United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 19-1627**
	)	**Issued: April 17, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Hamilton, OH, 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, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 29, 2019 appellant, through counsel, filed a timely appeal from a June 7, 2019 merit decision of the Office of Workers' Compensation Programs. 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.[3]

[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*.

[3] The Board notes that, following OWCP's June 7, 2019 decision appellant submitted additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

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 January 7, 2014 appellant, then a 51-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on December 9, 2013, she sustained injuries to her neck and back when she fell while loading her vehicle in the performance of duty. OWCP accepted the claim for left foot plantar fasciitis, sprain of the left foot, permanent aggravation of cervical disc degeneration, permanent aggravation of cervical disc disorder, sprains of the neck, thoracic, and lumbar regions, and contusion of the left foot. Appellant stopped work on January 3, 2014 and returned on November 10, 2014, in a limited-duty capacity. OWCP paid wage-loss compensation on the supplemental rolls commencing February 22, 2014, and the periodic rolls commencing April 6, 2014.

In a July 2, 2014 report, Dr. Jon Sulentic, an osteopathic physician Board-certified in family practice, indicated that appellant had reached maximum medical improvement (MMI). He noted that appellant continued to have back pain, but that she did not have signs of a radicular pattern into the lower extremities.

A January 5, 2015 electromyography (EMG) scan was performed by Dr. David S. Seymour, Board-certified in physical medicine and rehabilitation. He noted that since appellant's fall a year prior she had experienced chronic persistent cervical, thoracic, and lumbar pain with occasional symptoms to her upper arms and fingertips, as well as lower leg pain. Dr. Seymour reported that appellant's left lumbar, thoracic, and cervical paraspinal examination was normal. He found no diagnostic evidence of radiculopathy, plexopathy, generalized peripheral neuropathy, or myopathy.

In a January 25, 2016 report, Dr. Martin Fritzhand, a Board-certified urologist, noted appellant's history of injury and treatment. He utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] and *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) to assess impairment. Dr. Fritzhand examined appellant, determined MMI as of December 2014, and found that she sustained nine percent permanent impairment of the left lower extremity. He noted that appellant had evidence of nerve root damage as her left Achilles tendon reflex was absent, her muscle strength was diminished over the left hip flexors and extensors, and she had sensory loss involving the left foot. Dr. Fritzhand used *The Guides Newsletter* and Table 16-11, page 533, of the A.M.A., *Guides* to assess sensory and motor severity. He calculated that appellant sustained a sensory impairment to her left lower extremity of three percent and a motor impairment of six percent.

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

On February 8, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated February 16, 2016, OWCP requested that appellant submit an impairment evaluation from her attending physician addressing whether she had reached MMI and evaluating the extent of permanent impairment, if any, in accordance with the A.M.A., *Guides*.

In a March 1, 2016 report, Dr. Herbert White, an occupational and environmental medicine specialist serving as a district medical adviser (DMA), reviewed the record and noted appellant's history of injury and treatment. He determined that appellant had four percent permanent impairment of the left lower extremity. The DMA noted that appellant's EMG study was normal, however, he indicated that appellant's S1 nerve root was impaired as appellant had loss of Achilles reflex. He then indicated appellant's sensory and motor deficits pursuant to Table 16-11, page 533, and concluded that appellant had three percent severe sensory impairment and one percent mild motor impairment. The DMA explained that he did not agree with Dr. Fritzhand's findings regarding motor impairment, as appellant only had a mild motor deficit.

In a letter dated March 15, 2016, OWCP requested that Dr. Fritzhand review the DMA's conclusion and provide a new opinion on permanent impairment.

In a letter dated September 9, 2016, counsel for appellant noted that Dr. Fritzhand indicated that he may have made a mistake and that the DMA was correct. He requested that OWCP issue an order accordingly.

In a September 7, 2017 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA, reviewed the record and noted appellant's history of injury and treatment. He concurred that appellant had four percent left lower extremity impairment. Dr. Harris noted that appellant had three percent lower extremity impairment for residual problems with severe pain/impaired sensation from an S1 lumbar radiculopathy and one percent permanent impairment of the lower extremity for residual problems with mild motor weakness from the S1 lumbar radiculopathy.

On April 25, 2018 OWCP determined that there was a conflict of opinion between Dr. Fritzhand, appellant's treating physician who opined that appellant had nine percent permanent impairment, and Dr. Harris, the DMA, who opined that appellant had four percent left lower extremity impairment. It referred appellant for an impartial medical examination with Dr. Alan Kohlhaas, a Board-certified orthopedic surgeon.

In a May 23, 2018 report, Dr. Kohlhaas noted appellant's history of injury and treatment, and examination findings. He reported range of motion findings for appellant's hips, knees, and ankles. Dr. Kohlhaas found that appellant had zero percent permanent impairment for both lower extremities since the impairment of the left lower extremity appeared to be a meniscal tear, surgery to the left knee, and hammer toe deformities on her feet.

In an August 14, 2018 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon, serving as a DMA, noted that Dr. Kohlhaas had not provided a detailed neurological examination

of the lower extremities and thus his report could not be accepted as probative. He recommended that Dr. Kohlhaas be contacted for a supplemental report.

On October 26, 2018 OWCP requested a supplemental report from Dr. Kohlhaas and requested that he rate the upper and lower extremity conditions emanating from the spine utilizing the A.M.A., *Guides* and *The Guides Newsletter*.

In a November 16, 2018 addendum, Dr. Kohlhaas advised that he had not found any neurological deficits in either lower extremity, that appellant's neurological examination was normal, that under the accepted conditions there was no radiculopathy or nerve injury, and that this was confirmed by the January 5, 2015 EMG, which was normal. He explained that with the "lack of physical findings, subjective complaints of radiculopathy-type symptoms, and a normal EMG," appellant had no permanent l impairment of a scheduled member of the lower extremities.

In a November 29, 2018 report, Dr. Katz, the DMA, concurred with the findings of Dr. Kohlhaas.

By decision dated December 10, 2018, OWCP denied appellant's schedule award claim finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On December 14, 2018 counsel requested a telephonic hearing before an OWCP hearing representative, which was held on March 29, 2019.

In a February 18, 2019 report, Dr. Fritzhand noted that he reviewed the medical evidence of record and Dr. Kohlhaas' reports. He indicated in his report that Dr. Kohlhaas incorrectly summarized motor and sensory testing from appellant's May 23, 2018 physical examination. Dr. Fritzhand reiterated that he agreed with the DMA, Dr. Harris, and that appellant had four percent permanent impairment of the left lower extremity.

By decision dated June 7, 2019, OWCP's hearing representative affirmed the December 10, 2018 decision.

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 loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified

[5] 5 U.S.C. § 8101 *et seq*.

[6] 20 C.F.R. § 10.404.

edition of the A.M.A., *Guides*, published in 2009.[7] 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.[8]

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.[9] OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred, describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[10]

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.[11] Furthermore, the back is specifically excluded from the definition of organ under FECA.[12] 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's procedures indicate that *The Guides Newsletter* is to be applied.[13] The Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[14]

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 federal employment.[15]

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[7] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[8] *See K.J.*, Docket No. 19-1492 (issued February 26, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[9] *See T.H.*, Docket No. 19-1066 (issued January 29, 2020); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001)..

[10] *Supra* note 7; *see also B.J.*, Docket No. 19-0960 (issued October 7, 2019).

[11] *K.Y.*, Docket No. 18-0730 (issued August 21, 2019); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[12] *See* 5 U.S.C. § 8101(19); *see also G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[13] Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[14] *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

[15] *G.S.*, *supra* note 12; *Veronica Williams*, 56 ECAB 367 (2005).

Section 8123(a) of FECA provides that, 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.[16] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[17] Where a case is referred to an impartial medical examiner (IME) for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[18]

ANALYSIS

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

OWCP determined that a conflict in the medical opinion evidence existed between Dr. Fritzhand, a treating physician, who opined in his January 25, 2016 report that appellant had a nine percent permanent impairment of the left lower extremity, and Dr. Harris, the DMA, who opined on September 7, 2017 that appellant had a four percent permanent impairment of the left lower extremity, due to her accepted work-related conditions. However, by letter dated September 9, 2016, counsel asserted that Dr. Fritzhand had reviewed Dr. White's March 1, 2016 DMA report and concurred that appellant only had four percent permanent impairment of the left lower extremity.

Therefore, when Dr. Kohlhaas was selected as the impartial medical examiner (IME) to resolve the conflict in medical opinion, a conflict did not exist in the medical opinion evidence as Dr. Fritzhand agreed with both DMAs regarding the extent of appellant's left lower extremity permanent impairment. The referral to Dr. Kohlhaas is therefore considered to be for a second opinion evaluation.[19]

In his May 23, 2018 report, Dr. Kohlhaas reviewed the SOAF, the medical record, and provided physical examination findings. He determined that appellant reached MMI on January 25, 2016, and assessed that appellant had zero percent permanent impairment of the lower extremities. In a November 16, 2018 addendum, Dr. Kohlhaas explained that he had not found any neurological deficit in either lower extremity, and that appellant's physical examination findings were normal. He also noted that the January 5, 2015 EMG was normal and explained that with the "lack of physical findings, subjective complaints of radiculopathy type symptoms, and a

[16] 5 U.S.C. § 8123(a). *See R.C.*, Docket No. 18-0463 (issued February 7, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016).

[17] *See M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

[18] *Id*.

[19] *See S.M.*, Docket No. 19-0397 (issued August 7, 2019) (the Board found that at the time of the referral for an impartial medical examination there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); *see also Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (the Board found that, as there was no conflict in medical opinion evidence, the report of the physician designated as the impartial medical examiner was not afforded the special weight of the evidence, but instead considered for its own intrinsic value as he was a second opinion specialist).

normal EMG," appellant did not possess a permanent impairment of a scheduled member of the lower extremities.

Dr. Fritzhand had, however, reported on January 25, 2016 that appellant did have evidence of nerve root damage as her left foot Achilles tendon reflex was absent, muscle strength testing was diminished over the left hip flexors and extensors, and appellant had sensory loss of the left foot.

The Board finds that a conflict in medical opinion now exists between Dr. Fritzhand and Dr. Kohlhaas regarding whether appellant had physical examination findings of lumbar radiculopathy causing a permanent sensory and motor impairment of the lower extremities. Therefore, the case must be remanded to OWCP for referral of appellant to an IME for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).[20] After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 17, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[20] *See L.W.*, Docket No. 19-0722 (issued November 20, 2019).