

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
H.M., Appellant)	
)	
and)	Docket No. 21-0046
)	Issued: June 1, 2021
DEFENSE AGENCIES, PENTAGON FORCE)	
PROTECTION AGENCY, Washington, DC,)	
Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 14, 2020 appellant, through counsel, filed a timely appeal from an August 25, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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

On October 14, 2014 appellant, then a 40-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her hip, left knee, left lower leg, lower back, and right elbow when she slipped and fell down wet steps while in the performance of duty. She did not stop work.

On February 18, 2015 OWCP accepted appellant's claim for lumbar back sprain, coccyx sprain, and peripheral enthesopathy.³ It paid her wage-loss compensation on the supplemental rolls commencing January 27, 2015.

A magnetic resonance imaging (MRI) scan of appellant's lumbosacral spine, dated March 19, 2015, revealed levoscoliosis, mild discogenic disease, spondylosis, and diffuse posterior disc bulge at L5-S1.

An electromyography (EMG) study, dated July 20, 2015, revealed left L5 lumbar radiculopathy.

Appellant filed a notice of recurrence (Form CA-2a) on February 1, 2016 alleging that on January 8, 2016 she sustained a recurrence of disability causally related to her October 14, 2014 employment injury.

By decision dated March 9, 2016, OWCP accepted that appellant sustained a recurrence of disability on January 8, 2016 due to her accepted lumbar back sprain, coccyx sprain, and peripheral enthesopathy. It placed her on the supplemental rolls, with wage-loss compensation retroactive to January 10, 2016.

On April 27, 2017 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. By decision dated August 3, 2017, it finalized the termination of appellant's wage-loss compensation and medical benefits, effective August 20, 2017.

In a December 8, 2017 report, Dr. Eric Dawson, an orthopedic surgeon, noted appellant's history of injury. Utilizing the diagnosis-based impairment (DBI) method of 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*), he identified the class of diagnosis (CDX) as a class 1 impairment for the diagnosis of very severe sensory deficit and motor deficit under Table 2, page 6 of *The Guides Newsletter*, which corresponded to 13 percent permanent

³ Appellant accepted a part-time, light-duty assignment, effective January 27, 2015, and was removed from federal employment, effective August 7, 2016.

⁴ A.M.A., *Guides* (6th ed. 2009).

impairment of the left lower extremity. Dr. Dawson also identified the CDX as a class 1 impairment for the diagnosis of moderate sensory impairment at L5, which corresponded to six percent permanent impairment of the right lower extremity. He totaled the two impairments and found that appellant had 19 percent permanent impairment of the lower extremities. Dr. Dawson opined that appellant had reached maximum medical improvement (MMI).

On February 9, 2018 OWCP referred appellant's case, along with a statement of accepted facts (SOAF), for a schedule award impairment rating with Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA). In a February 12, 2018 report, Dr. Katz reviewed the SOAF and medical record. He determined that a conflict of medical opinion existed that could not be resolved on the basis of a medical records review. Dr. Katz, therefore, recommended that a second opinion impairment evaluation be obtained.

On February 27, 2018 OWCP referred appellant for a second opinion examination with Dr. Robert Allen Smith, a Board-certified orthopedic surgeon. In a March 15, 2018 report, Dr. Smith noted his review of the medical record and provided physical examination findings. He opined that appellant had reached MMI. Utilizing the sixth edition of the A.M.A., *Guides and The Guides Newsletter*, Dr. Smith identified the CDX as a class 1 impairment for the diagnosis of mild sensory deficit without any motor deficit. He assigned a grade modifier for functional history (GMFH) of 0, in accordance with Table 16-6, page 516, as appellant had no limp. Dr. Smith reported a grade modifier for clinical studies (GMCS) of 4, in accordance with Table 16-8, page 519, as appellant had denervation. He calculated that appellant had a net adjustment of 3, resulting in movement from the default class of C to E and corresponding to two percent permanent impairment of the lower extremity.

On October 11, 2018 OWCP again referred appellant's case to Dr. Katz, the DMA, for a schedule award impairment rating. In an October 13, 2018 report, Dr. Katz reviewed the SOAF and medical record. Utilizing the DBI method of the sixth edition of the A.M.A., *Guides and The Guides Newsletter*, he identified the CDX as a class 1 impairment for the diagnosis of mild sensory deficit under Table 2, page 6 of *The Guides Newsletter*. Dr. Katz assigned a GMFH of 0 and a GMCS of 4 and noted that a grade modifier for physical examination (GMPE) was not applicable. He calculated that appellant had a net adjustment of 2, resulting in movement from the default class of C to E and corresponding to two percent impairment of the left lower extremity. Dr. Katz, therefore, concurred with Dr. Smith's impairment rating and noted that his physical examination findings were consistent with the medical record. He opined that a range of motion (ROM) rating was not applicable under the A.M.A., *Guides* and that appellant had reached MMI on March 15, 2018.

In a January 11, 2019 addendum report, Dr. Dawson reviewed Dr. Smith's March 15, 2018 report. He noted that Dr. Smith failed to perform any reflex testing so appellant's deep tendon reflexes were not tested. Dr. Dawson further indicated that Dr. Smith failed to perform adequate ROM testing and that he failed to perform straight leg raise testing. He identified the CDX as a class 1, grade B impairment for the diagnosis of moderate motor deficit under Table 2, page 6 of *The Guides Newsletter*, which corresponded to 13 percent permanent impairment of the left lower extremity. Dr. Dawson also identified the CDX as a class 1 impairment for the diagnosis of moderate sensory impairment at L5, which corresponded to six percent permanent impairment of

the right lower extremity. He again totaled the two impairments and found that appellant had 19 percent permanent impairment of the lower extremities.

On March 12, 2019 appellant, through counsel, requested a schedule award and submitted a March 6, 2019 report from Dr. Sami Moufawad, a Board-certified specialist in physical medicine and rehabilitation. Dr. Moufawad reported appellant's history of injury, provided physical examination findings, and reviewed her medical record. He found that appellant's ROM of the lumbar spine was 15 degrees of forward flexion, 5 degrees of extension, 15 degrees of right-sided bending, and 10 degrees of left-sided bending. Dr. Moufawad noted that appellant's straight leg raising was positive on the left side at 45 degrees with increased numbness and tingling. He diagnosed lumbar back sprain, coccyx sprain, peripheral enthesopathies, disc bulge at L5-S1, and left L5 radiculopathy. Dr. Moufawad opined that appellant's conditions were a result of her accepted October 14, 2014 employment injury. He found that appellant had reached MMI on March 6, 2019. Utilizing the DBI method of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, Dr. Moufawad identified the CDX as a class 1 impairment for the diagnosis of mild motor deficit under Table 2, page 6 of *The Guides Newsletter*. He assigned a GMFH of 1, in accordance with Table 16-6, page 516, as appellant had a lower limb questionnaire score of 24. Dr. Moufawad noted that a GMPE was not applicable since it was used for class determination. He reported a GMCS of 1, in accordance with Table 16-8, page 519, based on appellant's EMG study. Dr. Moufawad calculated that appellant had a net adjustment of 0, resulting in no movement from the default class of C and corresponding to five percent permanent impairment. Utilizing the DBI method, he also identified the CDX as a class 1 impairment for the diagnosis of sensory deficit under Table 2, page 6 of *The Guides Newsletter*. Dr. Moufawad noted that a GMFH and a GMPE were not applicable as they were used for class determination. He assigned a GMCS of 1 based on appellant's EMG and MRI scan findings, which showed a bulging disc at L5-S1. Dr. Moufawad calculated that appellant had a net adjustment of 0, resulting in no movement from the default class of C and corresponding to one percent permanent impairment. He totaled the two impairments and found that appellant had six percent permanent impairment of the left lower extremity. Dr. Moufawad attached a lower limb questionnaire completed by appellant with his report.

On May 3, 2019 appellant filed a claim for a schedule award (Form CA-7).

By decision dated July 12, 2019, OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity based on the opinions of Dr. Katz, the DMA, and Dr. Smith, the second opinion physician. The award ran for 5.76 weeks for the period March 15 through April 24, 2018.

On July 19, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated September 6, 2019, OWCP's hearing representative vacated the July 12, 2019 decision and remanded the case for further development. The hearing representative found that OWCP failed to forward Dr. Dawson's January 11, 2019 addendum report and Dr. Moufawad's March 6, 2019 report to the DMA for review prior to issuance of the July 12, 2019 decision.

On October 31, 2019 OWCP referred appellant's case, along with an updated SOAF, to Dr. Katz, the DMA, for a schedule award impairment rating. In a November 9, 2019 report, Dr. Katz reviewed the updated SOAF and medical record. He opined that a significant conflict of medical opinion existed as to the presence of motor deficits in the left lower extremity between Drs. Smith, Dawson, and Moufawad. Dr. Katz noted that Dr. Dawson's assertion of a severe sensory deficit appeared to be an outlier. He opined that the conflict could not be resolved on the basis of a medical records review. Dr. Katz recommended that a referee impairment evaluation be obtained from a Board-certified specialist in physical medicine and rehabilitation or orthopedic surgery.

On December 3, 2019 OWCP determined that a conflict of medical opinion existed between Drs. Dawson, Moufawad, and Smith and referred appellant for an impartial medical examination in order to resolve the conflict. In a January 7, 2020 report, Dr. Mohammad H. Zamani, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME), noted his review of the SOAF and medical record. He provided physical examination findings and noted that appellant had full flexion in her bilateral shoulders, bilateral elbows, bilateral wrists, metacarpophalangeal (MP) joint, proximal interphalangeal (PIP) joint, distal interphalangeal (DIP) joint, fingers, bilateral hips, and bilateral knees. Dr. Zamani opined that appellant's accepted lumbar sprain, coccyx sprain, and peripheral enthesopathies had resolved. He asserted that appellant's EMG study and Dr. Dawson's reports were not reliable. Dr. Zamani further noted that Dr. Smith's physical examination was acceptable, but disagreed with his impairment rating because it was based on the EMG nerve study. He opined that appellant had reached MMI. Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Zamani found that appellant had zero percent permanent impairment as she had no significant pain, weakness, loss of function, loss of endurance, or muscle atrophy. He reported that appellant's EMG study that showed radiculopathy did not correlate with her physical examination and MRI scan findings.

In a January 22, 2020 supplemental report, Dr. Zamani noted that appellant had no ratable impairment under the sixth edition of the A.M.A., *Guides* as she had normal physical examination findings. He disagreed with the opinions of Drs. Dawson and Moufawad and asserted that they continued to treat appellant unnecessarily for financial gain. Dr. Zamani opined that appellant never needed any treatment or time off work.

By decision dated February 25, 2020, 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. It based its determination on the opinion of Dr. Zamani, the IME.

On March 3, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 11, 2020.

By decision dated August 25, 2020, OWCP's hearing representative affirmed the February 25, 2020 decision.

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

Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back/spine or to 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 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 the 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.¹¹ 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.¹²

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.¹³ 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

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* Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ *See P.B.*, Docket No. 20-0984 (issued November 25, 2020); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁰ 5 U.S.C. § 8101(19); *S.G.*, Docket No. 19-1859 (issued August 20, 2020); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹¹ *Supra* note 8 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹² *N.T.*, Docket No. 20-0667 (issued November 25, 2020); *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

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

case.¹⁴ When there exist 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.¹⁵

ANALYSIS

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

OWCP properly found that a conflict in the medical opinion evidence existed between appellant's treating physician, Dr. Moufawad, who found six percent permanent impairment of the left lower extremity due to motor and sensory deficits and its second opinion physician, Dr. Smith, who found two percent permanent impairment of the left lower extremity due to mild sensory deficit without any motor deficit. It properly referred appellant's case to Dr. Zamani, pursuant to 5 U.S.C. § 8123(a), for an impartial medical examination in order to resolve the conflict in the medical opinion.¹⁶

In January 7 and 22, 2020 reports, Dr. Zamani 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.¹⁷

In his January 7, 2020 report, Dr. Zamani opined that all of appellant's accepted medical conditions stemming from her October 14, 2014 employment injury had resolved. The Board notes, however, that he failed to adequately explain how and when those conditions had resolved.¹⁸ Dr. Zamani acknowledged appellant's July 20, 2015 EMG nerve study, which revealed left L5 lumbar radiculopathy, but he did not adequately explain why he found that it was not reliable. He simply noted that there was no detail and that the EMG only evaluated appellant's gluteal muscle. However, the July 20, 2015 EMG study specifically noted that a monopolar needle electrode was used to examine selected muscles along the lower limbs, gluteal, and lumbar muscles on both sides. It further showed evidence of denervation along the L5 distribution. Furthermore, Dr. Zamani 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

¹⁴ 20 C.F.R. § 10.321; *see also R.C.*, 58 ECAB 238 (2006).

¹⁵ *P.B.*, *supra* note 9; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁶ *W.C.*, Docket No. 19-1740 (issued June 4, 2020).

¹⁷ *Supra* note 8 at Chapter 2.808.6(f) (February 2013); *see also R.A.*, Docket No. 19-0288 (issued July 12, 2019); *Tommy R. Martin*, 56 ECAB 273 (2005).

¹⁸ *See P.B.*, *supra* note 9.

of *The Guides Newsletter*, the above-described FECA-approved methodology, which is premised on permanent impairment stemming from radiculopathies affecting the lower extremities and did not calculate any permanent impairment as he found that appellant's employment-related conditions had resolved without residuals.¹⁹ Dr. Zamani further failed to specifically address Dr. Moufawad's March 6, 2019 report and impairment rating.

In his January 22, 2020 supplemental report, Dr. Zamani indicated that appellant had no ratable impairment in accordance with the sixth edition of the A.M.A., *Guides* and that "all calculation [was] 10 to 0." The Board finds that Dr. Zamani again failed to adequately explain his opinion in accordance with the relevant standards, including *The Guides Newsletter*.²⁰ Dr. Zamani further asserted that Drs. Dawson and Moufawad treated appellant unnecessarily for financial gain and opined that appellant never needed any treatment or time off work. The Board finds that Dr. Zamani provided insufficient medical rationale to support his conclusory opinion. Dr. Zamani failed to address Drs. Dawson and Moufawad's assessments of sensory and motor deficits and did not specifically comment on their determination of CDX, grade modifiers, net adjustment, and total impairment rating.

For the above-described reasons, the opinion of Dr. Zamani is insufficient to resolve the continuing conflict in the medical opinion evidence. The Board will, therefore, remand the case to OWCP for referral of the case record, a SOAF, and appellant to a new IME for the purposes of evaluating whether she has permanent impairment of her extremities, warranting a schedule award.²¹ 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.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *K.W.*, Docket No. 20-0047 (issued November 12, 2020); *K.C.*, Docket No. 18-0234 (issued September 14, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2020 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: June 1, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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