United States Department of Labor
Employees' Compensation Appeals Board

N.T., Appellant	)	
and	)	**Docket No. 20-0667**
	)	**Issued: November 25, 2020**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Oklahoma City, OK, 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:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 4, 2020 appellant, through counsel, filed a timely appeal from a December 19, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] 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

This case has been previously before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On March 26, 2007 appellant, then a 51-year-old dietitian, filed a traumatic injury claim (Form CA-1) alleging that on March 7, 2007 she injured her low back when she slipped and fell on a wet floor, landing on her right hip and shoulder, while in the performance of duty. She stopped work on March 7, 2007 and did not return.

In an April 19, 2007 report, Dr. Richard Kirkpatrick, a Board-certified orthopedic surgeon, noted that an April 4, 2007 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated significant degenerative disc disease with a broad right lateral disc protrusion and bony spurring at L5-S1.

OWCP accepted the claim for displacement of a lumbar vertebral disc without myelopathy. It paid appellant wage-loss compensation on the periodic rolls.[4]

Appellant remained under medical treatment. In a June 28, 2013 report, Dr. Myra A. Gregory, an osteopathic physician Board-certified in family practice, diagnosed fibromyalgia, chronic fatigue syndrome, depression irritable bowel syndrome, obesity, gastro-esophageal reflux disease, migraines, neck pain, and left shoulder pain. She found appellant totally disabled from work. On October 29, 2013 OWCP obtained a second opinion from Dr. James E. Butler, III, a Board-certified orthopedic surgeon, who diagnosed degenerative cervical and lumbar disc disease and fibromyalgia unrelated to the accepted lumbar injury.

OWCP found a conflict of medical opinion between Dr. Gregory, for appellant, and Dr. Butler, for the government, regarding the nature and extent of appellant's continuing work-related condition. To resolve the conflict, it selected Dr. Sami R. Framjee, a Board-certified orthopedic surgeon, as an impartial medical specialist. Dr. Framjee submitted a July 2, 2014 report, in which he reviewed a statement of accepted facts (SOAF) and the medical record. On examination, he observed normal sensation in both lower extremities. Dr. Framjee diagnosed nonspecific mechanical low back pain and L5-S1 degenerative disc disease unrelated to the

[3] Docket No. 10-1648 (issued June 16, 2011).

[4] By decisions dated October 19 and November 2, 2009, OWCP terminated appellant's wage-loss compensation and schedule award entitlement effective October 25, 2009 due to her refusal of suitable work. A hearing representative affirmed the termination by decision dated May 13, 2010, a hearing representative affirmed the termination. By decision dated June 16, 2011, the Board reversed the May 13, 2010 termination decision finding that the offered position was not suitable.

accepted March 7, 2007 employment injury. He opined that the accepted lumbar injury had ceased without residuals and that appellant had attained maximum medical improvement (MMI).

By notice dated October 1, 2014, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Framjee's opinion as the special weight of the medical evidence. It provided appellant 30 days to submit opposing evidence. No additional evidence was received. By decision dated December 1, 2014, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits effective December 14, 2014.

Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 9, 2015. By decision dated September 4, 2015, OWCP's hearing representative affirmed the termination of appellant's wage-loss compensation and medical benefits.

On July 14, 2017 appellant filed a claim for a schedule award (Form CA-7). In support of her claim, she provided a February 3, 2016 electromyogram and nerve conduction velocity (EMG/NCV) study report, by Dr. Janice M. Keating, a Board-certified neurologist, who found a mild sensory motor polyneuropathy affecting both lower extremities, with no definite evidence of right-sided radiculopathy.

In an April 12, 2017 report, Dr. M. Stephen Wilson, a Board-certified orthopedic surgeon, discussed appellant's medical history and reported his findings on examination. On examination of the lumbosacral spine, he observed restricted motion in all planes, decreased two-point discrimination in the right L5 dermatome, and a positive straight leg raising test at 50 degrees on the right. Dr. Wilson diagnosed an acute lumbar injury with disc displacement due to an L5-S1 disc protrusion, causing right-sided radiculopathy. He opined that appellant had attained MMI. Dr. Wilson then utilized American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[5] and *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*) to calculate her permanent impairment under the diagnosis-based impairment (DBI) rating method. He noted that appellant had chronic lumbar radiculopathy involving the right L5 nerve root and calculated the percentage of impairment based on that nerve root. Dr. Wilson referenced Proposed Table 2 and noted that her condition fell under a class of diagnosis (CDX) of 1 with default values for lower extremity impairment of one percent (due to mild sensory deficit), and five percent for impairment of the L5 motor nerve due to complaints of pain, neuropathy, and mild weakness. Referring to Table 16-6 and 16-8 on pages 516 and 519 of the sixth edition of the A.M.A., *Guides*,[6] he calculated a grade modifier for functional history (GMFH) of 3 (pain with vigorous activity and a Pain Disability Questionnaire (PDQ) score of 124, which he noted would not be utilized), and a grade modifier for clinical studies (GMCS) of 1. Dr. Wilson applied the net adjustment formula, resulting in a net adjustment of plus one, which raised the default CDX grade of C upward to D, equaling two percent permanent impairment of the right lower extremity for mild sensory deficit and seven percent permanent impairment for mild motor deficit. He added the percentages for a

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

[6] *Id.*

total of nine percent permanent impairment of the right lower extremity due to chronic lumbar radiculopathy.

On July 24, 2017 OWCP routed Dr. Wilson's report, a SOAF, and the case file to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), for an opinion on permanent impairment under the standards of *The Guides Newsletter* and the sixth edition of the A.M.A., *Guides*.

In a July 26, 2017 report, the DMA reviewed the medical record and SOAF. He noted that he could not find supportive evidence for Dr. Wilson's determination of focal right L5 motor and sensory radiculopathy. The DMA also noted that Dr. Keating opined in her February 3, 2016 report that there was "no definite evidence to support the diagnosis of radiculopathy affecting the right lower extremity on EMG study." He indicated that he was unable to resolve the right L5 motor and sensory radiculopathy on the basis of a records review.

On January 10, 2018 OWCP referred appellant to Dr. Timothy G. Pettingell, a Board-certified physiatrist, for a second opinion on whether the March 7, 2017 lumbar injury caused permanent impairment of a scheduled member or function of the body. In a February 26, 2018 report, Dr. Pettingell reviewed the medical record and SOAF. On examination he found restricted lumbar motion in all planes, normal range of passive hip motion bilaterally, and negative sitting straight leg raising tests bilaterally. Dr. Pettingell noted appellant's perception of patchy, diminished light touch sensation in a nonanatomic distribution in the right lower extremity. He noted an impression of subjective chronic low back pain and a prior diagnosis of lumbar strain/sprain. Dr. Pettingell opined that there was no objective evidence of lumbosacral radiculopathy on electrodiagnostic testing and no objective clinical signs of focal neurologic deficit, appellant had zero percent impairment to the lower extremities. He concurred with Dr. Framjee that appellant had attained MMI as of July 2, 2014.

On April 4, 2018 OWCP routed Dr. Pettingell's report, a SOAF and the case file to Dr. Katz, the DMA, for a follow-up opinion on permanent impairment under the standards of *The Guides Newsletter* and the sixth edition of the A.M.A., *Guides*. In an April 9, 2018 report, the DMA reviewed the medical record and SOAF. He opined that, as there was no objective evidence of sensory or motor nerve deficits originating in the spine, appellant had no ratable impairment of either lower extremity. The DMA emphasized that Dr. Keating found no spinal nerve impairment on February 3, 2016 EMG testing.

By decision dated August 2, 2019, 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 August 13, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 19, 2019. During the hearing, counsel contended that there was a conflict of medical opinion between Dr. Wilson and Dr. Pettingell regarding the appropriate percentage of permanent impairment.

By decision dated December 20, 2019, OWCP's hearing representative affirmed the August 2, 2019 decision, based on Dr. Pettingell's report as the weight of the medical evidence. She found that there was no conflict of medical opinion as there was no objective evidence of radiculopathy offered by Dr. Wilson.

LEGAL PRECEDENT

The schedule award provisions of FECA,[7] and its implementing federal regulations,[8] 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.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

Neither FECA nor its regulations provide for a schedule award for impairment to the back/spine 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 upper or lower extremities. Recognizing that FECA allows ratings for the 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 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]

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id*. at § 10.404(a).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

[11] *See 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); *S.G.*, Docket No. 19-1859 (issued August 20, 2020); *see also G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[13] *Supra* note 10 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[14] *S.G.*, *supra* note 12; *see E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

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.

In a report dated April 12, 2017, Dr. Wilson indicated that appellant had reached MMI and found nine percent permanent impairment of the right lower extremity due to lumbar radiculopathy using *The Guides Newsletter*. OWCP obtained a second opinion from Dr. Pettingell, who provided a detailed January 10, 2018 report finding no evidence of lumbar radiculopathy by history or examination.

The DMA, Dr. Katz, found that Dr. Wilson's impairment evaluation was in error as he predicated the finding of nine percent permanent impairment of the right lower extremity on lumbar radiculopathy not demonstrated by Dr. Keating's February 3, 2016 EMG study or other medical evidence of record. The Board finds that the DMA properly explained that Dr. Wilson's report was insufficient to establish permanent impairment of a scheduled member or function of the body.[15]

Appellant has submitted no other medical evidence in conformance with either the A.M.A., *Guides* or *The Guides Newsletter*, establishing permanent impairment of a scheduled member or function of the body. The Board therefore finds that she has not met her burden of proof to establish her schedule award claim.

On appeal, counsel contends that the EMG was definitive evidence of lower extremity impairment. As explained above, however, both Dr. Pettingell and the DMA properly found that the evidence of record was insufficient 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.

[15] *S.G., supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 25, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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