

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

S.C., Appellant)	
)	
and)	Docket No. 22-0564
)	Issued: March 27, 2023
U.S. POSTAL SERVICE, PLANETARIUM)	
STATION, New York, NY, Employer)	
)	

Appearances:
Michael D. Overman, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 8, 2022 appellant, through counsel, filed a timely appeal from a September 21, 2021 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 to consider 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.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 19, 2005 appellant, then a 42-year-old window clerk, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured her back when she tripped and fell forward onto her knees when picking up a parcel while in the performance of duty. She stopped work on the date of injury. OWCP accepted appellant's claim for bilateral knee contusions, thoracic or lumbar neuritis or radiculitis, and displacement of the lumbar intervertebral disc without myelopathy. It paid appellant wage-loss compensation on the supplemental rolls as of December 6, 2005.⁴

Thereafter, OWCP received a March 10, 2015 narrative report from Dr. Arthur Becan, an attending orthopedic surgeon. Dr. Becan noted appellant's history of injury, reviewed the medical evidence, and provided examination findings. He found that appellant had reached maximum medical improvement (MMI) from her work-related injuries on October 19, 2005. Dr. Becan found that appellant had permanent impairment of the lower extremities due to sensory loss and motor weakness, as well as her left contusion. He determined that she had 31 percent right lower extremity permanent impairment and 18 percent left lower extremity permanent impairment based upon the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁵ and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*).⁶

On May 6, 2015 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On September 28, 2015 OWCP forwarded the case record, including Dr. Becan's March 10, 2015 letter and a statement of accepted facts (SOAF), to Dr. Henry J. Magliato, Board-certified in orthopedic surgery serving as an OWCP district medical adviser (DMA), for review and determination as to whether appellant sustained permanent impairment as a result of her accepted October 19, 2005 employment injury based on the sixth edition of the A.M.A., *Guides* and the date of MMI.

In an October 5, 2015 report, Dr. Magliato noted that Dr. Becan's physical examination findings were contradicted by findings of appellant's prior attending physician and two second

³ Docket No. 18-1450 (issued March 4, 2019).

⁴ By decision dated June 1, 2007, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date, as she no longer had any residuals or disability causally related to her accepted employment-related injuries. By decision dated September 19, 2008, it vacated the June 1, 2007 decision and remanded the case for further development of the medical evidence to determine whether appellant sustained an additional lumbar condition as a consequence of her accepted conditions and whether she had continued employment-related disability. OWCP again paid appellant wage-loss based upon her wage-earning capacity on the periodic rolls until July 26, 2014.

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ *The Guides Newsletter* (July/August 2009).

opinion physicians who generally noted that she had fully recovered from her employment-related conditions without marked neurological findings. The DMA recommended that appellant be referred for an impartial medical evaluation to determine her entitlement to a schedule award.

On February 24, 2016 OWCP declared a conflict in medical opinion between Dr. Becan, the attending physician, and Dr. Magliato, the DMA, regarding the extent of appellant's permanent impairment due to her October 19, 2005 employment injury. On July 21, 2016 it referred appellant, a SOAF, the medical record, and a series of questions, to Dr. Lawrence C. Schweitzer, a Board-certified orthopedic surgeon selected as the impartial medical examiner (IME) to resolve the conflict in the medical opinion evidence.

In a report dated August 11, 2016, Dr. Schweitzer indicated that he reviewed appellant's medical records. He diagnosed lumbosacral strain. Dr. Schweitzer also accepted the condition of bilateral knee contusions. Utilizing the sixth edition of the A.M.A., *Guides*, he determined that appellant had seven percent permanent impairment of the lumbar spine based on multiple level disc herniations with medically documented findings and resolved radiculopathy. Dr. Schweitzer advised that there was no justifiable evidence for further impairment due to neurologic deficit. Additionally, he determined that appellant's accepted bilateral knee contusions had resolved without permanent impairment. Dr. Schweitzer concluded that appellant reached MMI years ago on an unknown date.

On November 10, 2016 Dr. Jovito Estaris, a Board-certified occupational medicine physician serving as a DMA, reviewed the medical record, and advised that Dr. Schweitzer had not provided detailed calculations to support his lumbar spine impairment rating. The DMA further advised that Dr. Schweitzer had not used *The Guides Newsletter* to rate impairment of either lower extremity due to a spinal nerve impairment. He found that appellant reached MMI on August 11, 2016, the date of Dr. Schweitzer's impairment evaluation. The DMA recommended that OWCP obtain an addendum report from Dr. Schweitzer containing an impairment rating based on *The Guides Newsletter*.

By letter dated November 30, 2016, OWCP requested that Dr. Schweitzer review Dr. Estaris' November 10, 2016 report, and provide an addendum report within 30 days. No response was received. By letter dated March 21, 2017, OWCP sent Dr. Schweitzer a second request for an addendum report.

In an addendum letter dated March 27, 2017, Dr. Schweitzer noted that he had reviewed Dr. Estaris' November 10, 2016 report. He related that *The Guides Newsletter* was not applicable because he found no clinical evidence of nerve impairment during his examination of appellant. Dr. Schweitzer further related that, non-key modifiers were not used because her functional history was unreliable, as she exhibited signs of symptom magnification and her electromyogram (EMG) studies were outdated. He reaffirmed his seven percent lumbar spine permanent impairment rating, as there was no credible evidence of an ongoing radiculopathy amongst "a number of independent observers." Dr. Schweitzer deferred to Dr. Estaris' expertise that appellant had reached MMI on August 11, 2016, the date of his own examination.

On May 8, 2017 the DMA, Dr. Estaris, reviewed Dr. Schweitzer's March 27, 2017 report and concluded that appellant had zero percent permanent impairment of the bilateral lower extremities due to her accepted conditions of thoracic or lumbosacral neuritis, or radiculitis. He

explained that Dr. Schweitzer found no nerve impairment to the lower extremities. The DMA further explained that *The Guides Newsletter* mandated ratings based on a nerve root injury for permanent impairment of the extremities, which precluded an impairment rating for the spine.

OWCP, by decision dated June 14, 2017, 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 weight of the medical evidence to the May 8, 2017 opinion of the DMA, Dr. Estaris.

On June 20, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 29, 2017.

By decision dated October 10, 2017, an OWCP hearing representative affirmed the June 14, 2017 decision. He determined that the recommendation of the DMA, Dr. Magliato, that appellant be referred to an IME had been insufficient to create a conflict in the medical opinion evidence regarding the extent of her permanent impairment. Thus, the hearing representative found that Dr. Schweitzer should have been designated as a second opinion physician, rather than an IME. He further found that the May 8, 2017 opinion of Dr. Estaris as the DMA represented the weight of the evidence, and established that appellant had no permanent impairment of the lower extremities.

On November 13, 2017 appellant, through counsel, requested reconsideration. With her reconsideration request, she submitted a letter dated November 1, 2017 from Dr. Becan. Dr. Becan reviewed Dr. Schweitzer's August 11, 2016 and March 27, 2017 reports and Dr. Estaris' November 10, 2016 report. He noted that appellant had positive objective diagnostic studies that showed pathology related to her lumbar spine. Thus, Dr. Becan disagreed with Dr. Schweitzer's finding that there was no grade modifier for clinical studies. He also disagreed with his normal physical examination findings, as Dr. Schweitzer reported that sensory to light touch was minimally decreased subjectively in the left calf. Dr. Becan related that there was no indication that Dr. Schweitzer utilized a Semmes Weinstein Monofilament test. Further, he maintained that, according to the sixth edition of the A.M.A., *Guides*, motor strength testing was graded on a scale of 0 to 5, and sensory examination was best quantified using the Semmes Weinstein Monofilament test. Dr. Becan noted that Dr. Schweitzer had provided a whole person impairment rating which was not used in these cases. In conclusion, he advised that his right lower extremity permanent impairment of 31 percent and left lower extremity permanent impairment of 18 percent remained unchanged.

On January 22, 2018 the DMA, Dr. Estaris, reviewed the medical record, including Dr. Becan's March 10, 2015 letter and Dr. Becan's November 1, 2017 letter. He noted the deficiencies in both physicians' reports. The DMA explained the basis for his zero percent permanent impairment ratings for appellant's lumbar spine and bilateral knees. He concluded that she had reached MMI on August 11, 2016, the date of Dr. Schweitzer's impairment evaluation.

OWCP, by decision dated February 9, 2018, denied modification of the October 10, 2017 decision. It accorded the weight of the medical evidence to the January 22, 2018 opinion of the DMA, Dr. Estaris, who again found that appellant had no employment-related permanent impairment of the lower extremities.

On July 24, 2018 appellant, through counsel, appealed to the Board. By decision dated March 4, 2019, the Board set aside the February 9, 2018 decision.⁷ The Board found that OWCP properly determined that there was no conflict of medical opinion evidence requiring appellant's referral to Dr. Schweitzer as an IME and properly designated Dr. Schweitzer as a second opinion physician. The Board then found that the August 11, 2016 second opinion report of Dr. Schweitzer, who found that appellant had seven percent permanent impairment of the lumbar spine and zero percent permanent impairment of the knees was in conflict with the March 10, 2015 report of Dr. Becan, the treating physician, who found that appellant had 31 percent permanent impairment of the right lower extremity and 18 percent permanent impairment of the left lower extremity. The Board remanded the case to OWCP for referral of appellant to an IME to resolve the conflict in the medical opinion evidence.

On January 7, 2021 OWCP referred appellant, along with a SOAF, the medical record, and a series of questions, to Dr. Alan Crystal, a Board-certified orthopedic surgeon, selected as the IME.

In a January 28, 2021 report, Dr. Crystal reviewed the SOAF and medical record. He noted that on examination appellant had no functional loss of use of her right and left knees due to her accepted conditions of bilateral knees contusions. Dr. Crystal explained that there were no objective findings related to the knees such as loss of range of motion or swelling. He indicated that the medical record only referenced appellant's knee condition on October 20, 2005. Dr. Crystal thus found that the accepted bilateral knee contusions reached MMI on November 20, 2005 as no x-rays or magnetic resonance imaging (MRI) scans were performed and no treatment was rendered related to appellant's knees. Additionally, he noted that contusions heal within a month. Further, Dr. Crystal noted that the medical record did not prove otherwise that appellant still suffered from a knee condition.

Dr. Crystal also opined that she had no functional loss of her bilateral lower extremities related to the accepted conditions of lumbar radiculitis and displacement of lumbar disc without myelopathy. He reasoned that there was no motor weakness and motor strength was intact. Dr. Crystal also reasoned that there were no reflex deficits although they were only noted by Dr. Becan. Further, neither he nor the second opinion physician found any atrophy while some treating physicians referenced right-sided atrophy. Additionally, Dr. Crystal noted that there was no sensory deficit in a dermatome. He indicated that while appellant complained of slight decreased sensation in her entire left lower extremity on January 28, 2021, this was a regional loss that did not occur with a lumbar radiculopathy. Dr. Crystal noted inconsistency in the medical record which revealed sensory deficits ranging from no sensory loss, right-sided sensory loss, left-sided sensory loss, and bilateral sensory loss. He found that MMI was reached on January 16, 2011 regarding the accepted lumbar conditions, which was one month after appellant received a lumbar epidural injection on December 16, 2010. Regarding appellant's diagnosis, Dr. Crystal noted that she had subjective complaints of throbbing and chronic low back pain. She did not have any complaints of numbness or weakness of the knees. Dr. Crystal noted that appellant did not undergo surgery on her knees or back. There were no objective findings related to the knees or lumbar spine and there were no findings of a lumbar radiculopathy. Regarding permanent impairment to the bilateral knees, he utilized Table 16-3, page 509 of the sixth edition of the

⁷ *Supra* note 3.

A.M.A., *Guides* and found a class 0 impairment as there was no significant objective abnormal findings on examination at MMI, resulting in zero percent lower extremity impairment. Regarding permanent impairment to the lumbar spine, Dr. Crystal referred to *The Guides Newsletter* and found a class 0 impairment based on a lack of motor strength deficits and verifiable sensory loss, resulting in zero percent lower extremity permanent impairment. He noted that this impairment rating did not infer that appellant did not suffer from ongoing back pain due to her degenerating discs and spinal arthritis.

By decision dated March 29, 2021, OWCP denied appellant's claim for a schedule award. It accorded the special weight of the medical evidence to Dr. Crystal's impartial medical opinion.

On April 14, 2021 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on August 4, 2021.

By decision dated September 21, 2021, a second OWCP hearing representative affirmed the March 29, 2021 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁸ and its implementing regulations⁹ 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.¹⁰ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹¹ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹²

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement*.¹³ In evaluating lower extremity impairment, the sixth edition requires identifying the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404.

¹⁰ *Id.* See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

¹¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (March 2017).

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

¹³ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3.

(GMPE), and clinical studies (GMCS).¹⁴ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁵ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹⁶

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. However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹⁷ The sixth edition of the A.M.A., *Guides* 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. 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 into OWCP's procedures.¹⁸

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.¹⁹ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.²⁰ Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.²¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her lower extremities, warranting a schedule award.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence that appellant submitted prior to the issuance of OWCP's February 9, 2018 merit decision because

¹⁴ *Id.* at 494-531.

¹⁵ *Id.* 411.

¹⁶ *See M.P.*, Docket No. 18-1298 (issued April 12, 2019); *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹⁷ 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).

¹⁸ *Supra* note 11 at Chapter 3.700, Exhibit 4 (January 2010).

¹⁹ 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).

²⁰ *See M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

²¹ *R.R.*, Docket No. 21-0212 (issued November 3, 2021); *V.H.*, Docket No. 20-0012 (issued November 5, 2020).

the Board considered that evidence in its March 4, 2019 decision. Findings made in prior Board decisions are *res judicata*, absent any further review by OWCP, under section 8128 of FECA.²²

In a January 28, 2021 report, Dr. Crystal, selected as the IME, discussed appellant's history of injury, and reviewed appellant's medical records. He reported normal findings on physical examination of appellant's knees and lumbar spine. Regarding permanent impairment to the bilateral knees, Dr. Crystal utilized Table 16-3, page 509 of the sixth edition of the A.M.A., *Guides* and found a class 0 impairment as there was no significant objective abnormal findings on examination, resulting in zero percent permanent impairment of the right and left lower extremities. Regarding peripheral lumbar nerve impairment, he referred to *The Guides Newsletter* and found a class 0 impairment based on a lack of motor strength deficits and verifiable sensory loss of the lower extremities, resulting in zero percent lower extremity permanent impairment.

As noted above, when a case is referred to an IME 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.²³ The Board finds that Dr. Crystal's report is entitled to special weight and established that appellant had no right or left lower extremity permanent impairment.²⁴ Dr. Crystal properly applied the standards of *The Guides Newsletter* to determine that appellant did not have permanent impairment of a scheduled member or function of the body. *The Guides Newsletter* rates permanent impairment from spinal radiculopathy based upon sensory or motor loss of the extremities.²⁵ Dr. Crystal's opinion was based on a proper factual and medical history, which he reviewed, and his normal examination findings. He found that appellant had no sensory or motor loss of the lower extremities. Dr. Crystal therefore properly determined that appellant did not have a ratable permanent impairment. As his report indicated that appellant had no permanent impairment of the lower extremities due to the accepted bilateral knee contusions, thoracic or lumbar neuritis or radiculitis, and displacement of the lumbar intervertebral disc without myelopathy, it is insufficient to establish that she was entitled to a schedule award.²⁶ Accordingly, OWCP properly accorded special weight to Dr. Crystal's report.²⁷

The record contains no other probative, rationalized medical opinion which establishes that appellant had right and/or left lower extremity permanent impairments based upon the A.M.A., *Guides*, and *The Guides Newsletter*. As such, the Board finds that she has not met her burden of proof.

²² See *C.D.*, Docket No. 18-0677 (issued November 4, 2019); *B.R.*, Docket No. 17-0294 (issued May 11, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

²³ *Supra* note 21.

²⁴ See *V.G.*, Docket No. 19-1728 (issued September 2, 2020); *H.K.*, Docket No. 18-0528 (issued November 1, 2019); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

²⁵ See *E.F.*, Docket No. 18-1723 (issued May 1, 2019).

²⁶ See *A.M.*, Docket No. 16-0499 (issued June 28, 2016); see also *Veronica Williams*, 56 ECAB 367 (2005).

²⁷ See *R.R.*, *supra* note 21; *V.G.*, *supra* note 24; *D.S.*, Docket No. 18-0336 (issued May 29, 2019); *T.C.*, Docket No. 17-1741 (issued October 9, 2018).

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her lower extremities, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 27, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board