

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

_____)	
L.P., Appellant)	
)	
and)	Docket No. 21-0409
)	Issued: November 5, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Trenton, NJ, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 22, 2021 appellant filed a timely appeal from a September 15, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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.

ISSUE

The issue is whether appellant has established permanent impairment of her right lower extremity warranting a schedule award.

¹ The Board notes that, following the September 15, 2020 decision, OWCP received 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.*

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 18, 2017 appellant, then a 37-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) alleging that on December 14, 2017 she injured her back and legs pulling down tall gay lords while in the performance of duty. She returned to light-duty work on December 25, 2017. On August 15, 2018 OWCP accepted the claim for sprain of the ligaments of the lumbar spine. Appellant returned to full-duty work on October 25, 2018. OWCP paid wage-loss compensation intermittently from March 3 through 15, 2019.

On October 25, 2018 and January 17, 2019 appellant's attending physician, Dr. Marc J. Levine, a Board-certified orthopedic surgeon, found that appellant required no further medical treatment, that she had reached maximum medical improvement (MMI) and discharged her from his care. He diagnosed work-related sprain of ligaments of the lumbar spine, morbid obesity, acute bilateral low back pain with sciatica, and neurologically intact presentation.

In a March 26, 2019 report, Dr. Amy Schneider-Lyall, an osteopath, diagnosed work-related lumbar strain and radiculopathy. She performed a physical examination noting that appellant's sensation was intact to light touch. Dr. Schneider-Lyall recommended additional electrodiagnostic studies.

On March 27, 2019 appellant filed a notice of recurrence (Form CA-2a) noting that she was in daily pain performing light-duty work. Her supervisor indicated that she was performing a modified assignment within her restrictions since her accident, and had not stopped work.

In a June 7, 2019 report, Dr. Mitchell K. Freeman, an osteopath, reviewed appellant's electromyogram/nerve conduction velocity (EMG/NCV) studies of June 7, 2019, which were normal with no evidence of lumbar radiculopathy or peripheral neuropathy. He also performed a physical examination and found that she had positive straight-leg raising on the right, but that sensation to touch and proprioception were intact as were strength and reflexes.

On June 26, 2019 Dr. Schneider-Lyall noted appellant's history of injury and diagnosed sprain of the ligaments of the lumbar spine, lumbar radiculopathy, and lumbar strain with radiculitis status post work injury. She did not report findings on physical examination, but found that appellant had reached MMI.

On July 29, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award due to her accepted December 14, 2017 employment injury.

In an August 2, 2019 development letter, OWCP requested that appellant provide a diagnosis, a detailed description of objective findings and permanent impairment, a detailed narrative medical report, including a finding of MMI, and a rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ It afforded 30 days for a response.

³ A.M.A., *Guides*, 6th ed. (2009).

Appellant provided a November 27, 2018 report from Dr. David Weiss, an osteopath Board-certified in orthopedic surgery, who examined appellant and noted her history of injury. Dr. Weiss found paravertebral muscle spasm and tenderness and loss of range of motion in the lumbar spine. He found no sensory abnormalities in the lower extremities. Dr. Weiss found normal reflexes and normal muscle strength in the lower extremities. He reported that Semmes-Weinstein Monofilament testing revealed a diminished light touch sensibility over the L4, L5, and S1 dermatome in the right lower extremity and L4 and L5 dermatome in the left lower extremity. Dr. Weiss diagnosed chronic post-traumatic lumbosacral strain and sprain, bulging lumbar discs at L4-5, L5-S1, and lumbar radiculitis confirmed by monofilament testing

Dr. Weiss applied *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), to his findings and determined that appellant had a Class 1 moderate sensory deficit of the right L4 nerve root, a three percent permanent impairment in accordance with Table 2. He found that the grade modifier for functional history (GMFH) was one, in accordance with Table 16-6 page 516 of the A.M.A., *Guides* and that the grade modifier for clinical studies (GMCS) was also one, in accordance with Table 16-8, page 519 of the A.M.A., *Guides*. Dr. Weiss applied the net adjustment formula of the A.M.A., *Guides*, page 521 to his grade modifiers and reached three percent permanent impairment of the right lower extremity. He found that appellant had a Class 1 moderate sensory deficit of the right L5 nerve root, three percent permanent impairment, Table 2 of *The Guides Newsletter*, with a GMCS of one resulting in three percent permanent impairment of the right lower extremity. Dr. Weiss found a Class 1 moderate sensory deficit of the right S1 nerve root which constituted a two percent permanent impairment, with GMCS of one and net adjustment of zero resulting in two percent permanent impairment of the right lower extremity and a total impairment rating of eight percent permanent impairment of the right lower extremity.

OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon and district medical adviser (DMA). In an October 5, 2019 report, Dr. Katz reviewed the medical records including Dr. Weiss' report and recommended a second opinion examination to address discrepancies in the findings of sensory impairment between Dr. Weiss and Drs. Schneider-Lyall, Levine, and Freeman.

On November 12, 2019 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions to Dr. Stanley Askin, a Board-certified orthopedic surgeon, to establish her permanent impairment for schedule award purposes.

In his December 5, 2019 report, Dr. Askin described appellant's employment injury and noted her ongoing symptoms of pain from the lower back into the right knee and left hip as well as back spasms. On physical examination he found no objective findings consequential to the work injury. Dr. Askin reported normal straight leg raising, symmetrical reflexes, and normal muscle strength in the lower extremities. He found that sensation was preserved to the extent that there was no area of anesthesia, but that appellant reported less sensitivity to touch 360 degrees around on the right lower extremity when compared to the left. Dr. Askin found that appellant had reached MMI and found that there was no current diagnosis or permanent impairment causally related to her accepted employment injury. He determined that appellant had no neuromuscular deficit regarding her right lower extremity, that her EMG did not reveal any nerve damage, and that her MRI scan did not reveal any disc pathology. Dr. Askin opined that appellant's current

symptoms were due to her weight and that there was no impairment of any sort, consequential to the work injury.

OWCP referred Dr. Askin's report to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA. In a January 13, 2020 supplemental report, the DMA reviewed Dr. Askin's report and agreed with his finding of no permanent impairment based on his physical examination. He noted that Dr. Askin found no neurological deficit in the right lower extremity as there was no motor weakness and a "circumferential" area of less sensitivity to touch in the right lower extremity, which did not follow a dermatomal distribution. The DMA determined that application of the A.M.A., *Guides* would not result in a ratable impairment. He further noted that Dr. Weiss' findings of sensory deficits were not in keeping with those of appellant's physicians nor those of Dr. Askin.

By decision dated February 14, 2020, OWCP denied appellant's request for a schedule award, finding that she had met her burden of proof to establish permanent impairment of a scheduled member.

On March 6, 2020 appellant requested a review of the written record and an oral hearing before a representative of OWCP's Branch of Hearings and Review with regard to the February 14, 2020 decision.

On July 10, 2020 appellant testified before an OWCP hearing representative and asserted that Dr. Askin did not perform a thorough examination as he only asked questions and did not physically examine her.

By decision dated September 15, 2020, OWCP's hearing representative affirmed the February 14, 2020 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ and its implementing regulations⁵ 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.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, is used to calculate schedule awards.⁷

⁴ *Supra* note 1.

⁵ 20 C.F.R. § 10.404.

⁶ 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 Awards and Permanent Disability Claims*, Chapter 2.808.5.a. (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁷ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,⁸ or the body as a whole. However, a schedule award is permissible where the employment-related spinal conditions affects the upper and/or lower extremities.⁹ The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*, which is a supplemental publication of the sixth edition of the A.M.A., *Guides*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.¹⁰

Section 8123(a) of FECA provides in pertinent part: 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.¹¹

ANALYSIS

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

The Board finds that there is a conflict in the medical opinion evidence regarding appellant's permanent impairment of the right lower extremity between Dr. Weiss, the attending physician, and Dr. Askin, the second opinion physician, which requires further development of the medical evidence.¹²

In his November 27, 2018 report, Dr. Weiss reported that Semmes-Weinstein Monofilament testing revealed a diminished light touch sensibility over the L4, L5, and S1 dermatome in the right lower extremity and L4 and L5 dermatome in the left lower extremity. He based his impairment rating of eight percent permanent impairment of the right lower extremity on these positive findings.

In contrast, Dr. Askin reported that he found no objective findings consequential to the work injury. He found that sensation was preserved to the extent that there was no area of anesthesia, but that appellant reported less sensitivity to touch 360 degrees around on the right lower extremity when compared to the left.

Consequently, the case must be referred to an impartial medical specialist to resolve the existing conflict in the medical opinion evidence, pursuant to 5 U.S.C. § 8123(a) regarding appellant's lower extremity permanent impairment. On remand OWCP shall refer appellant, along

⁸ FECA specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

⁹ *Supra* note 6 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3) (March 2017).

¹⁰ *Supra* note 6 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹¹ 5 U.S.C. § 8123(a).

¹² *Id.*

with the case file and a statement of accepted facts, to a specialist in the appropriate field of medicine for an impartial medical evaluation for a rating of permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. After this and other such development as deemed necessary, it shall issue a *de novo* decision regarding appellant's schedule award claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: November 5, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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