United States Department of Labor
Employees' Compensation Appeals Board

W.M., Appellant	)	
	)	
and	)	**Docket No. 18-0957**
	)	**Issued: October 15, 2018**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Kearny, NJ, Employer	)	

Appearances:
James D. Muirhead, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 9, 2018 appellant, through counsel, filed a timely appeal from a November 30, 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.

[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.*

ISSUE

The issue is whether appellant has established permanent impairment of a scheduled member warranting a schedule award.

FACTUAL HISTORY

On October 16, 2007 appellant, then a 50-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on October 15, 2007, she sustained an injury to her middle and lower back while in the performance of duty. She stopped work on October 16, 2007. On November 23, 2007 OWCP accepted the claim for sprain of back, lumbar region. Subsequent to her injury, appellant performed modified employment.

In a report dated August 6, 2008, Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon and OWCP referral physician, discussed appellant's complaints of back pain radiating into the buttocks. On examination he found a negative straight leg raise, full motor strength, and intact sensation. Dr. Hutter diagnosed lumbar strain due to the employment injury. He further found degeneration and a disc herniation at L4-5 based on an October 25, 2007 magnetic resonance imaging (MRI) scan study, noting that it was "unlikely that the disc herniation was caused by the accident in question, but that there was some aggravation as a result of the injury…." On October 15, 2009 Dr. Hutter discussed appellant's complaints of numbness in the lower back and bilateral legs, especially on the left side. On examination, he found a negative straight leg test, an intact sensory examination, and full strength of the lower extremities. Dr. Hutter diagnosed lumbar strain and listed work restrictions.

February 11, 2010 electromyogram (EMG) and nerve conduction velocity (NCV) studies revealed mild motor demyelinating peripheral neuropathy of the bilateral extremities and radiculopathy on the left at L4-5.

Dr. James M. Lee, an attending Board-certified orthopedic surgeon, noted on January 8, 2009 that appellant experienced back pain radiating into the lower extremities. On December 22, 2009 he found a positive straight leg raise bilaterally. In a March 30, 2010 report, Dr. Lee diagnosed low back pain with radiculopathy on the left at L4-5 and mild peripheral neuropathy. On examination he found a positive straight leg raise more on the left.

In a May 3, 2010 report, Dr. David Rubinfeld, a Board-certified orthopedic surgeon and OWCP referral physician, noted that appellant had pain in her back and legs and numbness in both legs. He found intact sensation and full motor strength of the lower extremities. Dr. Rubinfeld diagnosed lumbosacral sprain that had resolved and opined that appellant could resume her usual employment.

OWCP determined that a conflict in medical opinion existed between Dr. Lee and Dr. Rubinfeld and referred appellant to Dr. Michael Wujciak, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated July 13, 2010, Dr. Wujciak discussed her complaints of low back pain radiating down her left leg with left foot numbness. On examination, he found a negative straight leg raise, decreased sensation on the left at L5 and S1, and mild weakness of the extensor digitorum communis greater on the left. Dr. Wujciak opined

that appellant had "sustained a lumbar strain and an aggravation/exacerbation of a previously existing albeit asymptomatic degenerative disc disease of the lumbar spine, which predated the accident in question." He noted that she had quickly recovered from the "immediate effects of the accepted condition," but that her degenerative disc disorder had progressed. Dr. Wujciak opined that appellant had reached maximum medical improvement (MMI) for her lumbar condition and had impairment "largely related to a concurrent nonwork[-]related condition…." He found that she could resume work without restrictions considering only the accepted condition, but further advised that, given the aggravation of the preexisting degenerative disc disease and its subsequent progression, modified employment was "generally in [appellant's] best interest."

Dr. Lee continued to treat appellant from 2011 to 2013 for low back pain and radiculopathy.[3] In an August 9, 2011 examination, he found straight leg raising 70 degrees on the right and 75 degrees on the left with no extensor halluces weakness. On November 20, 2012 Dr. Lee found a mildly positive straight leg raise on the left. On January 8, 2013 he diagnosed lumbar radiculopathy and, on July 16, 2013, diagnosed chronic lumbar myeloradiculopathy.

In an impairment evaluation dated November 25, 2015, Dr. Nicholas Diamond, an osteopath, discussed appellant's history of injury and complaints of low back pain radiating into the left lower extremity. He noted that an October 24, 2007 MRI scan study showed a disc herniation at L4-5 and desiccation at L4-5 and L5-S1 and an EMG on February 11, 2010 showed radiculopathy on the left at L4-5. Dr. Diamond found a positive straight leg raise on the left, muscle strength of the hip flexors and extensor halluces longus of 4/5, and a loss of sensation at L5 and S1 of the lower extremity. He diagnosed chronic post-traumatic lumbosacral strain/sprain, a disc herniation at L4-5, radiculopathy on the left at L4-5, and an aggravation of preexisting degenerative disc disease and grade 1 spondylolisthesis at L5-S1. Dr. Diamond attributed the findings on examination and appellant's complaints to her October 15, 2007 work injury. Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[4] he found that, according to *The Guides Newsletter*,[5] appellant had three percent impairment for a class 1 moderate sensory deficit of the left L5 nerve root, which he adjusted to five percent after applying grade modifiers. Dr. Diamond further found five percent impairment for mild loss of motor strength of the left hip flexors, and five percent impairment for mild motor strength deficits of the left extensor halluces longus, which he determined yielded nine percent impairment for each loss after the application of grade modifiers. He combined the impairment ratings to find a total left lower extremity impairment of 21 percent.

Appellant, on February 3, 2016, filed a claim for a schedule award (Form CA-7).

An OWCP medical adviser reviewed the record on March 15, 2016. He advised that he did not have the February 11, 2010 EMG and NCV studies to review. The medical adviser opined that Dr. Diamond's findings of deficits on the left at L4-5 varied significantly from the

[3] 2-15-11 low back pain without radiculopathy

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

[5] *The Guides Newsletter*, *Rating Spinal Nerve Impairment Using the Sixth Edition* (July/August 2009).

examinations conducted by Dr. Hutter, Dr. Rubinfeld, and Dr. Wujciak and thus could not constitute the basis for an impairment rating.

OWCP, on May 23, 2016, requested that OWCP's medical adviser review the February 11, 2010 electrodiagnostic testing and specifically address Dr. Diamond's November 25, 2015 impairment rating.

On June 5, 2016 OWCP's medical adviser opined that appellant had no permanent impairment of the left lower extremity based on the "consistent, objective evidence of normal LE [lower extremity] sensation and motor function." He advised that Dr. Diamond's findings were "inconsistent with most of the other physicians of record and therefore unreliable and will not be used for final impairment calculations."

By letter dated July 9, 2016, OWCP provided Dr. Diamond with OWCP's medical adviser's March 13 and June 5, 2016 reports for review. In a supplemental report dated July 27, 2016, Dr. Diamond related that he did not have the reports from Dr. Hutter, Dr. Rubinfeld, or Dr. Wujciak to review, but noted that their evaluations were made over five years before his November 25, 2015 examination. He advised that, based on Semmes Weinstein Momfilament testing and testing of manual muscle strength, appellant had 21 percent permanent impairment of the left lower extremity. Dr. Diamond asserted that the February 11, 2010 electrodiagnostic testing supported his rating.

On August 15, 2016 OWCP's medical adviser noted that Dr. Diamond discounted findings by physicians as more than five years before his examination, yet relied on an EMG study performed six years before his examination. He indicated that at MMI on August 6, 2008 appellant had no objective findings of sensory or motor deficits and that there was "no further treatment which has changed the clinical findings from this date going forward."

By decision dated May 4, 2017, OWCP denied appellant's schedule award claim. It found that the opinion of OWCP's medical adviser constituted the weight of the evidence and established that she had no permanent impairment of the left lower extremity.

Appellant, through counsel, on May 10, 2017 requested a telephone hearing before an OWCP hearing representative. During the telephone hearing, held on October 16, 2017, she described the effects of her work injury. Counsel noted that the 2010 EMG study established that appellant had radiculopathy.

By decision dated November 30, 2017, OWCP's hearing representative affirmed the May 4, 2017 decision. He noted that the accepted injury was lumbar strain, a soft-tissue injury, and that the medical evidence of record demonstrated that appellant had no lower extremity symptoms in 2008. The hearing representative indicated that Dr. Diamond rated her based in part on diagnoses not accepted as work related.

On appeal, counsel asserts that OWCP's medical adviser did not examine appellant or review the February 11, 2010 EMG and NCV studies. He maintains that Dr. Lee's reports support her claim and maintains that objective testing and examination findings support Dr. Diamond's impairment rating.

LEGAL PRECEDENT

The schedule award provisions of FECA,[6] and its implementing federal regulations,[7] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.[10] For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.[11] FECA approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[12]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[13] The implementing regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[14]

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id.* at § 10.404(a).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims*, Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical*, Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] *Id*. at Chapter 3.700, Exhibit 4 (January 2010).

[11] *Id*. at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4; *see also G.N.*, Docket No. 10-0850 (issued November 12, 2010).

[12] *Supra* note 9 at Chapter 2.808.5c(3) (February 2013).

[13] 5 U.S.C. § 8123(a).

[14] 20 C.F.R. § 10.321.

opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical evidence.

OWCP accepted that appellant sustained a lumbar sprain due to an October 15, 2007 employment injury. On August 6, 2008 Dr. Hutter, an OWCP referral physician, opined that the work injury caused some aggravation of a preexisting disc herniation and noted that she complained of back pain radiating into the buttocks. However, in a May 15, 2009 report, he diagnosed only lumbar strain. In a July 13, 2010 report, Dr. Wujciak, an impartial medical examiner, indicated that appellant complained of back pain radiating down her left lower extremity. He opined that her work injury aggravated previously asymptomatic degenerative disc disease. On examination, Dr. Wujciak found a negative straight leg raise and decreased sensation at L5 and S1 on the left. He determined that appellant had reached MMI and that most of her impairment resulted from nonemployment-related conditions. Dr. Lee, appellant's attending physician, noted that she complained of radiculopathy into the lower extremities on January 8, 2009. Electrodiagnostic testing performed on February 11, 2010 demonstrated mild motor demyelinating peripheral neuropathy of the bilateral extremities and radiculopathy on the left at L4-5. Dr. Lee continued to submit reports that described his treatment of appellant for back pain with radiculopathy.

Appellant filed a schedule award claim on February 3, 2016. In support of her claim, she submitted a November 25, 2015 impairment evaluation from Dr. Diamond. Dr. Diamond diagnosed chronic post-traumatic lumbosacral strain/sprain, an aggravation of preexisting degenerative disc disease, and grade 1 spondylolisthesis at L5-S1, an L4-5 disc herniation, and L4-5 radiculopathy, which he attributed to the October 15, 2007 work injury. After identifying the diagnosis and applying grade modifiers in accordance with *The Guides Newsletter*, he found that appellant had 5 percent impairment for a moderate sensory deficit of the left L5 nerve root, 9 percent impairment for mild loss of motor strength of the left hip flexors, and 9 percent impairment for mild loss of motor strength at the left extensor halluces longus, which he combined to find a 21 percent left lower extremity impairment.

An OWCP medical adviser reviewed the evidence on March 15 and June 5, 2016. He found that the opinion of Dr. Diamond was of insufficient weight to support any schedule award as his findings on examination varied from the findings set forth by Dr. Hutter, Dr. Rubinfeld, and Dr. Wujciak. The medical adviser opined that the evidence of record demonstrated consistent normal findings of lower extremity motor function and sensation.

Dr. Diamond responded to OWCP's opinion, noting that his examination findings and the results of the February 11, 2010 EMG and NCV studies supported his determination. On August 15, 2016 OWCP's medical adviser questioned Dr. Diamond's reliance on an EMG study performed six years prior to his examination and noted that on August 6, 2008 appellant had no

[15] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

objective evidence of sensory or motor deficits or such evidence on further treatment that changed these findings.

The Board finds that there exists a conflict in medical evidence between appellant's attending physician, Dr. Diamond and OWCP's medical adviser, regarding whether she sustained a permanent impairment of the left lower extremity due to her accepted employment injury. As noted above, if there is disagreement between an employee's physician and OWCP's referral physician, OWCP shall appoint a referee physician or impartial medical specialist who shall make an examination.[16] The case is thus remanded for OWCP to refer appellant to an appropriate specialist for an impartial medical examination pursuant to section 8123(a) to determine the extent of any left lower extremity impairment in accordance with the sixth edition of the A.M.A., *Guides*.[17] On remand, OWCP should request that the physician also address whether the claim should be expanded to include either an aggravation of the L4-5 disc herniation and/or an aggravation of preexisting degenerative disc disease, as indicated by its prior referral physicians. After such further development as OWCP deems necessary, it should issue a *de novo* decision.

CONCLUSION

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

[16] *See V.G.*, Docket No. 17-1341 (issued July 16, 2018).

[17] *See P.R.*, Docket No. 18-0022 (issued April 9, 2018); *G.W.*, Docket No. 17-0957 (issued June 19, 2017).

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 15, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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