United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 19-0214**
	)	**Issued: May 23, 2019**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Tacoma, WA, Employer	)	

Appearances:
Thomas R. Uliase, 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 November 6, 2018 appellant, through counsel, filed a timely appeal from a June 29, 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 employment-related permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On May 21, 2003 appellant, a then 48-year-old seasonal tax resolution representative, filed a traumatic injury claim (Form CA-1) alleging that she sustained multiple injuries at work on May 19, 2003 when she fell from a stool and struck her head while in the performance of duty. OWCP accepted her claim, assigned OWCP File No. xxxxxx070, for neck strain, face and scalp contusions, right lateral epicondylitis, and thoracic/lumbar radiculitis.[3] After several intermittent work stoppages, appellant stopped working for the employing establishment in 2005. She worked on a part-time basis in the private sector until June 2010 and she elected to receive Social Security Administration disability benefits commencing June 2010.

On May 31, 2014 appellant filed a claim for a schedule award (Form CA-7).

Appellant subsequently submitted an April 7, 2014 report from Dr. David Weiss, an osteopath Board-certified in clinical orthopedic surgery. Dr. Weiss determined that appellant had 39 percent permanent impairment of her left lower extremity, 23 percent of her right lower extremity, 11 percent of her left upper extremity, and 4 percent of her right upper extremity based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4]

OWCP referred the case record to Dr. Kenneth D. Sawyer, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to review both of appellant's claims and provide an opinion regarding her permanent impairment rating and whether it is causally related to her accepted conditions. In a June 13, 2014 report, Dr. Sawyer opined that he could not resolve inconsistent findings of Dr. Weiss as compared to other examining physicians. Because of those inconsistencies, he disagreed with the impairment ratings of Dr. Weiss and recommended an independent medical examination.

OWCP subsequently declared a conflict in the medical opinion evidence between Dr. Weiss' April 7, 2014 report and the June 13, 2014 report of DMA Dr. Sawyer. It referred appellant to Dr. Timothy Daly, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding permanent impairment.

Dr. Daly examined appellant on September 24, 2014 and, in a report of the same date, concluded that appellant had no ratable employment-related impairment. He explained that

[3] Appellant has a prior claim under OWCP File No. xxxxxx226, involving a September 6, 2001 traumatic injury accepted for neck, thoracic, and subscapularis muscle sprains/strains. OWCP has administratively combined OWCP File Nos. xxxxxx070 and xxxxxx226, and it has designated OWCP File No. xxxxxx070 as the master file.

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

appellant's accepted employment injuries of contusion of the head, cervical strain, epicondylitis, and right shoulder strain had all resolved without any ratable impairment. Dr. Daly noted that there were no objective findings, with the exception of reflex deficit of the left ankle, upon which to rate permanent impairment, and that there was an absence of sensory deficits. After applying the sixth edition of the A.M.A., *Guides,* he noted his disagreement with the rating of Dr. Weiss, and concluded that there was no objective evidence of cervical, right or left upper extremity, or lower back impairment.

Dr. L. Jean Weaver, a DMA Board-certified in internal medicine and pulmonology, reviewed the medical evidence of record, including Dr. Daly's report, and concluded that she concurred with his assessment.

By decision dated January 7, 2015, OWCP denied appellant's schedule award claim, finding that the September 24, 2014 report of Dr. Daly, who found no permanent impairment constituted the special weight of the medical evidence.

Appellant subsequently requested a hearing, held before an OWCP hearing representative on June 25, 2015. By decision dated September 9, 2015, the hearing representative set aside the January 7, 2015 decision and remanded the case for a supplemental opinion from Dr. Daly.

In a May 9, 2016 addendum report, Dr. Daly noted that the findings of Dr. Weiss were accurately reported by DMA Dr. Sawyer, but he was unable to review Dr. Weiss' 2014 and 2015 reports as requested because the reports had not been provided.

By decision dated December 6, 2016, a representative of OWCP's Branch of Hearings and Review set aside the denial of appellant's schedule award claim, finding that there was not a true conflict in the medical opinion evidence between the reports of Dr. Weiss and OWCP's medical adviser. Rather, a new conflict in the medical opinion evidence existed between the opinions of Dr. Weiss and Dr. Daly, now reduced from an impartial medical specialist to an OWCP referral physician. It therefore remanded the case to OWCP for referral to a new impartial medical specialist.

On remand OWCP referred appellant and the case record to Dr. St. Elmo Newton, III, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding appellant's permanent impairment under the sixth edition of the A.M.A., *Guides.*

In a March 22, 2017 report, Dr. Newton found that appellant had no permanent impairment of a scheduled member or function of the body.

By decision dated April 10, 2017, OWCP denied appellant's schedule award claim based on the opinion of Dr. Newton.

Appellant subsequently requested an oral hearing, held on July 12, 2017. By decision dated August 24, 2017, OWCP's hearing representative set aside the April 10, 2017 decision and remanded the case to OWCP for further development. He found that Dr. Newton was not qualified to serve as an impartial medical specialist due to his association with another physician involved in the present claim, and he remanded the case to OWCP for referral to a new impartial medical specialist.

On remand OWCP referred appellant and the case record to Dr. Josef K. Eichinger, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding appellant's permanent impairment under the sixth edition of the A.M.A., *Guides.*

In a June 13, 2018 report, Dr. Eichinger noted appellant's factual and medical history and reported the findings of the his physical examination conducted on May 25, 2018. He indicated that palpation revealed no areas of tenderness along the spinous processes from the cervicocranial junction to the top of the sacrum, or in the lumbar paraspinal musculature. Dr. Eichinger advised that the upper extremity examination revealed 5/5 strength in the bilateral upper extremities, including shoulder abduction, external and internal rotation, elbow flexion and extension, wrist flexion and extension, and finger and thumb flexion, extension, adduction, and abduction bilaterally. He indicated that sensory examination was intact in all dermatomal distributions about appellant's bilateral upper extremities in all dermatomes. Dr. Eichinger noted that appellant's lower extremity examination revealed 5/5 strength throughout her right lower extremity, including hip flexion, extension, adduction, and abduction, and knee flexion. Appellant's left lower extremity had 5/5 strength when she gave full effort, but she demonstrated give way strength. Dr. Eichinger advised that appellant's right lower extremity sensation was intact in all dermatomal distributions with an intact ability to discriminate between sharp and dull touch. Appellant's left lower extremity sensory examination was intact in all dermatomal distributions, but she demonstrated inconsistent ability to discriminate between sharp and dull touch. Dr. Eichinger noted that this was demonstrated both in the superficial peroneal nerve distribution and in the saphenous nerve distribution. He diagnosed neck strain (resolved), scalp contusion (resolved), right lateral epicondylitis (resolved), and unspecified thoracic/lumbar neuritis and radiculopathy present only by electromyogram (EMG) and unrelated to the May 19, 2003 accident.

Dr. Eichinger asserted that appellant demonstrated a nonphysiologic and inconsistent examination. Appellant had volitional weakness during the testing of her lower extremity strength, particularly the left lower extremity. Dr. Eichinger indicated that, although appellant had an EMG documenting left S1 radiculopathy and left tibial neuropathy, this would not explain the nonphysiologic global weakness she demonstrated during the examination of her left lower extremity. He noted that, with respect to appellant's upper extremities, there was a lack of consistency between her ability to discriminate between sharp and dull, despite her two-point discrimination being five millimeters in all digits. There were no other objective findings in appellant's upper extremities, as she demonstrated 5/5 strength when giving full effort. The degenerative findings noted in appellant's cervical spine with multilevel spondylitic changes and degenerative discs, were preexisting and unrelated to the May 19, 2003 accident. Dr. Eichinger noted that, given the lack of consistency on multiple elements of appellant's examination, no permanent impairment could be attributed to her preexisting conditions. Dr. Eichinger maintained that all of appellant's accepted conditions had resolved and opined that she did not have any permanent impairment of her extremities under the sixth edition of the A.M.A., *Guides*.

By decision dated June 29, 2018, OWCP determined that appellant did not establish employment-related permanent impairment of her extremities entitling her to schedule award compensation. It found that the special weight of the medical opinion evidence with respect to appellant's permanent impairment rested with the June 13, 2018 report of Dr. Eichinger, the impartial medical specialist.

LEGAL PRECEDENT

The schedule award provisions of FECA,[5] and its implementing federal regulation,[6] 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.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the elbow, a relevant portion of the arm for the present case, reference is made to Table 15-4 (Elbow Regional Grid) beginning on page 398. After the class of diagnosis (CDX) is determined from the Shoulder Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9]

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.[10] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[11] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*).[12] 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

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

[8] 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).

[9] *See* A.M.A., *Guides* (6th ed. 2009) 398-411. Table 15-4 also provides that, if motion loss is present for a claimant who has lateral or medial epicondylitis, impairment may alternatively be assessed using section 15.7 (range of motion impairment). Such a range of motion impairment stands alone and is not combined with a diagnosis-based impairment. *Id.* at 399, 475-78.

[10] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

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

[12] *Id.*

extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[13]

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[14] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

The medical management application (MMA) system provides for a rotation among potential impartial medical specialists from the American Board of Medical Specialties, including the medical boards of the American Medical Association, and those physicians Board-certified with the American Osteopathic Association.[16] Upon proper entry of appointment information, the MMA system prompts the medical scheduler to prepare a Form ME023 (appointment notification report) for imaging into the case file.[17]

ANALYSIS

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

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Weiss, an attending physician, and Dr. Daly, an OWCP referral physician, regarding whether appellant had permanent impairment of a scheduled member or function of the body.[18] In order to resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Eichinger for an impartial medical examination.[19]

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[13] *Supra* note 11 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[14] 5 U.S.C. § 8123(a).

[15] *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

[16] *Supra* note 11 at Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(a) (May 2013).

[17] *Supra* note 11 at Chapter 3.500.5(h), (i). The ME023 serves as documentary evidence that the referee appointment was scheduled through the medical management application rotational system. *Id.*

[18] *See supra* note 14. In an April 7, 2014 report, Dr. Weiss determined that appellant had 39 percent permanent impairment of her left lower extremity, 23 percent of her right lower extremity, 11 percent of her left upper extremity, and 4 percent of her right upper extremity based on the sixth edition of the A.M.A., *Guides.* In contrast, Dr. Daly, an OWCP referral physician, determined on September 24, 2014 that appellant had no permanent impairment under the sixth edition of the A.M.A., *Guides.*

[19] On appeal counsel questions whether Dr. Eichinger was properly selected under the rotational method of selecting impartial medical specialists. However, he did not adequately identify any deficiencies in the selection process and the record contains a May 3, 2018 Form MEO23 showing that Dr. Eichinger was properly selected through the established MMA system. *See supra* notes 16 and 17.

In his June 13, 2018 report, Dr. Eichinger opined that appellant did not have any permanent impairment of a scheduled member or function of the body under the sixth edition of the A.M.A., *Guides.* However, the Board finds that Dr. Eichinger did not adequately explain this opinion in accordance with the relevant standards. In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification and/or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[20]

In his June 13, 2018 report, Dr. Eichinger opined that all of appellant's accepted medical conditions stemming from her May 19, 2003 employment injury had resolved, including her left-sided thoracic and lumbar neuritis/radiculitis, right lateral epicondylitis, and neck strain. The Board notes, however, that Dr. Eichinger failed to adequately explain how and when those conditions had resolved. Dr. Eichinger acknowledged that prior diagnostic testing, including EMG testing, had shown that appellant had a left radiculopathy extending from her back into her left leg, but he did not adequately explain why this condition was not related to the accepted condition of lumbar neuritis/radiculitis.

Moreover, Dr. Eichinger did not provide any discussion of whether appellant had permanent impairment due to her September 6, 2001 employment injury which was accepted for neck, thoracic, and subscapularis muscle sprains/strains. He noted that appellant exhibited some strength and sensory inconsistencies in her extremities and ostensibly provided an opinion that these inconsistencies showed that appellant had no permanent impairment stemming from her trunk into her extremities. However, Dr. Eichinger failed to provide any discussion of the relevant portion of the sixth edition of the A.M.A., *Guides* governing this type of permanent impairment. He did not discuss the standards of *The Guides Newsletter,* the above-described FECA-approved methodology which is premised on permanent impairment stemming from radiculopathies affecting the upper and/or lower extremities.[21] In addition, with respect to appellant's accepted right lateral epicondylitis condition, Dr. Eichinger failed to make any reference to Table 15-4 of the sixth edition of the A.M.A., *Guides* which primarily concerns calculating permanent impairment based on the most impairing diagnosis of a given upper extremity.[22]

For the above-described reasons, the opinion of Dr. Eichinger requires clarification. Therefore, in order to resolve the continuing conflict in the medical opinion evidence, the case will be remanded to OWCP for referral of the case record, a statement of accepted facts, and, if necessary, appellant, to Dr. Eichinger for a supplemental report regarding whether appellant has permanent impairment of her extremities. If Dr. Eichinger is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist

[20] *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner),* 40 ECAB 232 (1988).

[21] *See supra* notes 11 through 13.

[22] *See supra* note 9. Table 15-4 also allows for calculation of permanent impairment based on range of motion deficits of the elbow in certain circumstances, including the instance when the claimant has a diagnosis of lateral epicondylitis. *Id.*

for the purpose of obtaining his rationalized medical opinion on the issue.[23] After carrying out such development, OWCP shall issue a *de novo* decision on this matter.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 29, 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 decision.

Issued: May 23, 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

[23] *Harold Travis*, 30 ECAB 1071, 1078 (1979).