United States Department of Labor
Employees' Compensation Appeals Board

F.F., Appellant	)	
and	)	**Docket No. 19-0212**
	)	**Issued: July 12, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Kalamazoo, MI, 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
JANICE B. ASKIN, Judge

JURISDICTION

On November 6, 2018 appellant, through counsel, filed a timely appeal from a September 7, 2018 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 met her burden of proof to establish permanent impairment of her lower extremities, warranting a schedule award.

FACTUAL HISTORY

On November 2, 2014 appellant, then a 60-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a back injury on November 1, 2014 due to bending over to get mail out a mail container while in the performance of duty. She did not stop work.

In a November 1, 2014 emergency room report, Dr. Joseph Keithley, an attending Board-certified emergency medicine physician, advised that appellant presented with a chief complaint of pain in both sides of her lower back that "did not radiate from there." He reported physical examination findings, noting that appellant did not report leg pain or weakness. Dr. Keithley noted that bilateral straight leg testing was negative and that there were normal reflexes in the bilateral patellar and Achilles muscles. The sensory examination of appellant's lower extremities was normal.

In a January 5, 2015 report, Dr. Paula Kilmer, an attending Board-certified neurologist, noted that appellant presented with a chief complaint of low back pain and specifically denied radicular symptoms. She detailed the findings of the physical examination she conducted on that date, noting that appellant had 5/5 strength in her lower extremities and did not exhibit pain in her legs.

On January 15, 2015 OWCP accepted appellant's claim for a lumbar sprain.

The findings of a January 23, 2015 magnetic resonance imaging (MRI) scan of appellant's lumbar spine contained an impression of diffuse disc bulge and posterior disc protrusion at L3-4 with mild-to-moderate narrowing of the right lateral recess and mild bilateral neural foraminal narrowing.

In a January 26, 2015 report, Dr. Kilmer indicated that appellant had 5/5 strength and normal reflexes with no sensory deficit in her lower extremities. Appellant was observed to have a normal gait.

On January 28, 2015 OWCP expanded the accepted conditions to include disc protrusion at L3-4.

In an April 4, 2016 report, Dr. Thomas Pinson, an attending Board-certified family practitioner, advised that appellant had reached maximum medical improvement (MMI).

On June 13, 2016 appellant filed a claim for a schedule award (Form CA-7) due to her accepted employment conditions.

In a development letter dated June 23, 2016, OWCP requested that appellant submit additional factual and medical evidence in support of her schedule award claim, including a

narrative report from an attending physician explaining, if appropriate, when and why appellant had reached MMI and including an impairment rating derived in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] It afforded her 30 days to submit the requested evidence.

In a September 30, 2016 report, Dr. Neil Allen, an attending Board-certified internist and neurologist, discussed appellant's factual and medical history and detailed the findings of the physical examination he conducted on August 16, 2016. He noted that appellant exhibited 4/5 strength in the extensor hallucis longus muscle of her right leg and that straight leg testing was negative for radicular pain bilaterally. Dr. Allen indicated that he was applying the standards of *The Guides Newsletter,* Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*) to evaluate the permanent impairment of appellant's lower extremities. He found that appellant had a default value of five percent for lower extremity permanent impairment due to mild motor deficit (stemming from the L5 disc level). Dr. Allen noted that appellant's functional history grade modifier (GMFH) of 2 and clinical studies grade modifier (GMCS) of 2 required movement to nine percent lower extremity permanent impairment. He concluded that appellant had nine percent lower extremity permanent impairment.[4]

In October 2016 OWCP referred appellant's case to Dr. Jovito Estaris, a Board-certified occupational medicine physician serving as an OWCP district medical adviser (DMA). It provided the DMA with a statement of accepted facts and requested that he provide an opinion on the extent of appellant's permanent impairment, if any, in accordance with the sixth edition of the A.M.A., *Guides.*

In a November 6, 2016 report, the DMA advised that he had reviewed the evidence of record, including the September 30, 2016 report of Dr. Allen. He noted that the reports of Dr. Kilmer showed no pain radiation or symptoms relating to the lower extremities and that appellant was found to have a normal gait with 5/5 strength and normal reflexes in the lower extremities. The findings of a January 23, 2015 MRI scan of appellant's lumbar spine contained an impression of diffuse disc bulge and posterior disc protrusion at L3-4, but did not demonstrate nerve impingement or pressure of a nerve at the L3-4 disc level. The DMA indicated that he was applying the standards of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* to evaluate the permanent impairment of appellant's lower extremities based on the employment-related diagnosis of lumbar sprain (no radiculopathy). He advised that, under FECA, a rating of permanent impairment was not available for the spine and that only a permanent impairment from radiculopathy would be rated.

The DMA indicated that appellant did not exhibit any symptom or sign of radiculopathy in her lower extremities and that no diagnostic study confirmed the existence of such a

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

[4] Dr. Allen did not specifically indicate to which lower extremity or extremities he attributed this permanent impairment. However, the content and context of the report suggest that he intended to attribute the nine percent permanent impairment to appellant's right lower extremity.

radiculopathy.[5] He concluded that, under the relevant standards, appellant did not have a ratable permanent impairment of her lower extremities. The DMA noted that Dr. Allen's finding of very mild weakness of the right extensor hallucis longus muscle was not confirmed by diagnostic testing or a physical examination by the other physicians of record. He explained that Dr. Allen's finding of weakness of the right extensor hallucis longus muscle was too subjective to support a finding of motor deficit and noted that it was highly questionable that appellant would have a motor deficit of the lower extremities when there was no sensory deficit in the lower extremities. The DMA determined that, therefore, Dr. Allen's impairment rating was not acceptable.

By decision dated June 23, 2017, OWCP denied appellant's claim for a schedule award, noting that appellant had not met her burden of proof to establish permanent impairment of a scheduled member which entitled her to schedule award compensation. It found that the weight of the medical opinion evidence with respect to this matter rested with the November 6, 2016 report of the DMA.

In a November 10, 2017 report, Dr. Allen noted that he had reviewed the impairment rating provided by the DMA. He indicated that, upon examination on August 16, 2016, appellant demonstrated weakness over the right L5 myotome and, therefore, his assessment of nine percent permanent impairment of the right lower extremity was valid.

Appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing, held on December 13, 2017, counsel argued that Dr. Allen had provided a valid rating of lower extremity permanent impairment.

By decision dated February 15, 2018, OWCP's hearing representative affirmed OWCP's June 23, 2017 decision denying appellant's schedule award claim. The hearing representative found that the weight of the medical opinion evidence with respect to this matter continued to rest with the November 6, 2016 report of the DMA.

On June 12, 2018 appellant, through counsel, requested reconsideration of the February 15, 2018 decision. Appellant submitted a June 7, 2018 report from Dr. Allen, who indicated that he had reviewed the February 15, 2018 decision. Dr. Allen repeated his prior discussions of the permanent impairment of appellant's right lower extremity and indicated that the January 23, 2015 MRI scan of record did not discount the existence of radiculopathy.

By decision dated September 7, 2018, OWCP denied modification of the February 15, 2018 decision.

[5] Dr. Estaris opined that the January 23, 2015 MRI scan of appellant's lumbar spine confirmed that she did not have a lower extremity radiculopathy.

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.[6] 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.[7] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[8]

Neither FECA nor the 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.[9] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[10] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment.[11] 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 radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the procedure manual.[12]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP DMA for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[13]

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[6] 5 U.S.C. § 8107(c).

[7] 20 C.F.R. § 10.404.

[8] *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 (March 2017).

[9] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3) (March 2017).

[11] The methodology and applicable tables were initially published in *The Guides Newsletter*. *Id.*

[12] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6f (February 2013).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her lower extremities, warranting a schedule award.

The Board notes that OWCP properly found that the weight of the medical opinion evidence with respect to permanent impairment rested with the well-rationalized November 6, 2016 report of Dr. Estaris, the DMA who reviewed the evidence of record, including the September 30, 2016 report of Dr. Allen, an attending physician.

In a November 6, 2016 report, the DMA noted that diagnostic testing of record and the clinical findings of attending physicians did not establish that appellant had a radiculopathy in a lower extremity that extended from her back. He indicated that he was applying the standards of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* to evaluate the nature and percentage of permanent impairment of appellant's lower extremities based on the employment-related diagnosis of lumbar sprain (no radiculopathy).[14] The DMA advised that, under FECA, a rating of permanent impairment was not available for the spine and that only a permanent impairment from radiculopathy would be rated.[15] He properly concluded that appellant did not have a ratable permanent impairment of her lower extremities because she did not exhibit any symptom or sign of radiculopathy in her lower extremities and that no diagnostic study confirmed the existence of such a radiculopathy. The DMA correctly noted that Dr. Allen's finding of very mild weakness of the right extensor hallucis longus muscle, detailed in his September 30, 2016 report, was not confirmed by diagnostic testing or a physical examination by the other physicians of record. He explained that Dr. Allen's finding of weakness of the right extensor hallucis longus muscle was too subjective to support a finding of the existence of a motor deficit and determined that, therefore, Dr. Allen's impairment rating of nine percent permanent impairment of the right lower extremity due to motor deficit was not acceptable.

In addition to his September 30, 2016 report, Dr. Allen produced November 10, 2017 and June 7, 2018 reports in which he continued to conclude that appellant had nine percent permanent impairment of her right lower extremity. However, in these reports he failed to explain how his finding of permanent impairment due to mild motor deficit of the right lower extremity (related to 4/5 strength in the right extensor hallucis longus muscle and stemming from the L5 disc level) was related to the accepted conditions of lumbar sprain and disc protrusion at L3-4. Such medical rationale is especially necessary given the fact that the medical evidence of record shows that appellant did not have a lower extremity radiculopathy.[16]

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.

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[14] *See supra* note 12.

[15] *See supra* notes 10 and 11.

[16] *See D.R.,* Docket No. 16-0528 (issued August 24, 2016) (finding that a report is of limited probative value regarding a given medical matter if it does not contain supporting medical rationale).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her lower extremities, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 7, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board