United States Department of Labor
Employees' Compensation Appeals Board

P.B., Appellant	)	
and	)	**Docket No. 20-0984**
	)	**Issued: November 25, 2020**
U.S. POSTAL SERVICE, LOGAN STATION, Pittsburgh, PA, 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:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 6, 2020 appellant, through counsel, filed a timely appeal from an October 25, 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.

[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 as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 29, 2006 appellant, then a 42-year-old letter carrier filed an occupational disease claim (Form CA-2) alleging that she had developed a stress fracture in her lower back due to factors of her federal employment, including repetitive lifting and bending. On April 23, 2007 OWCP accepted her claim for temporary aggravation of stress fracture of the L5 pedicle and temporary aggravation of lumbar degenerative disc disease. It subsequently expanded acceptance of appellant's claim to include sprain of the shoulder. Appellant stopped work on January 10, 2006 and did not return.

In a September 16, 2013 notice of proposed termination, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits due to her accepted condition. By decision dated October 29, 2013, it terminated appellant's wage-loss compensation and medical benefits, effective November 17, 2013, finding that accepted employment-related residuals and disability had ceased. Appellant requested an oral hearing on November 5, 2013 and, by decision dated July 15, 2014, a representative of the Branch of Hearings and Review affirmed the October 29, 2013 termination decision. On October 21, 2014 she appealed this decision to the Board. In its April 7, 2015 decision, the Board found that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective October 29, 2013.

On April 16, 2014 appellant underwent electrodiagnostic testing including electromyogram and nerve conduction velocity (EMG/NCV) testing, which demonstrated a mild severity acute right L4-5 radiculopathy and mild-to-moderate severity bilateral chronic L4-5 and L5-S1 radiculopathy.

On November 23, 2015 appellant filed a schedule award claim (Form CA-7). In support of this claim, she provided an October 6, 2015 report from Dr. David Weiss, an osteopath and a Board-certified orthopedic surgeon. Dr. Weiss diagnosed cumulative and repetitive trauma disorder, occupational low back syndrome, status post nondisplaced left L5 pedicle fracture, bulging lumbar discs at L1-2, L2-3, L3-4, and L5-S1, aggravation of preexisting multilevel degenerative disc disease and osteoarthritis of the lumbar spine, and bilateral L4, L5, and S1 lumbar radiculopathy. He found paravertebral muscle spasm and tenderness of the lumbar spine, muscle strength of 4/5 on the right hip flexors, and 3+/5 in the right gastrocnemius. Dr. Weiss reported that Semmes-Weinstein Monofilament Testing revealed diminished light touch sensibility over the L4 and L5 dermatome involving the left lower extremity. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*

[3] Docket No. 15-0112 (issued April 7, 2015).

(A.M.A., *Guides*)[4] including the provisions of *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (*The Guides Newsletter*) (July/August 2009) to his findings, he determined that appellant had 13 percent permanent impairment of her left lower extremity due to sensory impairment and 26 percent permanent impairment of the right lower extremity due to motor and sensory impairments. Dr. Weiss opined that she had reached maximum medical improvement (MMI) on October 6, 2015.

On January 8, 2018 OWCP referred appellant, a list of questions, and a statement of accepted facts (SOAF) for a second opinion examination with Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon. It asked that he determine if she continued to suffer from residuals of the work-related injury and any resulting permanent impairment.

In a January 24, 2018 report, Dr. Didizian reviewed the SOAF and noted that appellant's claim was accepted for temporary aggravation of stress fracture of the L5 pedicle, temporary aggravation of degenerative disc disease, and sprain of the shoulder. He reviewed her medical records including lumbar magnetic resonance imaging (MRI) scans, noted her reports of daily low back pain, and performed a physical examination. Dr. Didizian found that appellant had a normal gait, and negative straight leg raising. He reported normal muscle strength in the lower extremities bilaterally and equal sensory responses. Dr. Didizian opined that, based on his comprehensive orthopedic and neurologic examination, appellant had no residuals of her accepted employment injuries. He found that her stress fracture had healed as demonstrated by an/the? MRI scan, that, therefore, the aggravation of this condition had ended. Dr. Didizian also found that the temporary aggravation of appellant's underlying degenerative disc disease had ended. He indicated that appellant's objective orthopedic and neurologic examination was negative and did not support any ongoing subjective complaints or organic pathology. Dr. Didizian further found that his neurologic examination found no ongoing radiculopathy, motor, sensory, or reflex changes in the right lower extremity. He determined that appellant had reached MMI in 2006 when her MRI scan demonstrated resolution of her fracture. Dr. Didizian concluded that there was no permanent impairment related to the November 1, 2005 employment injury and therefore, an impairment rating could not be provided.

On July 20, 2018 due to the conflict of medical opinion between Drs. Weiss and Didizian regarding appellant's employment-related permanent impairment, OWCP referred her, a SOAF, and list of questions to Dr. Andrew Collier, a Board-certified orthopedic surgeon, for an impartial medical examination.

In his August 8, 2018 report, Dr. Collier noted that he had reviewed the SOAF, reviewed the medical reports, and performed a physical examination. He indicated that appellant reported low back pain with radiation to her right foot with occasional pins and needles sensation as well as numbness. Dr. Collier found that her straight leg raising was negative for radicular symptoms bilaterally, but positive on the right for low back pain. He determined that appellant's neurological examination was intact to sensory, motor, and deep tendon reflexes and that she had no focal sensory deficits nor any motor weakness of her hip flexors, quadriceps, or hamstrings, but that she did have decreased motion in the low back. Dr. Collier found no muscle atrophy and a nonantalgic

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

gait. He reviewed appellant's April 16, 2014 EMG/NCV study. Dr. Collier opined that she had experienced a temporary aggravation of her underlying degenerative disc disease and aggravation of her L5 left pedicle stress fracture which had since healed and resolved. He again described appellant's positive EMG/NCV study in 2014, and noted that these findings were made many years after her injury and exhibited chronic changes. However, Dr. Collier found that her current neurological examination was normal. He determined that appellant's current clinical course was due to her underlying degenerative disc disease. Dr. Collier did not calculate any permanent impairment as he found that her employment-related conditions had resolved without residuals.

By decision dated May 3, 2019, OWCP denied appellant's schedule award claim, finding that the medical evidence did not establish permanent impairment of a scheduled member due to her accepted work injury.

On May 13, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. On August 12, 2019 counsel provided an additional report from Dr. Weiss dated July 24, 2019 in which he reviewed the medical evidence of record and found that neither Dr. Didizian nor Dr. Collier used Semmes-Weinstein Monofilament testing in documenting appellant's sensory deficits. He also noted that Dr. Collier did not address motor strength findings in appellant's gastrocnemius on the right. Finally, Dr. Weiss noted that on April 16, 2014 her EMG/NCV study documented bilateral L4-5 and L5-S1 radiculopathy which corresponded with the sensory and motor deficits he found on October 6, 2015.

On August 15, 2019 counsel appeared before an OWCP hearing representative.

By decision dated October 25, 2019, OWCP's hearing representative found that Dr. Collier's report was entitled to the special weight of the medical evidence and established that appellant had no permanent impairment warranting a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA[5], and its implementing federal 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. 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]

[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) (February 2013); *see also id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a district medical adviser for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.[9]

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.[10] Furthermore, the back is specifically excluded from the definition of organ under FECA.[11] 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.[12] 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.[13]

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[14] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[15] When there exists opposing 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.[16]

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 employment.[17]

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[9] *R.A.*, Docket No. 19-0288 (issued July 12, 2019); *id* at Chapter 2.808.6(f) (February 2013); *Tommy R. Martin*, 56 ECAB 273 (2005).

[10] *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[11] 5 U.S.C. § 8101(19); *G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[12] *Supra* note 8 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

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

[14] 5 U.S.C. § 8123(a); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

[15] 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

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

[17] *L.S.*, *id.*; *Veronica Williams*, 56 ECAB 367 (2005).

ANALYSIS

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

OWCP found a conflict in the medical opinion evidence between appellant's treating physician, Dr. Weiss, who found 13 percent permanent impairment of her left lower extremity due to sensory impairment and 26 percent permanent impairment of the right lower extremity due to motor and sensory impairments, and its second opinion physician, Dr. Didizian, who found no ratable lower extremity impairment. It properly referred her case to Dr. Collier pursuant to 5 U.S.C. § 8123(a) for an impartial medical examination in order to resolve the conflict in the? medical opinion.[18]

In his August 8, 2018 report, Dr. Collier 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 he 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.[19]

In his August 8, 2018 report, Dr. Collier opined that all of appellant's accepted medical conditions stemming from her January 29, 2006 employment injury had resolved, including the temporary aggravation of stress fracture of the L5 pedicle and temporary aggravation of lumbar degenerative disc disease. The Board notes, however, that he failed to adequately explain how and when those conditions had resolved. Dr. Collier acknowledged that appellant's April 16, 2014 EMG/NCV study, which demonstrated a mild severity acute right L4-5 radiculopathy and mild-to-moderate severity bilateral chronic L4-5 and L5-S1 radiculopathy, but he did not adequately explain why these chronic findings were related to appellant's underlying degenerative disc disease and not to her accepted temporary aggravation of lumbar degenerative disc disease. Furthermore, he did not explain how and why he believed that his positive findings on physical examination including her reported low back pain with radiation to her right foot with occasional pins and needles sensation as well as numbness, and positive straight leg raising on the right for low back pain were due to her underlying degenerative disc disease rather than the accepted employment-related aggravation of this condition. Dr. Collier also 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 did not calculate any permanent impairment as he found that her employment-related conditions had resolved without residuals.

[18] *W.C.*, Docket No. 19-1740 (issued June 4, 2020).

[19] *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988).

For the above-described reasons, the opinion of Dr. Collier 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 SOAF, and, if necessary, appellant, to Dr. Collier for a supplemental report regarding whether she has permanent impairment of her extremities. If Dr. Collier 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 SOAF to a second impartial medical specialist for the purpose of obtaining his rationalized medical opinion on the issue.[20] After this and other such further development as deemed necessary, OWCP 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 October 25, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

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

[20] *L.S.*, *supra* note 14; *L.L.*, *supra* note 19; *Harold Travis*, 30 ECAB 1071, 1078 (1979).