

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

_____)
S.W., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
South Bend, IN, Employer)
_____)

Docket No. 22-0917
Issued: October 26, 2022

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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 31, 2022 appellant filed a timely appeal from an April 11, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (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 met her burden of proof to establish permanent impairment of her lower extremities, warranting a schedule award.

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 an 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.

FAUAL HISTORY

On September 4, 2019 appellant, then a 29-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her back and right leg while in the performance of duty. She noted that she bent over to sit in the driver's seat of her delivery vehicle and experienced low back pain and right leg weakness. Appellant did not stop work. OWCP accepted the claim for lumbar sprain.

A report of electromyography and nerve conduction velocity (EMG/NCV) study dated December 10, 2020 revealed no abnormalities with the exception of chronic neurogenic changes in the right rectus femoris muscle indicative of mild previous or chronic irritation of the right L3 and/or L4 nerve roots without evidence of ongoing denervation present.

On March 30, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a May 12, 2021 report, Dr. Sami Moufawad, Board-certified in physiatry, related that he had examined appellant and advised that she had reached maximum medical improvement (MMI) as of that date. He conducted a physical examination and found moderate-sensory deficits in the L5 and S1 dermatomes and mild motor deficits in the S1 myotome, bilaterally. Dr. Moufawad applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),² and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) to his findings. He diagnosed low back strain and aggravation of a lower lumbar spine condition. Dr. Moufawad opined that appellant had eight percent permanent impairment of the right lower extremity and eight percent permanent impairment of the left lower extremity.

OWCP thereafter received a series of diagnostic study reports, including a magnetic resonance imaging (MRI) scan of the lumbar spine dated September 7, 2018, which revealed acquired lower lumbar spondylosis at L5-S1 with disc bulge and left central extrusion encroaching on the traversing left S1 nerve root and a disc bulge at L4-5 causing mild lateral recess stenosis right greater than left. A report of the MRI scan dated December 19, 2018 of the lumbar spine revealed postsurgical changes at L4-5 and L5-S1 with mild residual right central disc bulge at L4_5. A report of the MRI scan of the lumbar spine dated December 19, 2020 revealed mild bilateral foraminal narrowing at L4-5 and L5-S1 without flattening of the corresponding nerve roots. A report of computerized tomography scan of the lumbar spine dated December 22, 2020 revealed mild-to-moderate degenerative disc disease at L4-5.

On May 29, 2021 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed a statement of accepted facts (SOAF) and the medical record. He noted that, in a prior examination, a treating physician had documented a normal motor and sensory examination of both lower extremities and that Dr. Moufawad noted bilateral sensory and motor deficits in the lower extremities. Dr. Katz recommended a second opinion examination and impairment rating evaluation by an appropriate physician.

² A.M.A., *Guides* (6th ed. 2009).

On July 27, 2021 OWCP referred appellant, a SOAF, the medical record, and a series of questions, to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second opinion examination and impairment rating evaluation.

In a September 13, 2021 report, Dr. Obianwu diagnosed a low back strain. He noted a prior history of disc abnormalities and lumbar surgery in 2018. Dr. Obianwu performed a physical examination, which revealed equal deep tendon reflexes bilaterally, negative straight leg raise bilaterally, no atrophy, good strength in the various muscle groups of the lower extremities, adequate bilateral extensor hallucis longus, and normal strength of dorsiflexion and plantar flexion of both ankles. He indicated he performed sensory testing of the left lower extremity and found no dermatomal sensory loss. Dr. Obianwu noted that appellant claimed to have diminished sensation throughout the entire right lower extremity when compared to the left, which he indicated did not allow for a diagnosis of a specific dermatomal pattern loss. He opined that she reached MMI on September 13, 2021, the date of his evaluation. Dr. Obianwu diagnosed a work-related low back strain and nonwork-related conditions of postoperative changes at L4-5 and L5-S1, right paracentral disc protrusion at L4-5, and disc bulging at L3-4 without abutment of the nerve roots. He referenced the sixth edition of the A.M.A., *Guides*, and given his clinical examination of the lower extremities, he did not find ratable impairment.

OWCP subsequently referred the evidence of record, including the September 13, 2021 report of Dr. Obianwu, to Dr. Katz serving as a DMA. In an October 6, 2021 report, Dr. Katz noted that Dr. Obianwu found no physiologic myotomal motor or dermatomal sensory deficits in either lower extremity, and that these findings were consistent with the prior examination by Dr. Watts. Under proposed Table 2, Spinal Nerve Impairment; Lower Extremity Impairment, the DMA found for spinal nerves L3, L4, L5, and S1 of both lower extremities that there was no motor deficit and no sensory deficit with no net adjustment. Thus, he opined that each extremity had class 0, or 0 percent impairment. The DMA further opined that the A.M.A., *Guides* did not allow for an alternative range of motion impairment calculation for the accepted conditions.

By decision dated November 23, 2021, OWCP denied appellant's schedule award claim, finding that she had not met her burden of proof to establish permanent impairment of a scheduled member or function of the body. It noted that Dr. Obianwu concluded that permanent impairment did not exist, because no ratable condition was discerned in the clinical examination of both lower extremities, and that the DMA agreed with Dr. Obianwu.

On November 30, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on March 8, 2022.

By decision dated April 11, 2022, OWCP's hearing representative affirmed the November 23, 2021 decision.

LEGAL PRECEDENT

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.³

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. However, FECA does not specify the manner in which the percentage of loss shall be determined. OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

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.⁷ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.⁸ The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. 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.⁹

In addressing lower extremity impairment due to peripheral or spinal nerve root involvement, the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* require identifying the class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹

³ See *T.H.*, Docket No. 19-1066 (issued January 29, 2020); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a. (March 2017); see also Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

⁸ *Supra* note 6 at Chapter 2.808.5c(3) (February 2022).

⁹ *Id.* at Chapter 3.700, Exhibit 4 (January 2010); see *L.H.*, Docket No. 20-1550 (issued April 13, 2021); *N.G.*, Docket No. 20-0557 (issued January 5, 2021).

¹⁰ A.M.A., *Guides* 494-531; see *R.V.*, Docket No. 20-0005 (issued December 8, 2020); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹¹ A.M.A., *Guides* 521.

Section 8123(a) of FECA provides that, 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.¹²

ANALYSIS

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

Dr. Moufawad conducted a physical examination and found-moderate-sensory deficits in the L5 and S1 dermatomes and mild motor deficits in the S1 myotome, bilaterally. He also performed a physical examination, but found equal deep tendon reflexes bilaterally, negative straight leg raise bilaterally, no atrophy, good strength in the various muscle groups of the lower extremities, adequate bilateral extensor hallucis longus, normal strength of dorsiflexion and plantar flexion of both ankles, and no specific dermatomal pattern of sensory loss. A conflict, therefore, exists in the medical opinion evidence between Dr. Moufawad and Dr. Obianwu regarding the nature and extent of any sensory or motor deficits in appellant's lower extremities. As there is an unresolved conflict in the medical evidence, the case must be remanded to OWCP for referral to an impartial medical examiner (IME) for resolution of the conflict in accordance with 5 U.S.C. § 8123(a).¹³

On remand OWCP shall refer the case record, the SOAF, and appellant to a specialist in the appropriate field of medicine, to serve as an IME, for a reasoned opinion regarding the extent of permanent impairment, if any, of appellant's lower extremities. Following 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.

¹² 5 U.S.C. § 8123(a). *See R.C.*, Docket No. 18-0463 (issued February 7, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016).

¹³ 5 U.S.C. § 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the April 11, 2022 decision of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 26, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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