United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
	)	**Docket No. 18-1380**
and	)	**Issued: May 1, 2019**
	)	
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Perry Point, MD, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 2, 2018 appellant, through counsel, filed a timely appeal from a May 21, 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 to consider 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 of the case set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 28, 1980 appellant, then a 28-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that, during a confrontation with a patient while in the performance of duty on January 31, 1980, and was thrown into the edge of a table then fell to the floor, causing neck and back injuries. OWCP accepted the claim for cervical, thoracic, and lumbar sprains and lumbosacral neuritis. Appellant worked intermittently at the employing establishment through July 2, 1980, then at a state hospital, and later at a private sector employer. By decision dated May 18, 1989, OWCP found that appellant's earnings in private sector employment properly represented her wage-earning capacity.

By decision dated June 14, 2012, OWCP terminated appellant's wage-loss and medical compensation benefits, effective July 1, 2012, according Dr. Rosenfeld the special weight of the medical evidence.[4] By decision dated October 17, 2012, an OWCP hearing representative affirmed the June 14, 2012 decision. Appellant then appealed to the Board.

By decision and order issued March 10, 2014,[5] the Board affirmed OWCP's May 18, 1989 wage-earning capacity determination and the hearing representative's October 17, 2012 decision affirming the termination of appellant's wage-loss compensation and medical benefits, effective July 1, 2012.

On October 6, 2014 appellant filed a schedule award claim (Form CA-7).[6] In support of her claim, she submitted a July 29, 2014 impairment rating from Dr. Arthur Becan, an orthopedic surgeon. Dr. Becan provided a history of injury and treatment and reviewed medical records. He opined that appellant had attained maximum medical improvement (MMI) on July 29, 2014. On examination, Dr. Becan noted an antalgic gait, an inability to heel or toe walk, limited lumbar motion, positive straight leg raising tests bilaterally, and absent left knee and ankle jerk reflexes.

[3] Docket No. 13-0304 (issued March 10, 2014).

[4] OWCP found a conflict of medical opinion between Dr. Robert Franklin Draper, Jr., a Board-certified orthopedic surgeon, for the government, and Dr. Pierre L. LeRoy, a Board-certified neurosurgeon, for the appellant, regarding whether appellant had residuals of the accepted conditions. To resolve the conflict, it selected Dr. Karl Rosenfeld, a Board-certified orthopedic surgeon, for an impartial examination.

[5] Docket No. 13-0304 (issued March 10, 2014).

[6] In a letter dated September 4, 2015, OWCP advised counsel that it had not taken action on appellant's schedule award claim as her entitlement to medical and wage-loss benefits had been terminated as of June 14, 2012. On May 9, 2017 appellant again claimed a schedule award (Form CA-7).

He also found severe sensory loss in the L4-5 and L5-S1 nerve distributions bilaterally with Semmes-Weinstein Monofilament Testing at a minimum 6.65 mgs. Dr. Becan administered a Pain Disability Questionnaire (PDQ) with a score of 116, rated as severe. He noted that a July 14, 2014 electromyography and nerve conduction velocity (EMG/NCV) study of the lower extremities demonstrated right-sided L5 radiculopathy. Dr. Becan diagnosed chronic lumbosacral sprain and strain, multilevel lumbosacral degenerative disc disease, bulging discs at L1-2 and L2-3, large disc bulges with spinal stenosis at L4-5 and L5-S1, and progressive bilateral L4-5 and L5-S1 radiculopathy.

Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[7] and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), Dr. Becan found 13 percent permanent impairment of the right lower extremity for a class 1 II/V motor strength deficit of the quadriceps (L4), the extensor hallucis longus (L5), and the gastrocnemius (S1) respectively. He also found eight percent impairment for a very severe sensory deficit in the right L4 nerve root, eight percent impairment for very severe sensory deficit of the right L5 nerve root, and five percent impairment for very severe sensory deficit in the right S1 nerve root. Dr. Becan combined these impairments to find a total of 47 percent permanent impairment of the right lower extremity.

With regard to the left lower extremity, Dr. Becan found 13 percent permanent impairment of the right lower extremity for class 1 III/V motor strength deficits of the quadriceps (L4), extensor hallucis longus (L5), and gastrocnemius (S1) respectively. He also found eight percent impairment for a very severe sensory deficit in the left L4 nerve root, eight percent impairment for very severe sensory deficit of the right L5 nerve root, and five percent impairment for very severe sensory deficit in the left S1 nerve root. Dr. Becan combined these impairments to find a total of 47 percent permanent impairment of the left lower extremity.

In a report dated May 17, 2017, Dr. Michael M. Katz, a Board-certified orthopedic surgeon acting as a district medical adviser (DMA), recommended that OWCP obtain a second opinion regarding the appropriate percentage of any permanent impairment.

On June 12, 2017 OWCP obtained a second opinion regarding the appropriate percentage of permanent lower extremity impairment from Dr. Robert Allen Smith, a Board-certified orthopedic surgeon. Dr. Smith reviewed appellant's history of injury and treatment. On examination, he found nonphysiologic weakness and sensory loss throughout both lower extremities. Dr. Smith noted that electrodiagnostic tests performed from June 27, 1985 through December 3, 2008 documented steady improvement and resolution of mild bilateral lumbosacral radiculopathy. He opined that appellant had no ratable permanent impairment of either lower extremity as she had no objective neurologic deficits. Dr. Smith noted that he could not verify Dr. Becan's clinical findings and that his impairment rating was exaggerated.

By development letter dated June 22, 2017, OWCP requested that appellant submit an updated narrative report from her attending physician regarding whether she had attained MMI,

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

with an impairment rating according to the sixth edition of the A.M.A., *Guides*. It afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted a July 14, 2017 letter contending that a 2014 electrodiagnostic study was abnormal. She described severe, chronic bilateral lumbar radiculopathy. Appellant noted that Dr. Uthaman no longer prepared narrative reports.

On July 24, 2017 OWCP found a conflict of medical opinion between Dr. Smith, for the government, and Dr. Becan, for appellant, regarding the appropriate percentage of permanent impairment of the lower extremities. To resolve the conflict, it selected Dr. Andrew Gelman, an osteopathic physician Board-certified in orthopedic surgery, as an impartial medical specialist.

Dr. Gelman submitted an August 30, 2017 report in which he reviewed the medical record and a SOAF. He noted that appellant presented wearing a lumbar brace and used a four-prong cane for ambulation. On examination that day, Dr. Gelman observed a slow, deliberate gait, normal heel and toe raises bilaterally, knee and ankle reflexes at five plus bilaterally, pain to light touch on the paravertebral musculature, nonphysiologic pain with patellofemoral compression bilaterally and left ankle dorsiflexion, and normal sensation in the L4, L5, and S1 dermatomes bilaterally using the pin scratch method. He opined that appellant had no objective neurologic abnormality of either lower extremity. Dr. Gelman attributed her symptoms to progressive degenerative disc disease unrelated to the January 31, 1980 soft tissue injuries. He noted that appellant exhibited positive Waddell's signs and elements of symptom exaggeration.

By decision dated September 18, 2017, OWCP denied appellant's schedule award claim, finding that the medical evidence of record did not establish permanent impairment of either lower extremity. It accorded the special weight of the medical evidence to Dr. Gelman, who provided a well-rationalized report based on the medical record and SOAF.

On September 27, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, held March 8, 2018. During the hearing, counsel contended that Dr. Smith and Dr. Gelman ignored the June 27, 1985 and January 2, 2002 electrodiagnostic studies which demonstrated lumbar radiculopathy. Alternatively, he asserted that there was a conflict of medical opinion between Dr. Gelman and Dr. Becan requiring selection of a new impartial medical specialist. Counsel submitted additional evidence.

In a report dated November 3, 2017, Dr. Becan argued that Dr. Smith failed to understand the importance of the electrodiagnostic studies of record and did not perform an adequate sensory examination. He affirmed his prior impairment rating based on bilateral L4, L5, and S1 radiculopathy as demonstrated by EMG/NCV testing.

An August 9, 2017 magnetic resonance imaging (MRI) scan performed for Dr. Uthaman demonstrated a disc bulge at L2-3 with left-sided neural foraminal narrowing, a small right-sided disc protrusion at L3-4 with right-sided neural foraminal narrowing, progressive L4-5 lumbar

spondylosis with central canal stenosis, severe right and moderate left-sided neuroforaminal narrowing, and severe bilateral neural foraminal narrowing at L5-S1.[8]

By decision dated May 21, 2018, an OWCP hearing representative affirmed OWCP's September 18, 2017 decision. She accorded Dr. Gelman's opinion special weight as an impartial medical examiner (IME), finding that his opinion was thorough, well-rationalized, and based upon a SOAF and the complete medical record.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim, including that he or she sustained an injury in the performance of duty as alleged, and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[9]

The schedule award provisions of FECA[10] and its implementing regulations[11] 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[12] It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[13] A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.[14]

A schedule award is not payable for a member, function, or organ of the body not specified in FECA or in the implementing regulations.[15] As neither FECA, nor the implementing

[8] An August 9, 2017 MRI scan of the cervical spine showed progressive multilevel cervical spondylosis.

[9] *See A.M.,* Docket No. 13-0964 (issued November 25, 2013) (where the employee claimed entitlement to a schedule award for permanent impairment to the left lower extremity due to his employment-related lumbar condition, the Board found that the medical evidence did not establish permanent impairment of the lower extremity resulting from his spinal condition and, therefore, denied his schedule award claim).

[10] 5 U.S.C. § 8107

[11] 20 C.F.R. § 10.404

[12] *Id.*

[13] *See Raymond E. Gwynn*, 35 ECAB 247, 253 (1983); Federal (FECA) Procedure Manual, *id*. at Chapter 3.700.3(a)(3) (January 2010). This portion of OWCP's procedures provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

[14] *See Gordon G. McNeill,* 42 ECAB 140, 145 (1990).

[15] *See Tania R. Keka,* 55 ECAB 354 (2004).

regulations, provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.[16] However, as FECA makes provision for the extremities, a claimant may be entitled to a schedule award for permanent impairment of an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.[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] Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[20]

ANALYSIS

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.

As previously noted, no schedule award is payable for injury to the spine, a claimant may receive a schedule award for permanent impairment to the upper or lower extremities even though the cause of the impairment originated in the spine.[21]

OWCP properly determined that there was conflict in the medical opinion evidence between Dr. Becan[22] and Dr. Smith, regarding appellant's bilateral lower extremity permanent impairment and referred appellant to Dr. Gelman for an impartial medical examination and opinion relative to the impairment assessment, pursuant to 5 U.S.C. § 8123(a).[23]

The Board finds that the special weight of the medical opinion evidence rests with the well-rationalized August 30, 2017 report of Dr. Gelman, who properly determined that appellant had

[16] *See id.* FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

[17] *See George E. Williams,* 44 ECAB 530 (1993). In 1966, amendments to FECA modified the schedule award provision 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.

[18] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[19] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[20] *T.C.*, Docket No. 17-1741 (issued October 9, 2018); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[21] *Supra* notes 16 and 17.

[22] The Board notes that in his report dated July 29, 2014, Dr. Becan referred to an abnormal July 14, 2014 EMG/NCV study. Appellant also mentioned an abnormal 2014 EMG study in her letter dated July 14, 2017. However, there is no July 14, 2014 EMG/NCV study report in the imaged case record as presented to the Board.

[23] *See supra* notes 26 and 27. In a report dated July 29, 2014, Dr. Becan determined that appellant had 47 percent impairment of each lower extremity under *The Guides Newsletter*. In contrast, Dr. Smith found on June 12, 2017 that appellant had zero percent permanent impairment of each lower extremity under *The Guides Newsletter*.

no permanent impairment of either lower extremity under the standards of the sixth edition of the A.M.A., *Guides*.[24] In his August 30, 2017 report, Dr. Gelman reported a normal physical examination of both lower extremities at the time of his evaluation with no objective neurologic deficit. He attributed appellant's symptoms to age-related degenerative disc disease and opined that appellant had a zero percent permanent impairment of each lower extremity according to *The Guides Newsletter*.

The Board further notes that Dr. Gelman provided medical rationale in support of his opinion explaining that appellant had no motor/sensory loss of the lower extremities detectable on examination. Dr. Gelman emphasized that she was able to heel and toe raise normally, knee and ankle reflexes were present and symmetric bilaterally, and sensation was intact in the L4, L5, and S1 dermatomes of the lower extremities bilaterally.

The Board thus finds that Dr. Gelman properly determined that appellant had no ratable impairment of either lower extremity, and that his report constitutes the special weight of the medical opinion evidence.[25] As such appellant did not meet her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

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.

[24] *See supra* note 28.

[25] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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