

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

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<b>B.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-1683</b>
	)	<b>Issued: April 19, 2019</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS ADMINISTRATION MEDICAL</b>	)	
<b>CENTER, Beckley, WV, Employer</b>	)	
_____	)	

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

**JURISDICTION**

On September 4, 2018 appellant, through counsel, filed a timely appeal from a July 3, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

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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.

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.<sup>3</sup>

### **ISSUE**

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

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 15, 2001 appellant, then a 48-year-old medical technician, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her low back when she prevented a patient's fall while in the performance of duty. OWCP accepted the claim for lumbosacral strain.<sup>5</sup>

On February 1, 2009 appellant filed a Form CA-7 claim for a schedule award.<sup>6</sup> By decision dated March 12, 2009, OWCP found that, as she had not established a permanent impairment causally related to her accepted condition, she was not entitled to a schedule award. By decision dated August 20, 2009, an OWCP hearing representative affirmed the March 12, 2009 decision.

Counsel filed an appeal with the Board on September 8, 2009. By decision dated May 14, 2010,<sup>7</sup> the Board set aside the March 12 and August 20, 2009 OWCP decisions and remanded the case for a review of the medical record by an OWCP district medical adviser (DMA).

Following review by a DMA who found that appellant had no lower extremity impairment related to the accepted condition, by decision dated June 8, 2010, OWCP again denied her schedule award claim.

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

<sup>3</sup> The Board notes that, following the July 3, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

<sup>4</sup> Docket No. 14-0345 (issued December 24, 2014); Docket No. 09-0231 (issued May 14, 2010).

<sup>5</sup> A March 21, 2002 electromyograph and nerve conduction velocity (EMG/NCV) study demonstrated that the lower extremities and lumbar paraspinals were within normal limits.

<sup>6</sup> The record indicates that appellant returned to a light-duty clerical position in March 2003 and retired in March 2007.

<sup>7</sup> Docket No. 09-2231 (issued May 14, 2010).

Additional development followed during which appellant submitted a July 22, 2011 report from Dr. Martin Fritzhand, a Board-certified urologist. He described examination findings of absent Achilles tendon reflexes and diminished muscle strength over both lower extremities. Dr. Fritzhand utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>8</sup> and *The Guides Newsletter* “Rating Spinal Nerve Extremity Impairment using the sixth edition” (*The Guides Newsletter*) (July/August 2009) and determined that appellant had sustained impairment to the S1 nerve root. He found a class 1 impairment, applied the net adjustment formula, and concluded that appellant had bilateral four percent sensory impairments and five percent motor impairments for a combined nine percent permanent impairment of each lower extremity.

On July 17, 2012 Dr. Arnold Berman, a Board-certified orthopedist serving as a DMA, reported that he reviewed Dr. Fritzhand’s July 22, 2011 report. The DMA found that appellant had four percent permanent impairment of each lower extremity. He noted his agreement with Dr. Fritzhand’s opinion that appellant’s S1 nerve root deficit was a sufficient basis for rating permanent impairment pursuant to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. However, the DMA indicated that Dr. Fritzhand’s rating was inconsistent with his examination findings and found that appellant had a mild sensory deficit under Table 16-11, which yielded one percent permanent impairment for sensory loss, as opposed to Dr. Fritzhand’s finding of a severe sensory deficit for five percent permanent impairment. He further found that Dr. Fritzhand had not properly applied the net adjustment formula. The DMA concluded that appellant had one percent sensory deficit and three percent motor deficit, for a combined four percent permanent impairment of each lower extremity with July 22, 2011 the date of maximum medical improvement.

By decision dated March 6, 2013, OWCP found the weight of the medical evidence rested with the opinion of the DMA and granted appellant a schedule award for four percent permanent impairment of each lower extremity, for a total lower extremity permanent impairment of eight percent. The award ran for a period of 23.04 weeks for the period July 22 to December 30, 2011. On November 5, 2013 an OWCP hearing representative affirmed the March 6, 2013 decision.

On December 2, 2013 appellant, through counsel, filed a timely appeal with the Board. By decision dated December 24, 2014, the Board found the case not in posture for decision because a conflict had been created between Dr. Fritzhand and the DMA regarding their opinions of the degree of permanent impairment of her lower extremities caused by the accepted back conditions. The Board set aside the November 5, 2013 decision and remanded the case for OWCP to refer appellant, the case record, and a statement of accepted facts (SOAF) for an impartial medical evaluation to determine the appropriate degree of her lower extremity impairment due to the accepted conditions.<sup>9</sup>

On July 7, 2015 OWCP referred appellant to Dr. David Soulsby, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion. In an August 13, 2015 report,

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<sup>8</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>9</sup> Docket No. 14-0345 (issued December 24, 2014).

Dr. Soulsby indicated that he had previously examined her on January 24, 2003.<sup>10</sup> He advised that, because appellant demonstrated subjective symptoms without objective physical findings, she had no ratable lower extremity findings with zero percent permanent impairment. Dr. Soulsby also found four percent whole person impairment upon application of Chapter 17 of the A.M.A., *Guides* due to degenerative disc disease.

By decision dated September 30, 2015, OWCP found the special weight of medical evidence rested with the impartial evaluation of Dr. Soulsby and found that appellant was not entitled to an increased schedule award.

On October 6, 2015 counsel requested a hearing before an OWCP hearing representative. At the hearing, held on June 6, 2016, he maintained that Dr. Soulsby had not properly rated appellant's spinal impairment and, therefore, Dr. Soulsby opinion was insufficient to resolve the conflict in medical evidence.

By decision dated July 28, 2016, an OWCP hearing representative set aside the September 30, 2015 decision. He noted that, under OWCP procedures, physicians previously connected with a claim were prohibited from serving as an impartial medical examiner (IME) and, therefore, as Dr. Soulsby had previously examined appellant on January 24, 2003, he was not qualified to resolve the conflict regarding her lower extremity impairment. The hearing representative remanded the case to OWCP to refer appellant to a new IME to resolve the conflict, in accordance with the sixth edition of the A.M.A., *Guides*.

On November 17, 2016 OWCP referred appellant to Dr. Andrew E. Landis, Board-certified in orthopedic surgery, for an impartial medical evaluation. In a January 3, 2017 report, he noted his review of the SOAF and medical record, including diagnostic studies. Dr. Landis described appellant's complaint of midline low back pain with numbness and burning. Physical examination demonstrated mild restriction in spinal range of motion with no evidence of spasm, no deformity of the lumbar spine, and tenderness to light touch over the lower back with no evidence of inflammation to account for the tenderness. Supine and sitting straight leg raising demonstrated low back pain without radiation. Heel and toe walking were done without difficulty and neurological examination revealed no motor weakness in either lower extremity with no atrophy present. Sensory examination revealed decreased sensation to light touch throughout the entire left lower extremity and with questionable decrease on the right, and sensation to pinprick was decreased throughout each lower extremity. Dr. Landis opined that all sensory changes were nonphysiologic and did not correspond to any dermatomal pattern. He indicated that appellant sustained a lumbosacral strain/sprain type of injury on May 15, 2001 that was superimposed on preexisting degenerative changes in the lumbar spine, noting that none of the diagnostic studies demonstrated disc herniation, nerve root impingement, or spinal stenosis. Dr. Landis advised that, since she had a normal EMG/NCV in 2002, the changes seen on the 2015 EMG/NCV would be a new finding unrelated to the 2001 employment injury. He opined that, at the time of his examination, there was no evidence of a credible neurological deficit involving either lower extremity, indicating that appellant's subjective complaints and clinical findings were consistent with nonphysiologic findings and some degree of symptom magnification. Dr. Landis advised that there was no evidence on clinical examination that would be consistent with radiculopathy or

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<sup>10</sup> The record indicates that Dr. Soulsby performed a second opinion evaluation on January 24, 2003.

evidence of nerve root damage at any level of the lumbar spine and, therefore, nothing on which to base any impairment of either lower extremity. He further found that, under Chapter 17, The Spine and Pelvis, of the A.M.A., *Guides*, appellant had a class 1 impairment which, after applying grade modifiers and the net adjustment formula, yielded three percent whole person impairment.

In correspondence dated April 24, 2017, OWCP informed Dr. Landis that schedule awards were not payable based upon a rating of the whole person or for an injury to the spine, but could be paid for impairment of the upper or lower extremities caused by injury to a spinal nerve. It attached a copy of the July/August 2009 *The Guides Newsletter* and asked that he utilize this in evaluating the degree of appellant's lower extremity impairment.

In a supplemental report dated May 17, 2017, Dr. Landis advised that *The Guides Newsletter* would not be applicable in appellant's case because she had no nerve impairment. He reiterated his previous findings and that she had nonphysiologic subjective complaints in both lower extremities and, therefore, would not be entitled to an impairment rating based on a spinal nerve injury in either lower extremity.

By decision dated November 20, 2017, OWCP found the special weight of the medical evidence rested with the impartial medical evaluation of Dr. Landis and found that appellant was not entitled to an increased schedule award.

Appellant, through counsel, requested a hearing before an OWCP hearing representative on November 29, 2017. She did not testify at the hearing, held on April 18, 2018. Counsel asserted that Dr. Landis was unqualified to serve as an IME because he was unfamiliar with the A.M.A., *Guides*. He requested that the case be remanded for a new impartial evaluation.

By decision dated July 3, 2018, an OWCP hearing representative affirmed the November 20, 2017 decision. She found that, contrary to counsel's assertions, OWCP properly referred appellant to Dr. Landis who provided a detailed report resolving the conflict regarding appellant's impairment due to the accepted back conditions. The hearing representative concluded that appellant had not established that she was entitled to a greater impairment than that previously awarded.

### **LEGAL PRECEDENT**

The schedule award provision of FECA,<sup>11</sup> and its implementing federal regulations,<sup>12</sup> 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

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<sup>11</sup> 5 U.S.C. § 8107.

<sup>12</sup> 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>13</sup> For decisions issued after May 1, 2009, the sixth edition will be used.<sup>14</sup>

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.<sup>15</sup> 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 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.<sup>16</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.<sup>17</sup> OWCP has adopted this approach for rating permanent impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in a July/August 2009 *The Guides Newsletter*.<sup>18</sup> Specifically, it will address lower extremity impairments originating in the spine through Table 16-11<sup>19</sup> and upper extremity impairment originating in the spine through Table 15-14.<sup>20</sup>

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.<sup>21</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.<sup>22</sup> Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if

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<sup>13</sup> *Id.* at § 10.404(a).

<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>15</sup> *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>16</sup> *J.M.*, *id.*; *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>17</sup> *R.B.*, Docket No. 17-1995 (issued August 13, 2018); *Rozella L. Skinner*, 37 ECAB 398 (1986).

<sup>18</sup> *Supra* note 14 at Chapter 3.700, Exhibit 1, (January 2010); *The Guides Newsletter* is included as Exhibit 4.

<sup>19</sup> A.M.A., *Guides*, *supra* note 8 at 533.

<sup>20</sup> *Id.* at 425.

<sup>21</sup> 5 U.S.C. § 8123(a).

<sup>22</sup> *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

sufficiently well rationalized and based on a proper factual and medical background must be given special weight.<sup>23</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish more than four percent permanent impairment of each lower extremity, for which she previously received schedule award compensation.

OWCP accepted that appellant sustained lumbosacral sprain/strain and temporary aggravation of degenerative disc disease. On February 1, 2009 appellant filed a schedule award claim. By decision dated March 6, 2013, OWCP granted a schedule award for four percent permanent impairment of each lower extremity.

By decision dated December 24, 2014, the Board found that a conflict in medical evidence had been created between Dr. Fritzhand, an attending physician and Dr. Berman, OWCP's DMA, regarding the degree of appellant's lower extremity impairment. The Board remanded the case to OWCP to refer her for an impartial medical evaluation to determine the degree of her lower extremity impairment.<sup>24</sup> The Board's review of the medical evidence submitted prior to November 5, 2013, the most recent OWCP decision prior to the Board's last decision, is *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>25</sup>

On November 17, 2016 OWCP referred appellant to Dr. Landis, for an impartial medical evaluation.<sup>26</sup> In a comprehensive report dated January 3, 2017 and a supplemental report dated May 17, 2017, Dr. Landis opined that, based on his examination findings of no motor weakness in either lower extremity, no atrophy, and that all sensory changes were nonphysiologic and did not correspond to any dermatomal pattern, she, therefore, had no permanent impairment of a lower extremity due to the accepted spinal conditions, pursuant to the rating method found in *The Guides Newsletter*.

The Board finds that Dr. Landis' opinion constitutes the special weight of the medical evidence and is sufficient to establish that appellant is not entitled to an additional schedule award for the accepted lumbar conditions. When a case is referred to an IME to resolve a conflict, the resulting medical opinion, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>27</sup> Dr. Landis provided a well-reasoned opinion based on a proper factual and medical history. He also accurately summarized the relevant medical

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<sup>23</sup> *Id.*

<sup>24</sup> *Supra* note 8.

<sup>25</sup> *B.W.*, Docket No. 18-1415 (issued March 8, 2019).

<sup>26</sup> As noted, OWCP had initially referred appellant to Dr. Soulsby for an impartial medical evaluation. However, as Dr. Soulsby had previously provided a second opinion evaluation on January 24, 2003, OWCP procedures precluded that he serve as an IME. *Supra* note 14 at Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4.b(3)(b) (July 2011); *see J.G.*, Docket No. 16-0328 (issued November 1, 2016).

<sup>27</sup> *A.G.*, Docket No. 18-0815 (issued January 24, 2019).

evidence and provided thorough physical examination findings. Dr. Landis provided detailed findings and medical rationale supporting his opinion, based upon the entire medical record, that appellant had no lower extremity impairment referable to the accepted lumbar conditions. As the IME, his opinion was entitled to special weight.<sup>28</sup>

Accordingly, the Board finds that OWCP properly relied on Dr. Landis' findings as a basis for finding that appellant had not met her burden of proof to establish greater lower extremity impairment.<sup>29</sup>

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 established more than four percent permanent impairment of each lower extremity, for which she has previously received schedule award compensation.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2019  
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

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<sup>28</sup> *Id.*

<sup>29</sup> *J.M.*, Docket No. 18-1387 (issued February 1, 2019).