United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
	)	
and	)	**Docket No. 17-0732**
	)	**Issued: March 19, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 14, 2017 appellant filed a timely appeal from a January 12, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 more than 10 percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On October 4, 2007 appellant, then a 50-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on October 2, 2007 she sustained injury due to loading and

[1] 5 U.S.C. § 8101 *et seq.*

unloading mail at work. She stopped work on October 8, 2007 and returned to work the next day on October 9, 2007 in a limited-duty position.

OWCP initially accepted that appellant sustained a lumbar sprain on October 2, 2007 and she received disability compensation on the daily rolls beginning January 27, 2010.[2]

On January 27, 2010 Dr. Mark J. Sokolowski, an attending orthopedic surgeon, performed bilateral lumbar hemilaminectomy at L5-S1 with decompression of the thecal sac and nerve roots, and partial facetectomy and foraminotomy bilaterally. The surgery was authorized by OWCP. In February 2011, OWCP expanded the accepted conditions to include lumbar radiculopathy and herniated lumbar disc.

In a report dated September 3, 2015, Dr. Sokolowski reported the findings of his physical examination on that date and noted that appellant's current and past findings on physical examination and diagnostic testing showed that she had spondylolisthesis at L5-S1. He indicated that appellant exhibited sensory loss in both extremities associated with the L5 and S1 dermatomes.

On June 7, 2016 appellant filed a claim for compensation (Form CA-7) for a schedule award due to her accepted employment conditions.

On June 28, 2016 Dr. Sokolowski noted that appellant presented complaining of pain radiating from her lumbar spine down into her left lower extremity. He reported the findings on physical examination noting that extension beyond neutral reproduced concordant back pain with radiation to appellant's left lower extremity. Dr. Sokolowski noted that the straight leg raise test was positive on the left and negative on the right and that sensation was diminished in her L5 and S1 dermatomes on the left.

In a report dated July 7, 2016, Dr. Sokolowski indicated that, although the January 27, 2010 surgery provided some relief, appellant remained persistently symptomatic with lumbar pain radiating into her left leg, positive straight leg raise test, five-degree hamstring contracture, and diminished sensation in her left L5 and S1 dermatomes. He noted that a recent magnetic resonance imaging (MRI) scan demonstrated L4-5 and L5-S1 spondylolisthesis and he determined that the impairment rating would be based on this condition under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] Dr. Sokolowski found that, under Table 17-4 (Lumbar Spine Regional Grid) on page 571, appellant's back condition fell under class 4 for lumbar spondylolisthesis with surgery and documented signs of multilevel left radiculopathy at the clinically appropriate levels on examination. He noted that the default impairment value for a class 4 condition was 29 percent of the whole person and described his calculation of grade modifiers.[4] Dr. Sokolowski indicated that application of the net adjustment formula yielded a result of -2 such that appellant's impairment

[2] Appellant received disability compensation on the periodic rolls beginning March 8, 2015.

[3] A.M.A., *Guides* (6th ed. 2009).

[4] Dr. Sokolowski noted that appellant had a grade modifier for Functional History (GMFH) of 3, a grade modifier for Clinical Studies (GMCS) of 2 and a grade modifier for Physical Examination (GMPE) of 2.

rating moved two places to the left of the 29 percent default value for whole person impairment found on Table 17-4.[5] He concluded that appellant had 25 percent whole person impairment.[6]

In a report dated November 9, 2016, Dr. Sokolowski noted that the diagnosis affecting appellant's left lower extremity and the L5 and S1 peripheral nerves was lumbar spondylolisthesis with surgery and documented signs of multilevel left radiculopathy at the clinically appropriate levels on examination. Dr. Sokolowski indicated that under Proposed Table 2 of *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) (hereinafter *The Guides Newsletter*), appellant had six percent default value for permanent impairment of the left lower extremity associated with class 1 severe sensory deficits of the L5 nerve. Under Proposed Table 2, appellant had four percent default value for permanent impairment of the left lower extremity associated with class 1 severe sensory deficits of the S1 nerve. Dr. Sokolowksi calculated grade modifiers and application of the net adjustment formula. He did not alter the six percent impairment associated with the L5 nerve or the four percent impairment associated with the S1 nerve.[7] He noted that combining these two values yielded a total permanent impairment of the left lower extremity of 10 percent.

In mid-November 2016, OWCP referred the case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, for an evaluation of the permanent impairment of her lower extremities. Dr. Harris was not provided with the November 9, 2016 report of Dr. Sokolowski at the time of the referral.

In a report dated November 18, 2016, Dr. Harris indicated that he was applying the standards of *The Guides Newsletter* to the findings from the physical examination Dr. Sokolowski conducted on September 3, 2015. He determined that appellant had one percent permanent impairment of the left lower extremity associated with sensory deficits of the L5 nerve and one percent permanent impairment of the left lower extremity associated with sensory deficits of the S1 nerve. Dr. Harris noted that combining these two values yielded a total permanent impairment of the left lower extremity of two percent.[8]

In mid-December 2016, Dr. Harris was provided the November 9, 2016 report of Dr. Sokolowski and he was asked to provide a supplemental impairment evaluation taking this report into account.

In a report dated December 16, 2016, Dr. Harris indicated that he had reviewed the November 9, 2016 report of Dr. Sokolowski. He applied the standards of *The Guides Newsletter* to find that appellant had six percent permanent impairment of the left lower extremity associated with sensory deficits of the L5 nerve and four percent permanent impairment of the left lower extremity associated with sensory deficits of the S1 nerve. Dr. Harris explained that his rating of

[5] *See infra* note 20.

[6] Dr. Sokolowksi indicated that the date of maximum medical improvement (MMI) was September 3, 2015

[7] Dr. Sokolowski again noted that appellant had a GMFH of 3, a GMCS of 2 and a GMPE of 2.

[8] Dr. Harris produced a similar calculation for appellant's right lower extremity and found permanent impairment of the right lower extremity of two percent.

left lower extremity impairment was higher than that provided in his November 18, 2016 report because he was now applying Dr. Sokolowski's examination findings from November 2016, rather than from September 2015, and appellant's left lower extremity condition had worsened between September 2015 and November 2016. He found that appellant reached MMI with respect to his accepted conditions on November 9, 2016, *i.e.*, the most recent evaluation by Dr. Sokolowksi and the evaluation that formed the basis for his impairment rating.

By decision dated January 12, 2017, OWCP granted appellant a schedule award for 10 percent permanent impairment of her left lower extremity. The award ran for 28.8 weeks from November 9, 2016 to May 29, 2017 and was based on the November 9, 2016 rating of Dr. Sokolowski and the December 16, 2016 rating of Dr. Harris.

LEGAL PRECEDENT

The schedule award provision of FECA[9] and its implementing regulations[10] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates 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 the implementing regulation as the appropriate standard for evaluating scheduled losses.[11] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[12]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[13] A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA.[14] Moreover, neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.[15]

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

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404 (1999).

[11] *Id*.

[12] *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).

[13] *Pamela J. Darling*, 49 ECAB 286 (1998).

[14] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[15] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

whether the cause of the impairment originated in a scheduled 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.[16]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) (*The Guides Newsletter*) is to be applied.[17] The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.[18] In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[19]

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on grade modifier for functional history (GMFH) and, if electrodiagnostic testing was done, grade modifier for clinical studies (GMCS).[20] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[21]

ANALYSIS

OWCP accepted that on October 2, 2007 appellant sustained lumbar sprain, lumbar radiculopathy, and herniated lumbar disc. On January 27, 2010 Dr. Sokolowski, an attending physician, performed bilateral lumbar hemilaminectomy at L5-S1 with decompression of thecal sac and nerve roots, and partial facetectomy and foraminotomy bilaterally. The surgery was authorized by OWCP. By decision dated January 12, 2017, OWCP granted appellant a schedule award for 10 percent permanent impairment of her left lower extremity. The award was based on the November 9, 2016 rating of Dr. Sokolowski and the December 16, 2016 rating of Dr. Harris, OWCP's medical adviser.

The Board finds that OWCP properly determined that appellant has not established more than 10 percent permanent impairment of her left lower extremity, for which she previously

[16] *Supra* note 14.

[17] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[18] *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

[19] *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

[20] A.M.A., *Guides* 515-21, 533.

[21] *Id.* at 521.

received a schedule award. This determination was justified by the November 9, 2016 rating of Dr. Sokolowski and the December 16, 2016 rating of Dr. Harris.

In a report dated November 9, 2016, Dr. Sokolowski noted that the diagnosis affecting appellant's left lower extremity and the L5 and S1 peripheral nerves was lumbar spondylolisthesis with surgery and documented signs of multilevel left radiculopathy at the clinically appropriate levels on examination. He indicated that, under Proposed Table 2 of *The Guides Newsletter*, appellant had six percent default value for permanent impairment of the left lower extremity associated with class 1 severe sensory deficits of the L5 nerve. Under Proposed Table 2, appellant had four percent default value for permanent impairment of the left lower extremity associated with class 1 severe sensory deficits of the S1 nerve. Dr. Sokolowksi calculated grade modifiers and application of the net adjustment formula did not alter the six percent impairment associated with the L5 nerve or the four percent impairment associated with the S1 nerve. He noted that combining these two values yielded a total permanent impairment of the left lower extremity of 10 percent.[22]

In a report dated December 16, 2016, Dr. Harris indicated that he had reviewed the November 9, 2016 report of Dr. Sokolowski. He also applied the standards of *The Guides Newsletter* to find that appellant had six percent permanent impairment of the left lower extremity associated with sensory deficits of the L5 nerve and four percent permanent impairment of the left lower extremity associated with sensory deficits of the S1 nerve. Dr. Harris combined these two values and concluded that appellant had a total permanent impairment of the left lower extremity of 10 percent.[23] The Board notes that Dr. Harris had previously provided a lower rating for permanent impairment of the left lower extremity. However, in his December 16, 2016 report, Dr. Harris explained that his rating of left lower extremity impairment was now higher than that provided in his prior report because he was now applying Dr. Sokolowski's examination findings from November 2016, rather than from September 2015, and appellant's left lower extremity condition had worsened between September 2015 and November 2016.[24]

In his December 16, 2016 report, Dr. Harris found that appellant reached MMI with respect to his accepted conditions on November 9, 2016, *i.e.*, the most recent evaluation by Dr. Sokolowksi and the evaluation that formed the basis for his impairment rating. On appeal

[22] Dr. Sokolowski had previously provided an opinion that appellant had 25 percent permanent impairment of her whole person. However, this report is of limited probative value because the Board has held that a schedule award is not payable under section 8107 of FECA for an impairment of the whole person. *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

[23] *See supra* notes 16 through 20 regarding the application of *The Guides Newsletter* for permanent impairment of the lower extremities stemming from the back.

[24] Dr. Harris previously had provided an impairment rating for appellant's right lower extremity in his November 18, 2016 report, but he later explained in his December 16, 2016 report that the most recent examination findings did not show a work-related impairment radiating into the right lower extremity from the accepted back injuries. The Board notes that a schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA. Neither FECA nor its implementing regulations provides for a schedule award for impairment to the back. *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990). As noted above, 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, if such radiating impairment is documented. *See supra* note 15.

appellant notes that Dr. Sokolowski provided an opinion that he reached MMI on September 3, 2015 whereas Dr. Harris found that he reached MMI on November 9, 2016. MMI means that the physical condition of the injured member of the body has stabilized and will not improve further,[25] and date of MMI is usually considered to be the date of the evaluation accepted as definitive by OWCP.[26] The Board requires persuasive proof of MMI if OWCP selects a retroactive date.[27] The Board notes that Dr. Harris adequately explained his choice of November 9, 2016 as the date of MMI because November 9, 2016 was the date of Dr. Sokolowski's examination on which the impairment rating was based. There is no persuasive evidence that choosing a retroactive date of MMI would be appropriate in the present case. For these reasons, the Board finds that appellant did not establish that she has more than 10 percent permanent impairment of her left lower extremity.

Appellant may request a schedule award or increased schedule award 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 did not meet her burden of proof to establish more than 10 percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

[25] *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

[26] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.a (January 2010); *see Richard Larry Enders*, 48 ECAB 184 (1996) (the date of MMI was the date of the audiologic examination used as the basis of the schedule award).

[27] *C.S.*, Docket No. 12-1574 (issued April 12, 2013); *P.C.*, 58 ECAB 539 (2007); *James E. Earle*, 51 ECAB 567 (2000).

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 2018
Washington, DC

Christopher J. Godfrey, 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