United States Department of Labor
Employees' Compensation Appeals Board

K.C., Appellant	)	
and	)	**Docket No. 13-1767**
	)	**Issued: January 14, 2014**
DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION, Boston, MA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 22, 2013 appellant filed a timely appeal from a February 15, 2013 decision of the Office of Workers' Compensation Programs (OWCP) that denied her claim for an additional schedule award and an April 19, 2013 decision that denied her request for a hearing. 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 the appeal.

ISSUES

The issues are: (1) whether appellant has more than 47 percent impairment of the right leg for which she received schedule awards; and (2) whether OWCP properly denied her request for a hearing.

On appeal, appellant asserts that the schedule award decision was in error because neither OWCP's referral physician nor the medical adviser properly applied the sixth edition of the

[1] 5 U.S.C. §§ 8101-8193.

American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2] They failed to utilize section 3.700 for rating a spinal nerve extremity impairment, they did not consider an electrodiagnostic study and the schedule award decision did not include an impairment rating for her right upper extremity.

FACTUAL HISTORY

On August 12, 2009 appellant, then a 33-year-old claims examiner, sustained an injury to the right leg and right shoulder when she slipped on plastic stripping while at work. The claim was initially accepted for sprain of the right shoulder, sprain of the right hip and lumbar strain. Appellant remained off work until September 14, 2009 when she returned to modified duty for four hours daily. A February 2, 2010 lower extremity electrodiagnostic study demonstrated moderate right L5-S1 radiculopathy. The claim was accepted for displacement of lumbar intervertebral disc (L5-S1) without myelopathy and right thoracic or lumbosacral neuritis or radiculitis. The previously accepted right shoulder sprain was changed to right rotator cuff strain. Appellant received wage-loss compensation until July 17, 2010 when she accepted a full-time position as program specialist with another federal agency.

On August 17, 2011 appellant filed a schedule award claim. In reports dated February 25 and August 12, 2011, Dr. James T. McGlowan, a Board-certified orthopedic surgeon, who provided examination findings. He noted discomfort on range of motion of the right shoulder with 4/5 deltoid and rotator cuff and right hip strength. There was a positive Patrick Faber test in the right hip which was stiff and weak, tenderness to palpation of the right sacroiliac (SI) joint and right leg foot drop. Dr. McGlowan advised that appellant had reached maximum medical improvement. On October 3, 2011 Dr. Daniel D. Zimmerman, an OWCP medical adviser and a Board-certified internist, recommended a second-opinion evaluation.

On November 16, 2011 OWCP referred appellant to Dr. Gilbert Shapiro, a Board-certified orthopedic surgeon, for a second-opinion examination and an impairment rating. In a December 16, 2011 report, Dr. Shapiro reviewed the medical record and diagnostic studies. He described the employment injury and appellant's complaints of an improved right shoulder with ongoing low back pain and numbness radiating into the right leg and a drop-foot type of gait. Dr. Shapiro diagnosed right shoulder strain, resolved; right hip strain, resolved; right sciatica with foot drop; and disc protrusion at L5-S1. He found a grade 2, moderate impairment under Table 16-11, Sensory and Motor Impairment, due to weakness against gravity. Dr. Shapiro applied the grade 2 impairment to Table 16-12, Peripheral Nerve Impairment, finding a class 1 impairment due to sciatica. He found grade 1 modifiers for functional history and clinical studies and no modifier for physical examination because appellant's physical findings were used to define impairment ranges. After applying the net adjustment formula, which moved the default value to grade E, Dr. Shapiro concluded that she had a right lower extremity sensory deficit of 9 percent and a motor deficit of 13 percent, for a total right leg impairment of 22 percent. He further concluded that appellant had no impairment for the resolved right shoulder and hip strains.

[2] A.M.A., *Guides* (6th ed. 2008).

On January 4, 2012 Dr. Zimmerman, the medical adviser, advised that maximum medical improvement was reached on December 16, 2011, the date of Dr. Shapiro's evaluation. He agreed with Dr. Shapiro's conclusion that appellant had a 22 percent right leg impairment.

On January 17, 2012 appellant was granted a schedule award for a 22 percent impairment of the right lower extremity, for a total of 63.36 weeks, to run from December 16, 2011 to March 3, 2013.

Appellant timely requested a hearing, that was held on May 10, 2012. On May 14, 2012 OWCP accepted right foot drop. On May 16, 2012 Dr. McGlowan found mildly positive Hawkins and Neer impingement signs and near full right shoulder range of motion with continued 4/5 strength. He diagnosed foot drop and SI joint discomfort, work related; and right rotator cuff tendinosis, work related.

By decision dated July 17, 2012, an OWCP hearing representative set aside the January 17, 2012 decision and remanded the case to Dr. Shapiro for further medical development. Upon remand, OWCP was to prepare an updated statement of accepted facts and remand the case to Dr. Shapiro for a new examination and opinion.[3]

In an August 17, 2012 report, Dr. McGlowan stated that appellant continued to have uncomfortable range of motion of the right hip and foot and that her foot drop continued. Appellant was seen in an emergency room on October 11, 2012 for complaints of back pain. Myofascial strain, lumbar strain and herniated disc were diagnosed and she was provided medications.

In an October 24, 2012 report, Dr. Shapiro reviewed the statement of accepted facts and medical record, including Dr. McGlowan's reports. He diagnosed right shoulder strain with impingement, resolved; disc protrusion at L5-S1 with right sciatica and foot drop; strain of right hip, resolved; and contusion of right wrist, question ligamentous tear.[4] Dr. Shapiro advised that right hip and shoulder examinations were normal with no impairment. In reference to the foot drop, he indicated that appellant had a class 3 impairment under Table 16-12, due to a severe motor deficit which had a default value of 47 percent impairment. Dr. Shapiro found a grade modifier 3 for functional history, no modifier for physical examination because neurologic findings were used to define the impairment range and no modifier for clinical studies because no electrodiagnostic testing was done. He applied the net adjustment formula, which yielded no adjustment. Dr. Shapiro concluded that appellant had reached maximum medical improvement and had 47 percent impairment of the right leg.

[3] On July 27, 2012 appellant filed a recurrence claim, indicating that her foot drop caused her to fall at home on July 15, 2012. She submitted a July 20, 2012 report in which Dr. George Despines, a Board-certified internist, diagnosed pain in soft tissues. A July 20, 2012 x-ray of the right forearm, wrist and hand was negative. An August 11, 2012 magnetic resonance imaging (MRI) scan of the right wrist indicated possible mild tenosynovitis. On October 5, 2012 Dr. McGlowan advised that an MRI scan study indicated a positive triangular fibrocartilage tear of the right wrist. On December 20, 2012 OWCP accepted the July 15, 2012 recurrence for medical care.

[4] *Id*.

In a November 15, 2012 addendum, Dr. Shapiro explained that he had again reviewed Dr. McGlowan's reports in reference to the right shoulder and hip. He advised that right shoulder examination approached normal with excellent strength and minimal range of motion loss for no impairment and that there were no objective findings on right hip examination, for no impairment. Dr. Shapiro reiterated that appellant had 47 percent right lower extremity impairment due to foot drop and indicated that maximum medical improvement was reached in July 2010 when she returned to full-time work and could drive to work.

On December 5, 2012 Dr. Zimmerman, the medical adviser, agreed with Dr. Shapiro's opinion that appellant had no impairment of the right shoulder or right hip and that she had 47 percent impairment of the right leg due to foot drop, with a date of maximum medical improvement of July 1, 2010.

By decision dated February 15, 2013, appellant was granted a schedule award for an additional 25 percent impairment of the right leg, or a total impairment of 47 percent. It ran for 72 weeks of compensation from July 18, 2010 to December 3, 2011. Appellant was provided appeal rights that indicated a hearing request must be submitted within 30 calendar days of the date of the decision, as determined by the postmark of her letter.

In a request dated March 15, 2013 and postmarked March 21, 2013, appellant requested a hearing. In an April 19, 2013 decision, OWCP denied her request for a hearing on the grounds that it was untimely filed. It noted that appellant's hearing request was postmarked March 21, 2013, more than 30 days after issuance of the February 15, 2013 OWCP decision. OWCP advised her that the issue in the case could equally be addressed by requesting reconsideration with OWCP.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA and its implementing federal regulation,[5] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[8] In 1960, amendments to FECA 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

[5] 20 C.F.R. § 10.404. *See* 5 U.S.C. § 8107.

[6] *Id.* at § 10.404(a).

[7] FECA Bulletin No. 09-03 (issued March 15, 2009).

[8] *Pamela J. Darling*, 49 ECAB 286 (1998).

the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[9]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.[10] OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in a July/August 2009 A.M.A., *Guides Newsletter*.[11]

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH) and if electrodiagnostic testing were done, Clinical Studies (GMCS).[12] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[13]

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision. OWCP accepted that on August 12, 2009 appellant sustained a right shoulder rotator cuff strain, right hip and lumbar sprains and displacement of lumbar intervertebral disc (L5-S1) without myelopathy and right thoracic or lumbosacral neuritis or radiculitis. Appellant was granted schedule awards for right lower extremity impairment totaling 47 percent.

OWCP has adopted the proposed tables outlined in a July/August 2009 A.M.A., *Guides Newsletter* for rating impairment of the upper or lower extremities caused by a spinal injury, which is presented as Exhibit 4 of section 3.700 of its procedures.[14] In this case, rather than utilizing Proposed Table 2, Spinal Nerve Impairment: Lower Extremity Impairment,[15] in his reports, Dr. Shapiro utilized Table 16-12, Peripheral Nerve Impairment, for rating appellant's right lower extremity. Dr. Zimmerman, the medical adviser, agreed with Dr. Shapiro's findings and conclusions.

[9] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

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

[11] FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, Chapter 3.700, Exhibit 1, note 5 (January 2010); the A.M.A., *Guides Newsletter* is included as Exhibit 4.

[12] A.M.A., *Guides*, *supra* note 2 at 533.

[13] *Id*. at 521.

[14] *Supra* note 11.

[15] *Id*., Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 3.700 at Exhibit 4.

Dr. Shapiro did not utilize the standard set forth in the A.M.A., *Guides Newsletter* found in Exhibit 4 of section 3.700 of OWCP's procedures or explain why it was not applicable in this case. His opinions on the extent of appellant's right lower extremity impairment is of reduced probative value.[16] OWCP's procedures contemplate that the examiner should apply the A.M.A., *Guides Newsletter*.[17] The case will be remanded for further medical development. Thereafter, OWCP shall issue an appropriate decision on the extent of appellant's right lower extremity impairment.

As to appellant's assertion on appeal that she is entitled to a schedule award for the right upper extremity, the Board's jurisdiction extends only to the review of final decisions by OWCP.[18] OWCP has not issued a final decision regarding the accepted right upper extremity condition. Regarding her argument that Dr. Shapiro did not consider an electrodiagnostic study, the record includes a February 2, 2010 lower extremity study.

In light of the Board's disposition regarding Issue 1, Issue 2 is rendered moot.

CONCLUSION

The Board finds that this case is not in posture for decision regarding the degree of appellant's right lower extremity impairment.

[16] *M.W.*, Docket No. 13-928 (issued August 15, 2013).

[17] *Id.*

[18] 20 C.F.R. § 501.2(c); *E.L.*, 59 ECAB 405 (2008).

ORDER

IT IS HEREBY ORDERED THAT the April 19 and February 15, 2013 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: January 14, 2014
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board