United States Department of Labor
Employees' Compensation Appeals Board

G.H., Appellant	)	
and	)	**Docket No. 19-1800**
	)	**Issued: September 4, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Leonard, MI, 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:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 27, 2019 appellant, through counsel, filed a timely appeal from a July 1, 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 her bilateral lower extremities, warranting a schedule award.

FACTUAL HISTORY

On September 26, 2002 appellant, then a 43-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on September 7, 2002 she sustained two herniated discs in her lower back when she tripped and fell while in the performance of duty. She stopped work on September 9, 2002. OWCP accepted appellant's claim for herniated discs at L4-5 and L3-4. It paid wage-loss compensation on the supplemental rolls beginning October 24, 2002 and on the periodic rolls effective March 18, 2004.

Appellant resigned from the employing establishment, effective October 10, 2005.

On September 26, 2007 OWCP terminated appellant's wage-loss compensation and medical benefits, effective September 26, 2007, because she no longer had residuals or disability causally related to the September 7, 2002 employment injury. It found that the special weight of the medical evidence rested with the September 6 and November 21, 2006, and May 2, 2007 reports[3] of Dr. Dale Hoekstra, a Board-certified orthopedic surgeon and OWCP impartial medical examiner, who found that appellant's accepted September 7, 2002 lumbar injury and disability had resolved.

Appellant continued to submit medical reports. In an October 21, 2015 electromyograph and nerve conduction velocity (EMG/NCV) study of the bilateral lower extremities, Dr. Karim Fram, a Board-certified neurologist, noted mild-to-moderate peripheral demyelinative and axonal polyneuropathy and chronic bilateral L4 radiculopathy with mild active denervation.

In a November 24, 2017 letter, counsel alleged that appellant had sustained permanent impairment to a scheduled member and requested a schedule award.

In an October 23, 2017 narrative report, Dr. Catherine Watkins Campbell, Board-certified in occupational and family medicine, indicated that she had examined appellant on August 24, 2017 and noted her accepted condition of lumbar intravertebral disc disorder with myelopathy. She reviewed appellant's medical records and related that the most recent October 21, 2015 EMG/NCV study of the bilateral lower extremities showed abnormal findings. Upon physical examination, Dr. Watkins Campbell observed that appellant had an antalgic gait and was unable

[3] The conflict in medical opinion arose between appellant's attending physician, Dr. David M. Montgomery, a Board-certified orthopedic surgeon, and an OWCP second opinion physician, Dr. Paul J. Drouillard, an osteopath Board-certified in orthopedic surgery. In a September 6, 2006 medical report, Dr. Hoekstra reviewed appellant's history of injury and related her current complaints of lower back pain radiating to her bilateral legs. Upon physical examination, he observed that she was not cooperative with walking on her toes or heels. Dr. Hoekstra noted subjectively positive tension signs in both lower extremities. He opined that appellant's accepted disc herniation at L4-5 had resolved and that her current symptomatology was related to her degenerative disc disease.

to stand for Trendelenburg or range of motion testing. She also noted bilateral decreased sensation to pinprick in appellant's lower extremities.

Dr. Watkins Campbell indicated that appellant had reached maximum medical improvement (MMI) as of December 11, 2015. She completed an impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] and noted that the condition was disc disorder at L4- 5. Utilizing the table for spinal nerve impairment, Dr. Watkins Campbell related that appellant's EMG/NCV studies showed L4 and L5 radiculopathies and grade 4/5 strength deficit (mild) for L4 and L5 nerve root bilaterally. She reported a grade modifier for functional history (GMFH) of 2 and a grade modifier for clinical studies (GMCS) of 4 and indicated that appellant was a grade E. Dr. Watkins Campbell calculated that appellant had 11 percent permanent impairment at the right L4 and 11 percent permanent impairment at the right L5 for a total of 21 percent right lower extremity impairment.[5] She also determined that appellant had 11 percent permanent impairment at the left L4 and 11 percent permanent impairment at the left L5 for a total of 21 percent permanent impairment of the left lower extremity.[6]

On January 8, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a January 19, 2018 report, Dr. Michael M. Katz, a Board-certified anesthesiologist serving as an OWCP district medical adviser (DMA), noted appellant's accepted condition for intervertebral disc disorder with myelopathy due to her September 7, 2002 employment injury. He indicated that he had reviewed Dr. Watkins Campbell's impairment rating report and noted no discrepancies. Utilizing the diagnosis-based impairment (DBI) method, Dr. Katz referenced Proposed Table 2: *Spinal Nerve Impairment, Lower Extremity* in *The Guides Newsletter Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) and determined that appellant had 21 percent right lower extremity permanent impairment and 21 percent left lower extremity permanent impairment. He reported a date of MMI of August 24, 2017, the date of Dr. Watkins Campbell's examination.

On June 7, 2018 OWCP referred appellant's claim, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second-opinion examination in order to determine whether she had permanent impairment due to her September 7, 2002 employment injury. In an August 15, 2018 report, Dr. Obianwu reviewed appellant's history of injury, including the SOAF. He noted that he did not have any medical records or completed studies to review. Upon examination of appellant's back, Dr. Obianwu observed no tightness of the muscles and negative straight leg raise testing. Examination of appellant's bilateral lower extremities revealed no sensory changes and equal deep tendon reflexes. Dr. Obianwu related that he found no clinical evidence of radiculopathy in the lower extremities. He recommended repeat electrodiagnostic studies of both lower extremities

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

[5] Dr. Watkins Campbell related that motor deficit, grade E, at right L4 and L5 was nine percent and sensory deficit, grade E, at right L4 and L5 was two percent permanent impairment.

[6] Dr. Watkins Campbell related that motor deficit, grade E, at left L4 and L5 was nine percent and sensory deficit, grade E, at left L4 and L5 was two percent permanent impairment.

and a magnetic resonance imaging (MRI) scan of the lumbar spine before he provided an impairment rating.

Appellant underwent diagnostic testing. An October 4, 2018 lumbar spine MRI scan revealed small, left paracentral disc protrusion at L1-2, small broad-based central disc protrusion at L4-5, and lumbar spondylosis with facet arthropathy. An October 12, 2018 EMG/NCV study of the bilateral lower extremities showed a normal electrodiagnostic study.

In an October 29, 2018 addendum report, Dr. Obianwu discussed appellant's recent lumbar MRI scan and related that the EMG/NCV study of appellant's bilateral lower extremities was normal. He opined that, while appellant may have suffered back problems 16 years ago, the September 7, 2002 employment injury did not cause any injury in the lumbar spine that would impair functionality in the lower extremities. Thus, Dr. Obianwu concluded that appellant did not have any permanent impairment to her lower extremities due to her accepted September 7, 2002 employment injury.

OWCP referred appellant's claim back to Dr. Katz. In a November 11, 2018 DMA report, Dr. Katz indicated that he reviewed Dr. Obianwu's second-opinion report and recent diagnostic studies. He related that there was a conflict between Dr. Watkins Campbell's October 23, 2017 impairment rating report and Dr. Obianwu's second-opinion reports. Dr. Katz requested that OWCP obtain a referee evaluation from a Board-certified specialist in physical medicine and rehabilitation.

On November 16, 2018 OWCP requested clarification from Dr. Katz and advised him to review Dr. Hoekstra's April 4, 2007, September 6, 2006, and May 2, 2007 referee medical reports, which found that appellant no longer had residuals or disability causally related to the September 7, 2002 employment injury. It asked that Dr. Katz provide an explanation as to what changed since Dr. Hoekstra's finding of no residuals such that appellant now had a permanent impairment related to the September 7, 2002 employment injury.

In a November 20, 2018 report, Dr. Katz related that the findings of Dr. Hoekstra from 2006 and 2007 supported Dr. Obianwu's determination that no objective findings of radiculopathy were present and that neurological examination showed no deficits in the bilateral lower extremities. He opined that the weight of the medical evidence supported Dr. Obianwu's second-opinion report that appellant did not have any spinal nerve impairment in the lower extremities and, accordingly, resolved "the conflict of information" that he had expressed in his November 11, 2018 report. Dr. Katz referenced Proposed Table Two: *Spinal Nerve Impairment* in *The Guides Newsletter* and indicated that appellant was Class 0 with no sensory deficits and no net adjustment. He concluded that appellant had zero percent permanent impairment of the right and left lower extremities due to her accepted lumbar injury. Dr. Katz noted a date of MMI of August 15, 2018.

By decision dated December 4, 2018, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of appellant's lower extremities as a result of her accepted September 7, 2002 employment injury. It found that the weight of the medical evidence rested with the reports of Dr. Obianwu, OWCP's second-opinion examiner, and Dr. Katz, an OWCP DMA, who found that appellant had no permanent impairment of either lower extremity causally related to the accepted work injury.

On December 11, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on April 17, 2019. Counsel asserted that an OWCP DMA could not resolve a conflict and that appellant's claim should be referred to an OWCP referee medical examiner in order to resolve the conflict between Dr. Obianwu and Dr. Watkins Campbell. He also asserted that OWCP's DMA should not have relied on the previous referee medical reports as they were stale medical evidence.

By decision dated July 1, 2019, an OWCP hearing representative affirmed the December 4, 2018 decision.

LEGAL PRECEDENT

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

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.[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 July/August 2009 edition of *The Guides Newsletter* is to be applied.[13]

OWCP's procedures and Board precedent provide that termination of a claim for all benefits due to a finding of no residuals of the accepted condition does not bar a subsequent

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[11] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[12] *See* 5 U.S.C. § 8101(19); *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.

schedule award. Rather, the claims examiner should consider the schedule award matter separately from the termination of benefits.[14] This is because a claimant may have an employment-related condition that results in a permanent impairment under the A.M.A., *Guides* without a disability for work or the need for continuing medical treatment.[15] If medical evidence establishes that impairment to the scheduled member exists, the claimant has the burden to prove that the condition for which a schedule award is sought is causally related to his or her employment.[16]

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 appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[17] 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.[18]

ANALYSIS

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

In support of her schedule award claim, appellant submitted an impairment evaluation report dated October 23, 2017 from Dr. Watkins Campbell, her treating physician, who opined that appellant had 21 percent right lower extremity and left lower extremity permanent impairment due to spinal nerve impairment. OWCP subsequently referred appellant's claim to Dr. Obianwu for a second-opinion evaluation. In an August 15, 2018 report, Dr. Obianwu conducted an examination and noted that he found no clinical evidence of radiculopathy in the lower extremities. He recommended repeat electrodiagnostic testing of the bilateral lower extremities and a lumbar MRI scan. Following additional diagnostic testing, Dr. Obianwu related in an October 29, 2018 addendum report that the EMG/NCV study of the bilateral lower extremities was normal. He concluded that appellant did not have any permanent impairment to her lower extremities due to her accepted September 7, 2002 employment injury.

In a November 11, 2018 report, the DMA noted that there was a "conflict of information" between Dr. Watkins Campbell's October 23, 2017 impairment rating report and Dr. Obianwu's second-opinion reports. He requested that OWCP obtain a referee impairment evaluation from a Board-certified specialist in physical medicine and rehabilitation. Instead of referring appellant for a referee medical opinion, however, OWCP requested that the DMA review the referee medical

[14] *R.H.*, Docket No. 17-1017 (issued December 4, 2018); *supra* note 10 at Chapter 2.808.11 (February 2013).

[15] *See B.K.*, 59 ECAB 228 (2007); *supra* note 10 at Chapter 2.808.11 (February 2013).

[16] *M.K.*, Docket No. 16-0243 (issued May 9, 2016).

[17] 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).

[18] *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *D.M.*, Docket No. 18-0476 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002).

reports of Dr. Hoekstra dated September 6, 2006, and April 4 and May 2, 2007, which OWCP had previously relied on in terminating appellant's wage-loss compensation and medical benefits. In a November 20, 2018 addendum report, the DMA related that Dr. Hoekstra's medical reports supported that appellant had no radiculopathy or neurological deficits in her bilateral lower extremities.

The Board finds that the DMA erred in relying on the 2006 and 2007 reports of Dr. Hoekstra. It was improper to determine that the conflict of medical opinion regarding appellant's permanent impairment was resolved because Dr. Hoekstra's reports supported Dr. Obianwu's October 29, 2018 second-opinion report. The Board notes that Dr. Hoekstra was asked to resolve the issue of whether appellant still had residuals or disability of her September 7, 2002 employment injury. He did not provide a medical opinion regarding whether appellant sustained a permanent impairment due to her accepted lumbar injury. As such his reports are insufficient to resolve the issue of appellant's permanent impairment rating.[19] Last, the DMA should not have relied on Dr. Hoekstra's April 4, 2007, September 6, 2006, and May 2, 2007 referee medical reports as his examination findings and medical opinion were stale medical evidence.[20] It was improper for the DMA to have relied on Dr. Hoekstra's findings from 2006 and 2007 as they were no longer sufficiently current.[21] For these reasons, the Board finds that the DMA's opinion is of diminished probative value.

The Board finds that a conflict in medical opinion remains between Dr. Watkins Campbell, appellant's treating physician, and Dr. Obianwu, OWCP's second-opinion examiner, regarding whether appellant has permanent impairment of her lower extremities due to her accepted lumbar injury. As both physicians properly applied Proposed Table 2 of *The Guides Newsletter*, but calculated divergent permanent impairment ratings, the Board finds that there exists a conflict in the medical opinion evidence requiring referral to an impartial medical examiner pursuant to 5 U.S.C. § 8123(a).[22] As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint a referee physician or impartial medical specialist who shall make an examination.[23] Therefore, the case must be remanded to OWCP for referral of appellant to an impartial medical examiner for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).[24] 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.

[19] *See S.T.*, Docket No. 18-1144 (issued August 9, 2019).

[20] *See M.L.*, Docket No. 18-0547 (issued November 7, 2018); *T.M.*, Docket No. 16-0429 (issued August 11, 2016).

[21] *A.W.*, Docket No. 14-0199 (issued September 1, 2017).

[22] *See S.S.*, Docket No. 19-0766 (issued December 23, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011).

[23] *Supra* note 16.

[24] *M.M.*, Docket No. 18-0235 (issued September 10, 2019); *S.M.*, Docket No. 19-0397 (issued August 7, 2019).

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 4, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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