opinion that appellant had no permanent impairment is of limited probative value.<sup>22</sup> His opinion on permanent impairment is of limited probative value for the further reason that he did not make any notable reference to the relevant standards for evaluating permanent impairment, including the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*.<sup>23</sup> The Board has held that an opinion on permanent impairment is of limited probative value if it is not derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.<sup>24</sup>

Given Dr. Cornett's failure to resolve the conflict regarding permanent impairment in the medical opinion evidence, there is an outstanding conflict on this matter.<sup>25</sup> In order to resolve the continuing conflict in the medical opinion evidence, the case will be remanded to OWCP for referral of appellant and the case record to a new impartial specialist for examination and an opinion regarding appellant's permanent impairment under the relevant standards.<sup>26</sup> After such further development as OWCP deems necessary, a *de novo* decision shall be issued regarding the extent of appellant's permanent impairment.

## **CONCLUSION**

The Board finds that the case is not in posture for decision.

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<sup>20</sup> See also G.W., Docket No. 15-1646 (issued September 1, 2016); P.B., Docket No. 08-1024 (issued January 7, 2009).

<sup>21</sup> *Supra* note 11 at Chapter 3.600.3(10) (October 1990).

<sup>22</sup> *See supra* notes 20 and 21.

<sup>23</sup> *See supra* notes 13 through 15.

<sup>24</sup> See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

<sup>25</sup> *See supra* note 18.

<sup>26</sup> *Harold Travis*, 30 ECAB 1071 (1979).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 1, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: February 16, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

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