United States Department of Labor
Employees' Compensation Appeals Board

B.M., Appellant	)	
and	)	**Docket No. 19-1069**
	)	**Issued: November 21, 2019**
DEPARTMENT OF AGRICULTURE, U.S. FOREST SERVICE, Ozark, AR, 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:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 15, 2019 appellant, through counsel, filed a timely appeal from a March 11, 2019 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of her right lower extremity (RLE) warranting a schedule award, or more than nine

[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.*

percent permanent impairment of her left lower extremity (LLE) for which she previously received a schedule award.

FACTUAL HISTORY

On May 13, 2010 appellant, then a 54-year-old cook, filed a traumatic injury claim (Form CA-1) alleging that on May 1, 2010 she injured her lower back lifting a 40-pound package of beef while in the performance of duty. She stopped work on May 3, 2010 and resumed work on May 11, 2010. On August 18, 2010 OWCP accepted appellant's claim for lumbar degenerative disc disease at L4-5 and L5-S1 and annulus rupture(s) at L4-5 and L5-S1.

On November 12, 2010 appellant underwent authorized lumbar decompression and fusion surgery. OWCP paid wage-loss compensation for temporary total disability and placed appellant on the periodic compensation rolls beginning November 21, 2010.[3]

Appellant continued to receive medical treatment. In an August 7, 2017 electromyography and nerve conduction velocity (EMG/NCV) study, Dr. William Knubley, a Board-certified neurologist, recounted appellant's history of bilateral lower extremity pain. He indicated that the NCV study performed on both lower extremities was abnormal. Dr. Knubley noted that needle examination was performed on the LLE and showed slight decreased and large amplitude motor units. He assessed mild neurogenic changes in left L5, S1 distribution, mild neuropathy of both lower extremities, and no evidence of active ongoing radiculopathy.

On January 12, 2018 appellant filed a claim for a schedule award (Form CA-7). She submitted a November 25, 2017 handwritten note by an unknown provider with an illegible signature, which indicated that appellant had reached maximum medical improvement (MMI).

In a development letter dated January 16, 2018, OWCP advised appellant that the medical evidence submitted was insufficient to establish her schedule award claim. It requested that she provide a medical report from her attending physician which included a statement that the accepted condition had reached MMI and an impairment rating utilizing the appropriate portions of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP referred appellant's claim, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Timothy G. Pettingell, Board-certified in physical medicine and rehabilitation, for a second-opinion examination in order to determine whether she had permanent impairment due to her May 1, 2010 employment injury. In an April 2, 2018 report, Dr. Pettingell reviewed appellant's history of injury, including the SOAF, and discussed her history of injury.

[3] Appellant returned to part-time, limited-duty work on May 22, 2011 and she worked 24 hours per week. She was compensated for 16 hours of lost wages per week on the supplemental rolls by OWCP. Effective July 29, 2012, OWCP placed appellant on the periodic compensation rolls. By decision dated May 15, 2013, it determined that appellant's position as a part-time, modified cook with weekly wages of $494.88 fairly and reasonably represented her wage-earning capacity. As her actual earnings were less than the then-current weekly pay rate of her date-of-injury position, OWCP paid her compensation based on her loss of wage-earning capacity.

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

He examined appellant's back and noted perceived diminished light-touch sensation throughout the LLE without deficits of a peripheral nerve or nerve root distribution as compared to the right. Dr. Pettingell referenced *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (*The Guides Newsletter*) (July/August 2009) and determined that appellant had 11 percent permanent impairment of the LLE due to L5 radiculopathy and no impairment of the RLE.

Appellant also received treatment from Dr. M. Stephen Wilson, a Board-certified orthopedic surgeon, who, in an April 18, 2018 report, reviewed appellant's history and conducted an examination. Dr. Wilson diagnosed lumbar degenerative disc disease, status post minimally invasive transforaminal lumbar interbody fusion at L3/4 and L4/5. He indicated that appellant was at MMI. Utilizing proposed Table 2 of the A.M.A., *Guides*, Spinal Nerve Impairment: Lower Extremity Impairments, Dr. Wilson determined that appellant had 7 percent RLE permanent impairment due to mild sensory and motor deficits at L4 and 9 percent RLE permanent impairment due to mild sensory and motor deficits at L5 for a combined total of 16 percent permanent RLE impairment. Regarding appellant's LLE, he calculated that she had 7 percent permanent impairment due to mild sensory and motor deficits at L4 and 9 percent permanent impairment due to mild sensory and motor deficits at L5 for a combined total of 16 percent LLE permanent impairment.

OWCP declared a conflict in the medical opinion evidence and referred appellant for an impartial medical examination. In a July 23, 2018 report, Dr. Andrew Olshen, Board-certified in physical medicine and rehabilitation serving as an impartial medical examiner, discussed appellant's history of injury and reviewed her medical records. He recounted that appellant still complained of persistent lower back pain radiating into her legs. Upon examination of appellant's lumbar spine, Dr. Olshen observed 5/5 positive Waddell's sign. He indicated that range of motion was minimal. Straight leg raise testing was positive. Dr. Olshen reported subjective decrease in sensation in the entire LLE and 4/5 strength throughout the LLE. He noted 5/5 strength throughout the RLE.

Dr. Olshen reported that he agreed with Dr. Pettingell that appellant had reached MMI and noted that the appropriate date of MMI was December 5, 2011. He related that the August 7, 2017 EMG/NCV study showed mild neurogenic changes at the left L5/S1 nerve root and mild neuropathy of both lower extremities. Dr. Olshen indicated that there was nothing in the medical evidence of record to suggest a permanent impairment of the RLE, so no impairment rating would be calculated. He referenced *The Guides Newsletter*, Exhibit 4, July/August 2009, Proposed Table 2 and noted that mild sensory deficits of L5 equaled one percent impairment. Dr. Olshen indicated that, based upon EMG findings, there would be a +1 (moderate findings) for a class D impairment of two percent permanent impairment. He also reported that, for the mild motor deficit (no atrophy, minimal findings), appellant was class D for seven percent permanent impairment due to EMG findings for a combined nine percent LLE impairment. Dr. Olshen explained that there was nothing in the medical record to suggest that there was an impairment of other spinal levels of the LLE.

By decision dated August 30, 2018, OWCP granted appellant a schedule award for nine percent permanent impairment of the LLE and zero percent permanent impairment of the RLE.

The award ran for 25.92 weeks from April 6 to October 4, 2016. OWCP noted that the schedule award was based on the July 23, 2018 report of Dr. Olshen, the impartial medical examiner.

On September 5, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on February 8, 2019.

By decision dated March 11, 2019, OWCP's hearing representative affirmed the August 30, 2018 decision. She found that Dr. Olshen's July 23, 2018 opinion represented the special weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] and its implementing regulations[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. FECA, however, does not specify the manner in which the percentage of loss of a member 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 and the Board has concurred in such adoption.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

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.[9] Furthermore, the back is specifically excluded from the definition of organ under FECA.[10] 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* 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.[11]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at 10.404(a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[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] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *See B.W.*, Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

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

[11] *Supra* note 8 at Chapter 3.700. *The Guides Newsletter* is included as Exhibit 4.

appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[12] This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13] When there exists 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.[14]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a permanent impairment of her RLE extremity warranting a schedule award, or more than nine percent permanent impairment of her LLE, for which she previously received a schedule award.

OWCP found a conflict in the medical opinion evidence between appellant's attending physician, Dr. Wilson, and its second opinion physician, Dr. Pettingell, regarding permanent impairment of the lower extremities due to her accepted spinal injury. It properly referred appellant's case to Dr. Olshen pursuant to 5 U.S.C. § 8123(a) for an impartial medical examination in order to resolve the conflict in medical opinion. In his July 23, 2018 report, Dr. Olshen reviewed appellant's history of injury, the relevant medical evidence, including appellant's August 7, 2017 EMG/NCV study, and provided physical examination findings. He noted appellant's accepted lumbar conditions and opined that, based on his clinical evaluations and diagnostic testing, appellant had two percent permanent impairment for class D mild sensory deficits and seven percent permanent impairment for class D mild motor deficits of the LLE for a combined nine percent LLE impairment. Dr. Olshen indicated that there was nothing in the medical record to suggest a nerve root impairment of the RLE.

As noted above, when a 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 Board finds that Dr. Olshen's July 23, 2018 report is entitled to special weight and established that appellant had nine percent permanent impairment of the LLE and no ratable impairment of the RLE.[16] Dr. Olshen's opinion was based on a proper factual and medical history, which he reviewed, and on the proper tables and procedures in the A.M.A., *Guides.* He referenced *The Guides Newsletter* and explained that appellant had nine percent permanent impairment of the LLE. Dr. Olshen based his impairment rating on the medical evidence in the record, correctly applied the A.M.A., *Guides* and *The Guides Newsletter*, and provided medical rationale for his impairment rating.[17] As

[12] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[13] 20 C.F.R. § 10.321.

[14] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[15] *Id*.

[16] *D.S.*, Docket No. 18-0336 (issued May 29, 2019); *T.C.*, Docket No. 17-1741 (issued October 9, 2018).

[17] *See D.B.*, Docket No. 17-0930 (issued July 11, 2018).

appellant has not provided a rationalized medical opinion to dispute Dr. Olshen's impairment rating, the Board finds that she has not established permanent impairment of her RLE or more than nine percent permanent impairment of her LLE due to her accepted lumbar injury.

On appeal counsel argues that OWCP's decision was contrary to fact and law. He did not, however, provide evidence or additional explanation to support his argument. As explained above, the medical evidence of record is insufficient to establish permanent impairment of her RLE and more than nine percent permanent impairment of her LLE, for which she previously received a schedule award. Accordingly, appellant has not met her burden of proof to establish that she is entitled to a schedule award greater than that previously awarded.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing a 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 her RLE, or more than nine percent permanent impairment of her LLE, for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 21, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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