

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

S.C., Appellant

and

**U.S. POSTAL SERVICE, PLANETARIUM
STATION, New York, NY, Employer**

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**Docket No. 18-1450
Issued: March 4, 2019**

Appearances:

Thomas R. Uliase, Esq., for the appellant¹

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 July 24, 2018 appellant, through counsel, filed a timely appeal from a February 9, 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of her lower extremities entitling her to a schedule award.

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.*

FACTUAL HISTORY

OWCP accepted that on October 19, 2005 appellant, then a 42-year-old window clerk, sustained bilateral knee contusions, lumbar radiculitis, and displacement of a lumbar intervertebral disc without myelopathy when she tripped and fell forward onto her knees while picking up a parcel while in the performance of duty. Appellant stopped work on the date of injury. OWCP paid her compensation for temporary total disability on the supplemental rolls as of December 6, 2005.³ On June 16, 2006 appellant returned to part-time, limited-duty work, five days a week.

Subsequently, OWCP received a March 10, 2015 report from Dr. Arthur Becan, an attending orthopedic surgeon. Dr. Becan noted appellant's history of injury, reviewed the medical evidence, and provided examination findings. He found that appellant had reached maximum medical improvement (MMI) from her work-related injuries on March 10, 2015. Dr. Becan calculated 31 percent right lower extremity permanent impairment and 19 percent left lower extremity permanent impairment based upon the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ He explained that the right lower extremity permanent impairment was comprised of a class 1 severe sensory deficit right L5 nerve root, yielding a net adjusted permanent impairment of 6 percent; a class 1 moderate III/V motor strength deficit of the right gastrocnemius S1, yielding a net adjusted permanent impairment of 10 percent; a class 1 severe sensory deficit right S1 nerve root, yielding a net adjusted permanent impairment of 4 percent; a class 1 moderate III/V motor strength deficit right extensor hallucis longus L5, yielding a net adjusted permanent impairment of 13 percent, and a class 1 right knee contusion, yielding a net adjusted permanent impairment of 1 percent. Dr. Becan combined these values to conclude that appellant had a total permanent impairment rating for her right lower extremity of 31 percent. He further explained that the left lower extremity impairment was comprised of a class 1 moderate motor strength deficits in left L5 nerve root, yielding a net adjusted permanent impairment of nine percent, a class 1 moderate sensory deficits in left S1 nerve root, yielding a net adjusted permanent impairment of three percent, a class 1 mild IV/V motor strength deficits in left extensor hallucis longus L5, yielding a net adjusted permanent impairment of nine percent, and a class 1 left knee contusion, yielding a net adjusted permanent impairment of one percent. Dr. Becan combined these values to conclude that appellant had a total permanent impairment rating for her left lower extremity of 18 percent. He noted that his impairment calculations were made in accordance with the A.M.A., *Guides* and Table 1 of *The Guides Newsletter* Rating Spinal Nerve Extremity Impairment Using the Sixth Edition, July/August 2009 edition (*The Guides Newsletter*).⁵

³ By decision dated June 1, 2007, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day, as she no longer had any residuals or disability causally related to her accepted employment-related injuries. By decision dated September 19, 2008, it vacated the June 1, 2007 decision and remanded the case for further development of the medical evidence to determine whether she sustained an additional lumbar condition as a consequence of her accepted conditions.

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ *The Guides Newsletter* (July/August 2009).

On May 6, 2015 appellant filed a claim for a schedule award (Form CA-7).

On September 28, 2015 OWCP routed Dr. Becan's March 10, 2015 report, a statement of accepted facts (SOAF), and the case file to Dr. Henry J. Magliato, an OWCP district medical adviser (DMA) Board-certified in orthopedic surgery, for review and determination regarding whether appellant had sustained permanent impairment based on the sixth edition of the A.M.A., *Guides* and the date of MMI.

In a report dated October 15, 2015, Dr. Magliato reviewed Dr. Becan's March 10, 2015 report. He indicated that the physical examination findings of Dr. Becan were contradicted by findings of appellant's prior attending physician and two second opinion physicians who generally noted that she had fully recovered from her employment-related conditions without marked neurological findings. Dr. Magliato recommended that she be referred for a referee medical examination to determine her entitlement to a schedule award.

OWCP found a conflict in the medical opinions of Dr. Becan for appellant and Dr. Magliato for the government. On July 21, 2016 it referred appellant, together with a SOAF, the medical record, and a series of questions, to Dr. Lawrence C. Schweitzer, a Board-certified orthopedic surgeon, to serve as an impartial medical examiner (IME).

In a report dated August 11, 2016, Dr. Schweitzer noted appellant's history of injury, reviewed the medical evidence, and related examination findings. He diagnosed lumbosacral strain and contusion of the bilateral knees. Dr. Schweitzer related that it was unknown whether a nonwork-related 2006 automobile accident had a bearing on her present state. With regard to the issue of lower extremity permanent impairment, he noted that since appellant's radiculopathy had resolved, it was best to apply Table 17-4 on page 570 of the sixth edition of the A.M.A., *Guides*. Dr. Schweitzer determined that she had a class 1 diagnosis, which yielded seven percent permanent impairment of the lumbar spine based on multiple level disc herniation with medically documented findings and resolved radiculopathy; he noted that there was no justifiable evidence for a further impairment rating due to neurologic deficit. He also noted that the "value given was not grossed up to a regional lumbar impairment in the State of Connecticut per jurisdictional custom." Dr. Schweitzer indicated that page 21 of the A.M.A., *Guides* provides that "These regional ratings may be convertible to whole person impairment ratings unless jurisdictional contraindications exist or otherwise specifically requested by the referring source." He determined that appellant's bilateral knee contusions had resolved without permanent impairment. Dr. Schweitzer related that she had no further knee symptoms on examination.

On October 24, 2016 OWCP routed Dr. Schweitzer's August 11, 2016 report and the case file to Dr. Jovito Estaris, a Board-certified occupational medicine physician serving as a DMA, for review.

On November 10, 2016 Dr. Estaris responded that Dr. Schweitzer had not provided detailed calculations to support his lumbar spine impairment rating. He noted that non-key modifiers were not mentioned as being used in the calculation. Dr. Estaris further noted that Dr. Schweitzer had not used *The Guides Newsletter*, July/August 2009 edition to rate permanent impairment of appellant's lumbar spine. He determined that she had reached MMI on August 11, 2016, the date of Dr. Schweitzer's impairment evaluation. Dr. Estaris recommended that the case

be sent back to Dr. Schweitzer for an addendum report containing an impairment rating based on *The Guides Newsletter*.

By letter dated November 30, 2016, OWCP provided Dr. Schweitzer a copy of Dr. Estaris' November 10, 2016 report for review and requested that he provide an addendum report within 30 days. By letter dated March 21, 2017, it sent Dr. Schweitzer a second request for an addendum report.

On March 27, 2017 Dr. Schweitzer responded that *The Guides Newsletter* was not applicable because he found no clinical evidence of nerve impairment on his examination of appellant. He further responded that non-key modifiers were not used because her functional history was unreliable as she exhibited signs of symptom magnification and her electromyogram (EMG) studies were outdated. Dr. Schweitzer confirmed his seven percent lumbar spine permanent impairment rating as there was no credible evidence of an ongoing radiculopathy amongst "a number of independent observers." He deferred to Dr. Estaris' expertise that appellant had reached MMI on August 11, 2016, the date of his own examination.

On May 11, 2017 Dr. Estaris reviewed Dr. Schweitzer's March 27, 2017 report and concluded that appellant had no permanent impairment of the bilateral lower extremities. He explained that no nerve impairment to the bilateral lower extremities had been found. Dr. Estaris disagreed with Dr. Schweitzer's seven percent lumbar spine impairment rating as *The Guides Newsletter* mandated ratings for extremities and precluded ratings for the spine.

By decision dated June 14, 2017, OWCP denied appellant's claim for a schedule award for the lumbar spine based on the opinion of Dr. Estaris.

On June 20, 2017 appellant, through counsel, requested an oral hearing before an OWCP hearing representative, which was held on August 29, 2017.

By decision dated October 10, 2017, an OWCP hearing representative affirmed the June 14, 2017 schedule award decision. He determined that Dr. Magliato's recommendation that appellant be referred to an impartial medical specialist had been insufficient to create a conflict in the medical opinion evidence regarding the extent of her permanent impairment. Thus, the hearing representative found that Dr. Schweitzer should have been designated as a second opinion physician, rather than an impartial medical specialist. He further found that the May 11, 2017 opinion of Dr. Estaris as the DMA represented the weight of the evidence and established that appellant had no permanent impairment of the bilateral lower extremities.

Appellant, through counsel, requested reconsideration on November 13, 2017. With this request for reconsideration, she submitted a letter dated November 1, 2017 from Dr. Becan. Dr. Becan reviewed Dr. Schweitzer's August 16, 2016 and March 27, 2017 reports and Dr. Estaris' November 10, 2016 report. He noted that appellant had positive objective diagnostic studies that showed pathology, including a March 18, 2006 magnetic resonance imaging scan of the lumbar spine which revealed disc herniations at L4-5 and L5-S1 and a bulging disc at L3-4. Dr. Becan also noted that EMG and nerve conduction velocity studies performed on April 13, 2006 revealed a right L4, L5, and S1 radiculopathy. Therefore, he disagreed with Dr. Schweitzer that there was no grade modifier for clinical studies. Dr. Becan indicated that Dr. Schweitzer's August 11, 2016 physical examination revealed no signs of motor weakness, but he did not rate

the different muscle groups from a scale of 0 to 5. He further indicated that while Dr. Schweitzer reported normal sensory to light touch in all dermatomes, he subsequently reported that sensory to light touch was minimally decreased subjectively in the left calf. Dr. Becan related that there was no indication that he used a Semmes Weinstein Monofilament test. He maintained that, according to the sixth edition of the A.M.A., *Guides*, motor strength testing was graded on a scale of 0 to 5 and sensory examination was best quantified using the Semmes Weinstein Monofilament test. Dr. Becan noted that Dr. Schweitzer had provided a whole person impairment rating which are not used in these cases. In conclusion, he stood by his final combined right lower extremity permanent impairment of 31 percent and left lower extremity permanent impairment of 18 percent.

On January 11, 2018 OWCP routed Dr. Becan's November 1, 2017 letter, a SOAF, and the case file to a DMA for review and determination regarding whether appellant sustained permanent impairment based on the sixth edition of the A.M.A., *Guides* and the date of MMI.

In a report dated January 22, 2018, Dr. Estaris reviewed the medical evidence of record and found that Dr. Becan's March 10, 2015 examination findings were inconsistent with the examination findings of Dr. Schweitzer and other physicians of record. He noted that Dr. Becan found severe sensory impairment of the bilateral lower extremities while the other physicians found no sensory impairment. Dr. Estaris indicated that at most, sensory impairment was moderate. He further indicated that Dr. Schweitzer's seven percent permanent rating for the spine was not allowed as *The Guides Newsletter* July/August 2009 edition provided that only impairment resulting in radiculopathy could be rated. Dr. Estaris found that based on this rule appellant had no impairment to the right lower extremity. He explained that, according to the standards delineated in Proposed Table 2 on page 6 of *The Guides Newsletter*, she had no permanent impairment to her diagnosis of lumbosacral radiculopathy. Utilizing Table 16-3 on page 509 of the A.M.A., *Guides*, Dr. Estaris explained that appellant's diagnosis of bilateral knee contusion fell under class 0, which was equivalent to zero percent permanent impairment of each lower extremity. He concluded that she had reached MMI on August 11, 2016, the date of Dr. Schweitzer's impairment evaluation.

By decision dated February 9, 2018, OWCP denied modification of the hearing representative's October 10, 2017 decision. It found that the weight of the medical evidence rested with Dr. Estaris' January 22, 2018 report and established that appellant did not have an employment-related permanent impairment of the lower extremities.

LEGAL PRECEDENT

The schedule award provision 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

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

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 Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹⁰

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.¹¹ 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.¹² FECA approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.¹³

ANALYSIS

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

Appellant's treating physician, Dr. Becan, initially found that appellant had 31 percent right lower extremity permanent impairment and 19 percent left lower extremity permanent impairment based upon application of the sixth edition of the A.M.A., *Guides*. He confirmed that his impairment calculations were based upon his physical examination findings and were made in accordance with the A.M.A., *Guides* and Table 1 of *The Guides Newsletter*. The DMA, Dr. Magliato, found that the report of Dr. Becan was deficient for purposes of rating permanent impairment as it was based upon physical findings he noted to be disparate from the findings of other examining physicians. For this reason, he suggested that the matter be referred for a referee medical examination for obtaining an appropriate rating of permanent impairment of the bilateral lower extremities.

OWCP referred appellant to Dr. Schweitzer for an independent medical examination. In a report dated August 11, 2016, Dr. Schweitzer, serving as an IME, determined that she had a class 1 diagnosis, which yielded seven percent permanent impairment of the lumbar spine based on a multiple level disc herniation with medically documented findings and resolved radiculopathy. He noted that there was no justifiable evidence for a further impairment rating due to neurologic deficit. This report was shared with a DMA, Dr. Estaris, who recommended an addendum report utilizing *The Guides Newsletter*.

On March 27, 2017 Dr. Schweitzer responded that *The Guides Newsletter* was not applicable because he found no clinical evidence of nerve impairment on his examination of

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 *D.S.*, Docket No. 18-1140 (issued January 29, 2019); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ *Supra* note 9 at Chapter 3.700, Exhibit 4 (January 2010).

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

¹³ *Supra* note 9 at Chapter 2.808.5c(3) (February 2013).

appellant. He confirmed his seven percent lumbar spine permanent impairment rating as there was no credible evidence of an ongoing radiculopathy amongst “a number of independent observers.” On May 11, 2017 the DMA, Dr. Estaris, reviewed the March 27, 2017 report and concluded that appellant had no permanent impairment of the bilateral lower extremities as no nerve impairment was noted in the bilateral lower extremities.

In a letter dated November 1, 2017, Dr. Becan noted his review Dr. Schweitzer’s August 16, 2016 and March 27, 2017 reports and Dr. Estaris’ November 10, 2016 report. He noted deficiencies in Dr. Schweitzer’s physical examination including that Dr. Schweitzer’s August 11, 2016 physical examination revealed no signs of motor weakness, it did not rate the different muscle groups from a scale of zero to five, and while it noted normal sensory to light touch in all dermatomes, it subsequently noted that sensory to light touch was minimally decreased subjectively in the left calf. Dr. Becan related that there was no indication that he had used a Semmes-Weinstein Monofilament test and maintained that, according to the sixth edition of the A.M.A., *Guides*, motor strength testing was graded on a scale of zero to five and sensory examination was best quantified using the Semmes-Weinstein Monofilament test. Noting these deficiencies with the examination of Dr. Schweitzer, he confirmed his prior bilateral lower extremity ratings.

The Board notes OWCP’s prior finding that a conflict did not exist at the time of the referral to Dr. Schweitzer as an IME. Thus, Dr. Schweitzer has been properly characterized as a second opinion physician for purposes of considering the weight of his medical report.

The Board finds that the report from Dr. Schweitzer as a second opinion physician is now in conflict with the opinion of Dr. Becan, who opined that appellant sustained 31 percent right lower extremity permanent impairment and 19 percent left lower extremity permanent impairment based upon the sixth edition of the A.M.A., *Guides*.¹⁴ The Board finds that these opposing medical reports are of virtually equal weight and rationale and are thus sufficient to establish a conflict.¹⁵

The case must therefore be remanded to OWCP for further development. This development shall include the appointment of an IME in accordance with 5 U.S.C. § 8123(a) to obtain a report regarding updated physical examination findings of appellant’s bilateral lower extremities in addition to a detailed explanation of the assignment of permanent impairment, if any, of appellant’s lower extremities based upon a correct application of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. After this and any other development deemed necessary, OWCP shall issue a *de novo* decision in the case.¹⁶

¹⁴ The Board does not find the opinion of Dr. Estaris, the DMA, sufficient to create a conflict with Dr. Becan as the DMA’s report is conclusory in nature and fails to provide medical rationale in support of the opinion that appellant has no lower extremity permanent impairment. *See J.S.*, Docket No. 08-1072 (issued November 25, 2008). Furthermore, the DMA’s report conflicts with the findings of the second opinion physician selected by OWCP, Dr. Schweitzer. However, in order to create a conflict in medical opinion, the conflict must exist between an employee’s physician and the medical opinion of either a second opinion physician or an OWCP medical adviser. *See J.V.*, Docket No. 17-1766 (issued April 3, 2018); *Mary A. Payne*, Docket No. 00-1615 (issued March 15, 2002).

¹⁵ *See B.C.*, Docket No. 15-0992 (issued August 11, 2015).

¹⁶ *See L.Y.*, Docket No. 16-0012 (issued May 17, 2016).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: March 4, 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