United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 11-833**
	)	**Issued: November 4, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Norfolk, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 15, 2011 appellant filed a timely appeal from October 5, 2010 and January 12, 2011 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[1] 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 sustained more than a four percent impairment of the left leg for which she received a schedule award.

On appeal, appellant asserts that her physician's impairment rating should carry the weight of the medical evidence. She also contends that an impartial medical examiner performed a cursory examination while her attending physician provided detailed functional testing.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on February 2, 1990 appellant, then a 31-year-old clerk, sustained a lumbar strain and herniated L4-5 disc with radiculopathy while lifting a sack of mail. On August 22, 1995 Dr. J. Abbott Byrd, III, an attending Board-certified orthopedic surgeon specializing in surgery of the spine, performed an open excision of the L5-S1 disc, a posterior lumbar interbody fusion at L5-S1 with tricortical iliac crest bone graft, bilateral posterolateral spinal fusion at L5-S1 with bone graft and fixation hardware placement. Appellant received compensation on the periodic rolls effective August 22, 1995. She returned to part-time limited-duty work as a modified distribution clerk on January 8, 1996.[2] Appellant received compensation on the periodic rolls for wage loss.

On July 7, 1998 Dr. Byrd opined that appellant had reached maximum medical improvement and was able to continue working light duty for four hours a day with permanent restrictions limiting lifting to 15 pounds. Appellant had 10 percent permanent impairment due to left-sided lumbar radiculopathy. Dr. Byrd submitted periodic reports through October 2002 finding appellant's condition unchanged.

In an August 31, 1998 report, an OWCP medical adviser noted that appellant had reached maximum medical improvement. He found five percent permanent impairment to each lower extremity based on Table 83 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*).[3]

In a January 11, 2006 report, Dr. Byrd noted decreased sensation in the left heel. He submitted reports through November 12, 2008.

Appellant retired from the employing establishment on December 31, 2008 and elected to receive FECA benefits. On January 20, 2010 she claimed a schedule award. In February 17 and April 26, 2010 letters, OWCP advised appellant to obtain an impairment rating from her attending physician utilizing the sixth edition of the A.M.A., *Guides*.

On June 2, 2010 Cindy Free and Rebecca McLain, physical therapists, administered lower extremity strength tests. Referring to Table 16-12[4] of the sixth edition of the A.M.A., *Guides*, the therapists found a class 1 impairment of the common peroneal and tibial nerves due to sensory and motor deficits. A class 1 sensory impairment of the common peroneal nerve had a mid-range default value of three percent according to Table 16-12. The therapists found a

[2] By decision dated July 24, 1996, OWCP issued a wage-earning capacity determination based on appellant's actual earnings of $382.00 a week working four hours a day as a modified distribution clerk beginning in January 1996. On October 18, 1996 it obtained a second opinion from Dr. Felix M. Kirven, an orthopedic surgeon, who found appellant could work eight hours a day and lift up to 30 pounds. In a March 3, 1997 report, Dr. Byrd opined that appellant could work six hours a day and lift up to 15 pounds.

[3] Table 83, page 130 of the fourth edition of the A.M.A., *Guides* is entitled "Unilateral Spinal Nerve Root Impairment Affecting the Lower Extremity."

[4] Table 16-12, pages 534-36 of the sixth edition of the sixth edition of the A.M.A., *Guides* is entitled "Peripheral Nerve Impairment (LEI) [lower extremity impairment]."

grade modifier for Functional History (GMFH) of two on the American Association of Orthopedic Surgeons (AAOS) lower limb outcome scale. The therapists found that, as there were no appropriate grade modifiers for Physical Examination (GMPE) or Clinical Studies (GMCS), the default value of three percent remained undisturbed. According to Table 16-12, a class 1 sensory involvement of the tibial nerve equaled two percent impairment of the lower extremity. Appellant also had a class 1 mild motor deficit of the tibial nerve for strength at 4/5 above the knee, equaling five percent lower extremity impairment. The therapists assigned a GMFH of two for the AAOS lower limb outcome scale, no net adjustment for GMPE and GMCS, resulting in two percent lower extremity impairment for sensory deficit and five percent impairment for motor deficit. The therapists totaled the two and five percent impairments to equal a seven percent impairment of the left lower extremity. Using the Combined Values Chart, the therapists combined the 7 percent and 3 percent impairments to equal a 10 percent impairment of the left lower extremity.

In a June 23, 2010 report, Dr. Byrd reviewed the June 2, 2010 impairment rating prepared by Ms. Free and Ms. McLain. He concurred with their ratings under the A.M.A., *Guides*. Dr. Byrd opined that appellant had a 10 percent impairment of the left lower extremity as set forth in the June 2, 2010 report.

On July 27, 2010 OWCP referred the June 2, 2010 impairment evaluation, a statement of accepted facts and the medical record to an OWCP medical adviser for review. In an August 10, 2010 report, the medical adviser noted that Dr. Byrd's impairment rating did not relate to appellant's left lower extremity as it addressed the tibial and peroneal nerves only. He opined that Dr. Byrd should have rated the sciatic nerve as it originated in the spine. The medical adviser found that, according to Table 16-12, page 535 of the A.M.A., *Guides*, appellant had four percent impairment of the left leg due to a class 1 mild sensory deficit of the sciatic nerve.

OWCP found a conflict of medical opinion between Dr. Byrd, for appellant and OWCP's medical adviser, for the government, regarding the appropriate percentage of permanent impairment. To resolve the conflict, it referred appellant to Dr. Edward W. Gold, a Board-certified orthopedic surgeon, as impartial medical examiner. A statement of accepted facts and a copy of the medical record were provided for his review. In a September 20, 2010 report, Dr. Gold provided a history of injury and treatment and reviewed the statement of accepted facts. On examination, he noted diffuse tenderness to lumbar palpation, limited range of lumbar motion, decreased sensation in the toes of both feet, normal deep tendon reflexes in both lower extremities and negative straight leg raising tests bilaterally. Dr. Gold diagnosed chronic lumbar pain and left sciatica status post L5-S1 fusion. He opined that "the calculation for sciatic nerve impairment, which was the proper neurological location attributable to the herniated disc impingement, would include sensory loss of both the peroneal and tibial nerves." Dr. Gold did not find motor loss on examination. He agreed with the medical adviser that appellant had four percent impairment of the left lower extremity due only to sensory loss in the sciatic nerve.

By decision dated October 5, 2010, OWCP granted appellant a schedule award for four percent impairment of the left lower extremity. The period of the award ran from September 26 to December 15, 2010.

In an October 26, 2010 letter, appellant requested a review of the written record. She asserted that Dr. Gold did not evaluate her properly and that Dr. Byrd's opinion should be given weight. Appellant submitted reports dated October 13 to December 22, 2010 from Dr. Byrd, who noted mechanical lumbar pain and a normal motor and sensory examination of both lower extremities. She participated in physical therapy in December 2010.

By decision dated and finalized January 12, 2011, an OWCP hearing representative affirmed the October 5, 2010 schedule award decision. The hearing representative found that Dr. Gold's opinion represented the weight of the medical evidence as it was thorough, well rationalized, based on a complete and accurate history. Also Dr. Gold explained that Dr. Byrd's rating was in error.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[6] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.[7]

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).[8] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[9] The net adjustment formula is GMFH - CDX + GMPE - CDX + GMCS - CDX.

FECA authorizes the payment of schedule awards only for the permanent impairment of specified members, organs or functions of the body. No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.[10] Because

[5] 5 U.S.C. § 8107.

[6] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- *Medical, Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] A.M.A., *Guides* (6th ed. 2008), page 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[9] A.M.A., *Guides* (6th ed. 2008), pp. 494-531.

[10] *William Edwin Muir*, 27 ECAB 579 (1976).

neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,[11] no claimant is entitled to such an award.[12] Amendments to FECA, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.[13]

Section 8123 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.[14] In situations where there exist opposing medical 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]

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 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.[16] If the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist.[17]

ANALYSIS

OWCP accepted that appellant sustained a lumbar strain, herniated L4-5 disc and left-sided radiculopathy necessitating an L5-S1 discectomy and fusion. Appellant claimed a schedule award on December 3, 2007. In support of her claim, she submitted July 7, 1998 and June 23, 2010 impairment ratings by Dr. Byrd, an attending Board-certified orthopedic surgeon, opining that appellant had a 10 percent impairment of the left leg due to peripheral nerve impairment originating in the lumbar spine. Dr. Byrd's June 23, 2010 report was based on sensory impairment of the common peroneal and tibial nerves and a motor impairment of the tibial nerve according to Table 16-12 of the sixth edition of the A.M.A., *Guides*. An OWCP

[11] FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

[12] *R.H.*, Docket No. 11-80 (issued August 15, 2011).

[13] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[14] 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

[15] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[16] *Harry T. Mosier*, 49 ECAB 688 (1998).

[17] *Guiseppe Aversa*, 55 ECAB 164 (2003).

medical adviser opined on August 10, 2010 that Dr. Byrd should have assessed only sciatic nerve impairment. The medical adviser opined that, according to Table 16-12, appellant had a mild sensory impairment of the sciatic nerve equaling four percent impairment of the left lower extremity.

OWCP found a conflict between Dr. Byrd and OWCP's medical adviser regarding the appropriate percentage of permanent impairment and appointed Dr. Gold, a Board-certified orthopedic surgeon, as impartial medical examiner. In his September 20, 2010 report, Dr. Gold noted negative straight leg raising tests bilaterally, sensory loss in the toes of both feet, and normal reflexes in both legs. He concurred with OWCP's medical adviser that appellant had four percent impairment of the left leg due to sciatic nerve impairment, but did not explain how his clinical findings correlated to a sciatic nerve impairment.[18] Also, Dr. Gold opined that the sciatic nerve impairment "would include sensory loss of both the peroneal and tibial nerves." However, he did not explain the medical reasoning for this opinion. The Board notes that Table 16-12 contains separate rating grids for the sciatic, common peroneal and tibial nerves. Dr. Gold did not set forth why he believed that the sciatic nerve impairment would encompass deficits of other nerves according to Table 16-12. Therefore, the Board finds that Dr. Gold's opinion requires clarification.

As stated, OWCP must obtain a supplemental report from an impartial medical examiner to cure a deficiency in the original opinion.[19] Therefore, the case will be returned to OWCP to obtain a supplemental, clarifying report from Dr. Gold explaining his rationale for the four percent impairment rating. Following this and any other development deemed necessary, OWCP will issue an appropriate decision in the case.

On appeal, appellant asserts that Dr. Gold's opinion is insufficient as he only performed a cursory examination designed to corroborate the report of an OWCP medical adviser. As stated, the case will be remanded to OWCP to obtain a supplemental report from Dr. Gold, followed by issuance of an appropriate decision.

CONCLUSION

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

[18] *See Richard R. LeMay*, 56 ECAB 341 (2005) (to properly resolve a medical conflict, it is the impartial medical specialist who should provide a reasoned opinion as to the extent of permanent impairment in accordance with the A.M.A., *Guides*; an OWCP medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist).

[19] *Harry T. Mosier*, *supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 12, 2011 and October 5, 2010 are set aside and the case remanded to OWCP for further development consistent with this decision.

Issued: November 4, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board