United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
and	)	**Docket No. 23-0216**
	)	**Issued: December 7, 2023**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Washington, DC, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On December 1, 2022 appellant filed a timely appeal from a November 3, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

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.

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that following the November 3, 2022 merit decision, OWCP received additional evidence. 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*.

FACTUAL HISTORY

On August 3, 2017 appellant, then a 55-year-old drug abatement inspector, filed a traumatic injury claim (Form CA-1) alleging that on August 2, 2017 she injured her right foot, legs, and low back when she slipped and fell while in the performance of duty. She did not stop work.[3] OWCP initially accepted appellant's claim for right ankle, neck, and lumbar sprains. It subsequently expanded its acceptance of her claim to include cervical and lumbar disc displacement and lumbar radiculopathy. In a July 16, 2018 memorandum of telephone call (Form CA-110) OWCP noted that appellant requested expansion of the acceptance of the claim to include a right shoulder condition. On September 5, 2018 it denied her request due to inadequate medical documentation.

A report of electromyography and nerve conduction velocity (EMG/NCV) studies of the upper and lower extremities dated May 5, 2020 revealed bilateral tibial neuropathy, right-sided sural and saphenous sensory neuropathy, left-sided L4 radiculitis, bilateral sensory carpal tunnel syndrome (CTS), and ulnar neuropathy across both elbows but no evidence of cervical radiculopathy.

A report of x-rays of the right ankle dated June 15, 2021 revealed soft-tissue swelling, an underlying linear oblique and vertically-oriented lucency within the distal fibula, tibiotalar joint effusion, a large inferior calcaneal spur, and an os trigonum.

In a report received by OWCP on December 1, 2021, Dr. Robert Spicer, a Board-certified physiatrist, evaluated appellant's permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] He indicated that her superficial appearance suggested that she was in distress and she ambulated with an antalgic gait and wore and ankle brace. Dr. Spicer performed a physical examination and documented range of motion restrictions in the cervical and lumbar spine, right ankle, and shoulders; reduced grip strength in the hands; positive cervical compression tests, bilaterally; a one-centimeter deficit in circumference in the left calf compared to the right calf; hypoesthesia in the left L4 dermatome compared to the right; positive straight leg raise tests bilaterally; and positive sitting root test on the left. He opined that the reduced circumference of the left calf was consistent with atrophy due to prolonged nerve impairment in the left lower extremity. Dr. Spicer reviewed the results of the May 5, 2020 EMG/NCV studies and diagnosed sprains of the right ankle, lumbar spine, pelvis, and cervical spine; a lower back strain; intervertebral disc displacement in the cervical and lumbar regions; and lumbar radiculopathy. He opined that appellant had reached maximum medical improvement (MMI) as of September 20, 2021. Dr. Spicer referred to the sixth edition of the A.M.A., *Guides*,[5] and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) and found 13 percent permanent impairment of the right upper extremity due to loss of range of motion (ROM) of the right shoulder using Table 15-34 on page 475 of the A.M.A., *Guides*, a 2 percent permanent impairment of the right lower extremity due to right ankle sprain

[3] The employing establishment issued an August 16, 2017 Authorization for Examination and/or Treatment report (Form CA-16). The form indicated that medical treatment was authorized for a right foot and ankle injury.

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

[5] *Id*.

using Table 16-2 on page 501; and 18 percent permanent impairment of the left lower extremity due to motor and sensory impairment according to *The Guides Newsletter*.

On December 1, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On December 10, 2021 OWCP referred the record and a statement of accepted facts (SOAF) to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as district medical adviser (DMA), and requested that he evaluate appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.

In a report received by OWCP on February 3, 2022, the DMA noted discrepancies in Dr. Spicer's impairment rating evaluation, including that Dr. Spicer's physical examination findings did not support rating for L4 moderate motor and sensory deficits, his impairment percentages for a moderate sensory deficit did not correlate with the percentages under Proposed Table Two of *The Guides Newsletter*, and he rated for a right shoulder impairment, which was not an accepted condition. On that basis, he recommended that appellant undergo a second opinion evaluation by a Board-certified specialist in physical medicine and rehabilitation or orthopedic surgery.

On February 7, 2022 OWCP referred appellant to Dr. Jack H. Henry, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the extent of any employment-related permanent impairment. In a report dated April 20, 2022, Dr. Henry reviewed the SOAF and provided detailed findings on examination. He opined that appellant's subjective complaints correlated with the objective findings on examination. Dr. Henry found tenderness and muscle spasm of the lumbosacral spine, loss of ROM of the cervical and lumbar spine, right ankle instability and swelling, loss of ROM of the right ankle, decreased sensation in the C5 and C6 nerve root distribution, 3/5 weakness in the left upper and lower extremities, and 4/5 weakness in the right upper and lower extremities, without significant atrophy. He diagnosed a right ankle sprain, a sprain of the other parts of the lumbar spine and pelvis, cervical sprain, cervical and lumbar intervertebral disc displacement, and lumbar radiculitis.

On June 16, 2022 OWCP referred appellant along with the medical record, SOAF and a series of questions to Dr. Vinod Kumar Panchbhavi, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding permanent impairment causally related to appellant's accepted August 2, 2017 employment injury. The SOAF listed the accepted injuries as sprains of the right ankle, cervical spine, lumbar spine and pelvis.

In a July 8, 2022 report, Dr. Panchbhavi reviewed the SOAF and medical record, including June 19, 2020 magnetic resonance imaging (MRI) scans of the cervical and lumbar spine and June 15, 2021 x-rays of the cervical spine, lumbar spine, right ankle, and right foot. He provided physical examination findings and noted that appellant presented with no sensory deficits; 5/5 muscle strength in the upper and lower extremities; no tenderness to palpation of the cervical and lumbar spine; negative supine straight leg raise test, sitting straight leg raise, and sitting root test; and no tenderness to palpation of the bilateral ankle or foot. Dr. Panchbhavi further noted reduced ROM in the right hip flexion, internal rotation, and external rotation compared to the left hip; reduced ROM in plantar flexion of the left foot compared to the right foot; and reduced ROM of inversion of the right foot compared with the left foot. He found that appellant's subjective complaints of weakness and abnormal sensation did not correspond with the objective findings on

examination. Dr. Panchbhavi diagnosed sprains of the right ankle, lumbar spine, pelvis, and cervical spine, which had resolved.

On September 20, 2022 OWCP requested clarification from Dr. Panchbhavi and provided him with an updated SOAF listing the accepted conditions as sprains of the right ankle, cervical spine, lumbar spine, and pelvis; cervical and lumbar disc displacement; and lumbar radiculopathy. It further requested that he respond to a series of questions regarding permanent impairment causally related to appellant's accepted August 2, 2017 employment injury.

In a September 20, 2022 addendum report, Dr. Panchbhavi diagnosed sprains of the right ankle, lumbar spine, pelvis, and cervical spine; lower back strain; cervical and lumbar disc displacement; and lumbar radiculopathy. He summarized his July 8, 2022 examination findings and noted that appellant's subjective complaints of weakness and abnormal sensation did not correspond with the objective findings on examination. Dr. Panchbhavi applied the sixth edition of the A.M.A., *Guides*, and *The Guides Newsletter* and found no ratable impairment in the right ankle or in the upper or lower extremities due to spinal nerve injuries. He opined that appellant had reached MMI on July 8, 2022, the date of his evaluation.

On October 11, 2022 OWCP referred the record and SOAF to Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon serving as DMA, and requested that he evaluate appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.

In a report dated November 2, 2022, Dr. Ugokwe reviewed the medical record, including the September 20, 2022 report of Dr. Panchbhavi. He noted that appellant was neurologically intact and that there was no evidence of decreased range of motion. Dr. Ugokwe indicated that he concurred with the impairment rating provided by Dr. Panchbhavi in his September 20, 2022 report. He explained that a ROM impairment rating was not available as an alternative to the diagnosis-based impairment (DBI) method because appellant's accepted diagnoses were not eligible for the ROM method under the A.M.A., *Guides*. Dr. Ugokwe found no permanent impairment causally related to the accepted August 2, 2017 employment injury. He concluded that appellant had reached MMI as of July 2, 2022.[6]

By decision dated November 3, 2022, 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 accorded the eight of the medical evidence to Dr. Panchbhavi.

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. OWCP has

[6] The Board notes that July 2, 2022 appears to be a typographical error, as the examination by Dr. Panchbhavi that Dr. Ugokwe relied upon occurred on July 8, 2022, as noted above.

[7] *Supra* note 1.

[8] 20 C.F.R. § 10.404.

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.[9]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the *World Health Organization's International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement*.[10] Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the CDX, which is then adjusted by a grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and/or grade modifier for clinical studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.[13]

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.[14] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[15] 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.[16]

In addressing upper or 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 impairment CDX, which is then adjusted by the GMFH and the GMCS. The effective net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[17]

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

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2022); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] A.M.A., *Guides* 3, section 1.3.

[11] *Id*. at 493-556.

[12] *Id*. at 521.

[13] *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[14] 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 (200

[15] *Supra* note 9 at Chapter 2.808.5c(3) (February 2022).

[16] *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).

[17] *G.W.*, Docket No. 22-0301 (issued July 25, 2022); *see also The Guides Newsletter*; A.M.A., *Guides* 430.

shall appoint a third physician who shall make an examination.[18] 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.[19]

ANALYSIS

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

Appellant's attending physician, Dr. Spicer, conducted a physical examination and documented ROM restrictions in the cervical and lumbar spine, right ankle, and shoulders; reduced grip strength in the hands; positive cervical compression tests, bilaterally; a one centimeter deficit in circumference in the left calf compared to the right calf; hypoesthesia in the left L4 dermatome compared to the right; positive straight leg raise tests bilaterally; and a positive sitting root test on the left. He opined that the reduced circumference of the left calf was consistent with atrophy due to prolonged nerve impairment in the left lower extremity. Dr. Spicer found permanent impairment based on his examination findings.

OWCP referred appellant to Dr. Panchbhavi for a second opinion examination. Dr. Panchbhavi, during his July 8, 2022 examination, noted that appellant presented with no sensory deficits; 5/5 muscle strength in the upper and lower extremities; negative supine straight leg raise, sitting straight leg raise, and sitting root tests; and some limited range of motion of the cervical spine and right ankle. In a supplemental report dated September 20, 2022, Dr. Panchbhavi found that appellant had no ratable impairment causally related to her accepted employment injury.

As Dr. Spicer and Dr. Panchbhavi disagreed regarding the findings on physical examination, a conflict in medical opinion exists between these physicians regarding the nature and extent of any sensory, strength, or motor deficits in appellant's upper and lower extremities.[20] 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).[21]

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 upper and lower extremities. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.[22]

[18] 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).

[19] 20 C.F.R. § 10.321; *P.H.*, Docket No. 21-0233 (issued May 10, 2023); *R.C.*, 58 ECAB 238 (2006).

[20] *See S.W.*, Docket No. 22-0917 (issued October 26, 2022).

[21] 5 U.S.C. § 8123(a).

[22] The Board notes that the employing establishment executed a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2022 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: December 7, 2023
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board