

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

R.A., Appellant)	
)	
and)	Docket No. 19-0288
)	Issued: July 12, 2019
)	
U.S. POSTAL SERVICE, POST OFFICE,)	
Miami, FL, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 20, 2018 appellant, through counsel, filed a timely appeal from a September 21, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On September 9, 2004 appellant, then a 42-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on September 8, 2004 she developed pain in her lower back and down her left leg while delivering mail in the performance of duty. OWCP accepted the claim for lumbosacral strain and herniated lumbar disc at L4-5 and L5-S1.

On May 18, 2007 appellant returned to limited-duty work until her position was withdrawn by the employing establishment on December 1, 2010. On December 1, 2011 she again returned to limited-duty work.

On June 4, 2012 appellant filed a claim for a schedule award (Form CA-7).

OWCP subsequently received a medical report dated June 20, 2012 by Dr. Martin Fritzhand, a Board-certified urologist. He described examination findings of nerve root damage as the Achilles tendon reflexes were absent and sensory loss in both feet. Dr. Fritzhand utilized Table 16-11 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ and Proposed Table 2 of *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*) and determined that appellant had sustained a severe level 3 sensory deficit of the S1 nerve root secondary to the pathology found on a magnetic resonance imaging (MRI) scan and on physical examination, which represented a class 1 impairment. He calculated grade modifiers, applied the net adjustment formula, and concluded that she had four percent sensory impairment of each lower extremity. Dr. Fritzhand concluded that appellant had reached maximum medical improvement (MMI) by September 2006.

On August 1, 2012 Dr. H.P. Hogshead, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reported that he reviewed Dr. Fritzhand's June 20, 2012 report. He recommended a second opinion impairment evaluation by an experienced orthopedic surgeon familiar with *The Guides Newsletter*. Dr. Hogshead explained that Dr. Fritzhand's four percent bilateral lower extremity permanent impairment ratings based on a class 1 impairment for severe S1 sensory nerve loss were more severe and not in agreement with the findings of other examiners of record, noting a report dated May 29, 2012 by Dr. Andres Vegas, a Board-certified

³ Docket No. 17-0303 (issued May 1, 2017).

⁴ A.M.A., *Guides* (6th ed. 2009).

anesthesiologist.⁵ Dr. Hogshead advised that an electrodiagnostic study may also be necessary if requested by the second opinion physician.

In a letter dated October 2, 2014, counsel requested a status update on appellant's schedule award claim.

On October 8, 2014 OWCP requested that an OWCP DMA review the medical record and provide an impairment rating based on the sixth edition of the A.M.A., *Guides* and the date appellant reached MMI. On that same date, Dr. Hogshead again reviewed the case file and reiterated his recommendation for a second opinion impairment evaluation.

On June 27, 2017 QTC Medical Services, OWCP's scheduling contractor, referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a set of questions, to Dr. Clinton G. Bush, III, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent of her employment-related permanent impairment based on the sixth edition of the A.M.A., *Guides* and establish her work restrictions and the date she reached MMI.

In a report dated July 6, 2017, Dr. Bush diagnosed degenerative spondylosis and multilevel disc herniations of the lumbosacral spine without myelopathy or radiculopathy. He found that appellant had no sensory or motor neurological deficits consistent with radiculopathy in the lower extremities. Referring to Table 17-4 (Lumbar Spine Regional Grid) on page 570 of the sixth edition of the A.M.A., *Guides*, Dr. Bush determined that she had a class 1 impairment for intervertebral disc herniation, which yielded a default value of seven percent. He calculated grade modifiers, applied the net adjustment formula, and concluded that appellant had nine percent whole person permanent impairment. Dr. Bush determined that she had reached MMI on March 31, 2014, the date of the first primary medical record presented for his review.

On December 12, 2017 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP DMA, reviewed the SOAF and medical record, including Dr. Bush's July 6, 2017 report. He utilized the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* and found that appellant had zero percent permanent impairment of each lower extremity. Dr. Harris reasoned that she had no neurologic deficit consistent with radiculopathy in the lower extremity. He indicated that while a lumbar MRI scan demonstrated spinal pathology, radiculopathy had not been established. Dr. Harris noted that his permanent impairment rating of the bilateral lower extremities differed from Dr. Bush's nine percent whole person permanent impairment rating because Dr. Bush calculated impairment ratings based on Table 17-4, pages 570 to 574, which provided impairment for mechanical low back pain, radiculopathy, and documented spinal pathology on diagnostic studies, including an MRI scan. He maintained that both OWCP and FECA provided schedule awards only for the loss of use/impairments in the lower extremities and not for spinal pain. As such, Dr. Harris indicated that he calculated impairment only for the loss of use of the lower extremities as discussed. He concluded that appellant had reached MMI on July 6, 2017, the date of Dr. Bush's impairment evaluation. Dr. Harris disagreed with Dr. Bush's finding that the date of MMI was March 31, 2014 as the case file did not contain any medical

⁵ In his May 29, 2010 report, Dr. Vegas found that appellant had grossly intact sensation to light touch in her bilateral upper and lower extremities on neurological examination.

records documenting that appellant had reached MMI on that date or any time prior to Dr. Bush's July 6, 2017 impairment evaluation.

By decision dated January 11, 2018, OWCP denied appellant's claim for a schedule award, finding that there was no evidence to establish that she sustained permanent impairment of a scheduled member or function of the body due to the accepted September 8, 2004 employment injuries. It accorded the weight of the medical evidence to Dr. Harris' December 12, 2017 opinion.

On January 25, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on July 10, 2018.

By decision dated September 21, 2018, an OWCP hearing representative affirmed the January 11, 2018 decision denying appellant's schedule award claim, finding that the opinion of Dr. Harris constituted the weight of the medical evidence.

LEGAL PRECEDENT

It is the claimant's burden of proof to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of any employment injury.⁶

The schedule award provisions of FECA,⁷ and its implementing federal regulations,⁸ 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.⁹ For decisions issued after May 1, 2009, the sixth edition will be used.¹⁰

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.¹¹ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹² The sixth edition of the A.M.A., *Guides* provides a specific

⁶ See *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at § 10.404(a).

¹⁰ 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).

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

¹² Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.808.5(c)(3) (March 2017).

methodology for rating spinal nerve extremity impairment.¹³ 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 Federal (FECA) Procedure Manual.¹⁴

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment for the class of diagnosis (CDX) condition, which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).¹⁵ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹⁶

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.¹⁷

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.¹⁸ For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.¹⁹

ANALYSIS

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

OWCP accepted appellant's claim for lumbosacral strain and herniated lumbar disc at L4-L5 and L5-S1. On June 4, 2012 appellant filed a schedule award claim which OWCP denied by decision dated January 11, 2018. By decision dated September 21, 2018, an OWCP hearing representative affirmed the January 11, 2018 decision denying appellant's schedule award claim.

The Board finds that there is an unresolved conflict in the medical opinion evidence between Dr. Fritzhand, the attending physician, and Dr. Harris, OWCP's DMA, regarding the extent of the permanent impairment of appellant's bilateral lower extremities.

¹³ The methodology and applicable tables were initially published in *The Guides Newsletter*.

¹⁴ See Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 3.700, Exhibit 4 (January 2010).

¹⁵ *Supra* note 4 at 515-21, 533.

¹⁶ *Id.* at 521.

¹⁷ See Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.808.6(f) (February 2013); see also *Tommy R. Martin*, 56 ECAB 273 (2005).

¹⁸ 5 U.S.C. § 8123(a); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

¹⁹ *C.H.*, Docket No. 18-1065 (issued November 29, 2018).

In a June 20, 2012 report, Dr. Fritzhand determined that appellant had four percent permanent impairment of each lower extremity pursuant to the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* (July/August 2009). He found that, under Table 16-11 of the A.M.A., *Guides*, she had a severe level 3 sensory deficit of the S1 nerve root. Dr. Fritzhand further found that appellant's S1 nerve root sensory deficit represented a class 1 impairment under Proposed Table 2 of *The Guides Newsletter*. He calculated grade modifiers, applied the net adjustment formula, and concluded that she had four percent sensory permanent impairment of each lower extremity. Dr. Fritzhand determined that appellant had reached MMI by September 2006.

In a December 12, 2017 report, Dr. Harris determined that appellant had no permanent impairment of her bilateral lower extremities under the standards of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. He explained that no neurologic deficit consistent with radiculopathy was reported in either extremity. Dr. Harris also explained that while a lumbar MRI scan demonstrated spinal pathology, radiculopathy had not been established. He further explained that FECA only allowed schedule awards for the loss of use/impairments in the lower extremities, and not for spinal pain. Dr. Harris concluded that MMI occurred on July 6, 2017, the date of the second opinion impairment evaluation performed by Dr. Bush. He explained that the case file did not contain any medical records documenting that appellant had reached MMI any time prior to Dr. Bush's evaluation.

As noted above, if there is disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint a referee physician or impartial medical specialist who shall make an examination.²⁰ As there is an unresolved conflict in the medical evidence regarding the extent of the permanent impairment of appellant's bilateral lower extremities due to her accepted employment conditions, the case must be remanded to OWCP for referral to an impartial medical specialist for resolution of the conflict in the medical opinion evidence in accordance with 5 U.S.C. § 8123(a). After such further development as OWCP deems necessary, it shall issue a *de novo* decision on appellant's schedule award claim.

CONCLUSION

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

²⁰ See *supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further action consistent with this opinion of the Board.

Issued: July 12, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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