

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

_____)	
G.S., Appellant)	
)	
and)	Docket No. 18-0827
)	Issued: May 1, 2019
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE, Trenton, NJ,)	
Employer)	
_____)	

Appearances:
Alan J. Shapiro, 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 March 12, 2018 appellant, through counsel, filed a timely appeal from a November 2, 2017 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

On June 16, 2011 appellant, then a 34-year-old secretary, filed a traumatic injury claim (Form CA-1) alleging that her foot slipped and she fell when ascending steps to the front door of the employing establishment on June 15, 2011 while in the performance of duty. She claimed injuries to her hip, knee, back, hand, and arm as a result of falling to the ground. Appellant stopped work on the date of her injury.

By decision dated August 4, 2011, OWCP accepted the claim for a left hip sprain. By decision dated October 14, 2011, it expanded acceptance of the claim to include a sprain of the left thigh and a lumbar sprain. By decision dated February 22, 2012, OWCP expanded acceptance of the claim to include the additional condition of left enthesopathy of the hip region. Appellant returned to full duty after a transfer to the Department of Veterans Affairs on October 21, 2012 where she accepted a position as a health technician.

In a January 16, 2015 report, Dr. David Lopez, a Board-certified orthopedic surgeon, opined that appellant had reached maximum medical improvement (MMI).

On March 4, 2015 appellant filed a claim (Form CA-7) for a schedule award.

In a development letter dated March 19, 2015, OWCP advised appellant of the deficiencies of her claim and requested medical evidence containing a detailed description of her permanent impairment specific to the accepted work-related conditions, a date of MMI, final rating of permanent impairment, and a discussion of the rationale for calculation of the impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ No evidence was received.

By decision dated May 1, 2015, OWCP denied appellant's schedule award claim finding that she had not submitted a medical report to establish permanent impairment causally related to an accepted condition in her claim.

On May 14, 2015 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant subsequently submitted a December 9, 2015 report from Dr. Karen M. Garvey, a Board-certified internist and occupational medicine specialist, who opined that appellant had reached MMI on January 16, 2015, the date of Dr. Lopez's report indicating same. Dr. Garvey reported that appellant completed a pain disability questionnaire (PDQ) scoring 136, which was categorized as extreme symptoms under Appendix 3-2, page 44, for a subjective assessment. Utilizing Table 16-6, page 516, she assigned a grade modifier of 1 for functional history (GMFH)

³ A.M.A., *Guides* (6th ed. 2009).

due to appellant's mildly antalgic gait. Dr. Garvey noted that OWCP had accepted the claim for left hip/thigh sprain, lumbar sprain, and enthesopathy of the left hip. Utilizing the diagnosed-based impairment (DBI) methodology she opined that appellant had a class 1, grade C impairment of the left hip, which equated to five percent permanent impairment of the left lower extremity. Regarding the lumbar sprain, Dr. Garvey opined that appellant had 11 percent permanent impairment of the right lower extremity for motor deficit of the sciatic nerve, 13 percent permanent impairment of the left lower extremity for sensory deficit from the sciatic nerve. She found a combined value of 24 percent left lower extremity permanent impairment and 11 percent permanent impairment of the right lower extremity. Using Appendix A, page 604, Dr. Garvey calculated that appellant's final total left lower extremity impairment rating was 24 percent plus 5 percent for a combined 28 percent left lower extremity impairment. The final right lower extremity permanent impairment was 11 percent.

A telephonic hearing was held before an OWCP hearing representative on December 10, 2015. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

By decision dated February 10, 2016, OWCP's hearing representative vacated the prior decision and remanded the case to administratively combine OWCP File No. xxxxxx653 into the instant claim, OWCP File No. xxxxxx402, and to refer appellant, along with the case medical records and an updated statement of accepted facts (SOAF) covering both claims, to an appropriate Board-certified specialist for a second opinion impairment rating examination.

OWCP referred appellant to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her accepted employment-related conditions. In his June 20, 2016 report, Dr. Lakin reviewed a SOAF, history of the injury, and the medical evidence of record. He conducted a physical examination and found that appellant's objective findings only revealed tenderness, noting that she otherwise had excellent motion and strength of the left hip, thigh, and lumbar spine. Dr. Lakin opined that appellant's conditions had resolved as there were no other objective findings. He noted a left hip magnetic resonance imaging (MRI) scan dated September 25, 2014 was unremarkable and a lumbar MRI scan revealed only degenerative changes unrelated to a traumatic incident. Dr. Lakin found that the sprains to the left thigh and hip and lumbar spine were caused by the accepted employment incident on June 15, 2011, but had resolved. He concluded that there was no disability due to the employment-related injury and there were no other factors, incidents, or disabilities that appellant was suffering from that would prevent her from returning to full-duty work. Dr. Lakin determined that appellant had reached MMI as of June 20, 2016, the date of his second opinion examination, and released her to full-time, full-duty work without restrictions. He concluded that appellant had no permanent impairment upon application of the A.M.A., *Guides*.

OWCP found a conflict in the medical opinion evidence between appellant's attending physician, Dr. Garvey, and its second opinion physician, Dr. Lakin, regarding her work capacity. It referred her to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for a referee examination to resolve the conflict. In his October 14, 2016 report, Dr. Fries reviewed the medical evidence, performed a physical examination, and found that appellant did not have objective findings to confirm residuals of the accepted lumbar, hip, and thigh diagnoses. He found widespread left hip pain with nonphysiological findings symptom magnification or fabrication. Dr. Fries concluded

that appellant had no objective findings of permanent impairment causally related to the accepted work injury and determined that she had reached MMI no later than December 2011 when her treating physicians identified no residuals of her employment exposure. He advised that appellant was capable of returning to work without restrictions.

In a December 7, 2016 addendum report, Dr. Fries corrected the date indicated in his responses to certain questions in his October 14, 2016 report as he had incorrectly listed appellant's date of injury as February 15, 2011. He further noted that these corrections did not change his opinions provided in his initial report.

On February 12, 2017 OWCP's district medical adviser (DMA), Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon, reviewed the medical evidence of record and determined that appellant's date of MMI was October 14, 2016, the date of Dr. Fries' impairment examination. He concurred with the opinions of Dr. Fries and Dr. Lakin who both found that appellant had not sustained a permanent impairment causally related to accepted work-related conditions. The DMA noted that appellant had multiple examinations by physicians of various specialties that documented no evidence of objective neurologic deficits of the lower extremities. He noted that there were inconsistent findings on examination of the left hip as there were no significant abnormal findings on diagnostic testing of the hip, but appellant exhibited pain out of proportion to the physical examination findings by multiple examiners. The DMA noted that appellant had preexisting degenerative disc disease of the lumbar spine that was unrelated to the accepted work injury. He questioned Dr. Garvey's December 9, 2015 report "as any sensory deficits noted are purely subjective findings and the methodology she used to calculate the impairment rating for neurologic deficits did not utilize *The Guides Newsletter* July/August 2009." The DMA concluded that appellant had not sustained a permanent impairment causally related to her accepted conditions.

By decision dated February 15, 2017, OWCP denied appellant's schedule award claim finding the medical evidence of record failed to establish a ratable impairment of a scheduled member.

On February 23, 2017 appellant, through counsel, requested a telephonic hearing, which was held before a hearing representative on August 18, 2017. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence. OWCP did not receive additional evidence.

By decision dated November 2, 2017, OWCP's hearing representative affirmed the February 15, 2017 schedule award decision.

LEGAL PRECEDENT

The schedule award provision of FECA,⁴ and its implementing federal regulation,⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

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.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.⁸ Furthermore, the back is specifically excluded from the definition of organ under FECA.⁹ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*) offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. 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.¹⁰

The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.¹¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a permanent impairment of a scheduled member or function of the body, warranting a schedule award.

OWCP found a conflict in the medical opinion evidence between appellant's attending physician, Dr. Garvey, who opined that appellant had 28 percent permanent impairment of the left lower extremity and its second opinion physician, Dr. Lakin, who opined that appellant had no permanent impairment based on the sixth edition of the A.M.A., *Guides*. It properly referred her to Dr. Fries, for a referee examination to resolve the conflict, pursuant to 5 U.S.C. § 8123(a). In his October 14, 2016 report, Dr. Fries found that appellant did not have objective findings to establish residuals of the accepted lumbar, hip, and thigh conditions. He noted that her allegations of other conditions and symptom not accepted by OWCP were not causally related to the June 15, 2011 work incident. Dr. Fries concluded that appellant had no measurable residuals solely due to the employment-related injury and she presented with no objective findings of permanent impairment causally related to the accepted work injury. The Board finds that OWCP properly

⁶ *Id.* at § 10.404(a).

⁷ 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).

⁸ *See N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

⁹ *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹¹ *See Veronica Williams*, 56 ECAB 367 (2005).

accorded the special weight of the evidence to the well-reasoned report of Dr. Fries.¹² Dr. Fries accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions as to permanent impairment which comport with his physical findings.¹³ As his report is detailed, well-rationalized, and based on the proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner (IME).¹⁴

OWCP referred the evidence of record to its DMA, Dr. Orenstein, who concurred with the opinions of Dr. Fries and Dr. Lakin who both concluded that appellant had not sustained a permanent impairment causally related to accepted work-related conditions. The Board notes, however, that it is the IME, however, who must resolve the conflict as to permanent impairment in accordance with the A.M.A., *Guides*.¹⁵

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 met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

¹² A.R., Docket No. 18-0632 (issued October 19, 2018).

¹³ *Id.*

¹⁴ See W.B., Docket No. 17-1698 (issued May 16, 2018).

¹⁵ OWCP's procedures provide that, if a case has been referred to an IME to resolve a conflict regarding permanent impairment, it is unnecessary to route the file to a DMA as long as the IME explains his or her impairment rating and cites to the appropriate tables and the A.M.A., *Guides*. The DMA should not resolve the conflict in medical opinion. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(g) (March 2017). See also J.M., Docket No. 18-1387 (issued February 1, 2019).

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 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