United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 11-2037**
	)	**Issued: May 8, 2012**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 13, 2011 appellant, through her attorney, filed a timely appeal from a June 14, 2011 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.

ISSUE

The issue is whether appellant has more than a seven percent permanent impairment of each lower extremity.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated September 20, 2004, the Board affirmed a November 26, 2003 OWCP decision finding that appellant had not established a recurrence of disability beginning June 28, 2002 causally related to her October 7,

[1] 5 U.S.C. § 8101 *et seq.*

1997 employment injury.[2] The facts and the circumstances as set forth in the prior decision are hereby incorporated by reference.

On August 12, 2005 appellant, through her attorney, requested a schedule award. She submitted a May 16, 2005 impairment evaluation from Dr. David Weiss, an osteopath, who applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) and found that appellant had an eight percent impairment of the left lower extremity due to calf atrophy of one centimeter and a three percent impairment due to pain.[3] Dr. Weiss further found three percent right lower extremity impairment due to pain.

On May 17, 2005 an OWCP medical adviser reviewed Dr. Weiss' report and concurred with his finding that appellant sustained three percent impairment due to pain in the right and left lower extremities according to Figure 18-1 on page 574. He determined, however, that one centimeter of left calf atrophy yielded three percent impairment, for a total left lower extremity impairment of six percent.

OWCP found that a conflict existed between Dr. Weiss and the medical adviser regarding the extent of any permanent impairment. On January 3, 2009 it referred appellant to Dr. Charles E. Kollmer, a Board-certified orthopedic surgeon, for an impartial medical examination.

An electromyogram (EMG) and nerve conduction studies (NCS) performed for Dr. Kollmer on April 16, 2009 revealed findings "consistent with chronic motor axon loss" and suggesting L5 radiculopathy.

In a report dated May 21, 2009, Dr. Kollmer diagnosed lumbosacral strain, Grade 2 spondylolisthesis, degenerative disc disease at L4-5 and L5-S1 with chronic radiculopathy, disc bulging at L4-5 and atrophy of the lower extremities. On examination he measured calf circumference as 37 centimeters on the right and 35.5 centimeters on the left with "sciatic notice tenderness towards the left side with straight leg raising." Dr. Kollmer applied the fifth edition of the A.M.A., *Guides* to his findings and determined that appellant had a 12 percent impairment of the lower extremity. He further noted that using the sixth edition of the A.M.A., *Guides* "comes to the same number with [appellant] being in [c]lass 1 using page 520, Table 16-9 for the lower extremities." Dr. Kollmer attached copies of pages of the fifth and sixth editions of the A.M.A., *Guides*.

On September 28, 2009 an OWCP medical adviser reviewed Dr. Kollmer's report and stated:

> "With respect to the lower extremities he utilizes Table 16-9 on page 520 and puts the patient at a [c]lass 1 impairment with a default grade of five which is between 1 percent, 13 percent being a default grade of five or a C grade of impairment

[2] Docket No. 04-994. OWCP accepted that on October 7, 1997 appellant, then a 46-year-old clerk, sustained lumbar disease and lumbosacral strain superimposed on preexisting spondylolisthesis. It paid her compensation for intermittent periods of temporary total disability.

[3] A.M.A., *Guides* 530, 574, Table 17-6, Figure 18-1.

which would place [appellant] right in the middle and therefore right in the middle of 1 through 13 and somewhere between 6 and a 7 not 12 percent as indicated. Therefore giv[ing] [appellant] the benefit of the doubt, 12 percent total impairment would otherwise be indicated. I do otherwise agree with the date of maximum medical improvement. This would be seven percent for the left lower extremity and seven percent for the right lower extremity."

By decision dated December 1, 2010, OWCP granted appellant a schedule award for a seven percent permanent impairment of the left lower extremity and a seven percent impairment of the right lower extremity. The period of the award ran for 40.42 weeks from May 16, 2005 to February 22, 2006.

On December 6, 2010 appellant, through her attorney, requested an oral hearing. At the videoconference hearing, held on April 12, 2011, counsel argued that the impartial medical examiner did not explain his impairment rating under the sixth edition of the A.M.A., *Guides* or apply grade modifiers.

By decision dated June 14, 2011, the hearing representative affirmed the December 1, 2010 decision. He determined that Dr. Weiss did not properly apply the A.M.A., *Guides* as he failed to explain why 1 centimeter atrophy constituted an eight percent impairment, the maximum allowed, when 1 to 1.9 centimeters yielded between a three and eight percent impairment. The hearing representative thus found that his report did not create a conflict with the medical adviser and that Dr. Kollmer was a second opinion physician rather than an impartial medical examiner. He concluded that the medical adviser properly applied the sixth edition of the A.M.A., *Guides* in finding that appellant had no more than a seven percent impairment of each lower extremity.

On appeal appellant's attorney argues that Dr. Kollmer did not adequately explain his application of the A.M.A., *Guides* and that the medical adviser resolved the conflict in medical opinion.

LEGAL PRECEDENT

The schedule award provision of FECA,[4] and its implementing federal regulations,[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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

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), Physical Examination (GMPE) and Clinical Studies (GMCS).[8] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

If there is a disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician who shall make an examination.[9] When 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.[10]

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.[11] However, when the impartial medical specialist is unable to clarify or elaborate on the original report or if a supplemental report is also vague, speculative or lacking in rationale, OWCP must submit the case record to a second impartial specialist for the purpose of obtaining a rationalized medical opinion on the issues.[12]

OWCP procedures indicate that referral to OWCP's medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained. Where a medical conflict is present, it is the medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*.[13] An OWCP medical adviser may create a conflict in medical opinion but generally may not resolve the conflict.[14]

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[6] *Id.* at § 10.404(a).

[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* 494-531.

[9] 5 U.S.C. § 8123(a).

[10] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[11] *Raymond A. Fondots*, 53 ECAB 637 (2002); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

[12] *Nancy Keenan*, 56 ECAB 687 (2005); *Roger W. Griffith*, 51 ECAB 491 (2000).

[13] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (October 1995).

[14] *See Thomas J. Fragale*, 55 ECAB 619 (2004).

ANALYSIS

OWCP accepted that appellant sustained lumbar disease and lumbosacral strain superimposed on preexisting spondylolisthesis due to an October 7, 1997 employment injury. Appellant submitted a May 16, 2005 impairment evaluation from Dr. Weiss, who found that she had an eight percent permanent impairment of the left lower extremity and a three percent permanent impairment of the right lower extremity using the fifth edition of the A.M.A., *Guides*. An OWCP medical adviser reviewed Dr. Weiss' opinion and disagreed with his finding that appellant had an eight percent impairment due to atrophy of the left lower extremity. He determined that she had three percent left lower extremity impairment due to atrophy and a three percent left lower extremity impairment due to pain, for a total left lower extremity impairment of six percent. OWCP thus found that there was a conflict in medical opinion between Dr. Weiss and the medical adviser. While the hearing representative determined that Dr. Weiss' report was insufficient to create a conflict as he did not properly apply the fifth edition of the A.M.A., *Guides*, the Board notes that a finding of an eight percent impairment for one centimeter of atrophy is within the permissible range under the A.M.A., *Guides* and thus a conflict existed between Dr. Weiss and the medical adviser regarding the extent of appellant's left lower extremity impairment.[15] Consequently, OWCP properly referred appellant to Dr. Kollmer for an impartial medical examination to determine the extent of her impairment of the left lower extremity. Regarding the right lower extremity, both Dr. Weiss and the medical adviser found that appellant had three percent impairment. Consequently, Dr. Kollmer provided a second opinion examination regarding the right lower extremity.

On May 21, 2009 Dr. Kollmer listed findings on examination of 37 centimeters of calf circumference on the right and 35.5 centimeters on the left. He further found tenderness from the sciatic nerve on the left with straight leg raising. Dr. Kollmer applied the fifth edition of the A.M.A., *Guides* and found that appellant had a 12 percent lower extremity impairment, without specifying the amount of the impairment on each side. As of May 1, 2009, however, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[16] Dr. Kollmer noted that appellant also had 12 percent impairment under the sixth edition of the A.M.A., *Guides,* citing Table 16-9 on page 520, which describes the method for determining grade in an impairment class. He did not, however, identify a diagnosis, apply grade modifiers or indicate whether the 12 percent impairment was for each lower extremity or bilaterally. Consequently, as argued by appellant's attorney on appeal, Dr. Kollmer's opinion is insufficient to resolve the conflict in medical opinion regarding the extent of permanent impairment of the left lower extremity.

In situations where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.[17] OWCP should have requested a supplemental

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[15] A.M.A., *Guides* 530, Table 17-6.

[16] *See supra* note 7.

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

report from Dr. Kollmer applying the sixth edition of the A.M.A., *Guides* to his clinical findings and providing a detailed opinion regarding the extent of appellant's permanent impairment of the left lower extremity. An OWCP medical adviser reviewed Dr. Kollmer's report and found that she had a seven percent impairment of each lower extremity. In order to properly resolve the conflict created, however, it is the impartial medical examiner 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 examiner.[18] Consequently, a conflict in medical opinion remains regarding appellant's permanent impairment of the left lower extremity.

Dr. Kollmer's opinion is further insufficient to establish that extent of appellant's right lower extremity impairment under the sixth edition of the A.M.A., *Guides*. As discussed, he generally found 12 percent lower extremity impairment without identifying a diagnosis or indicating whether the impairment was for each lower extremity or both extremities. An OWCP medical adviser reviewed Dr. Kollmer's opinion and used Table 16-9 to find seven percent right lower extremity impairment. Table 16-9, however, explains how to determine the grade in an impairment class after identifying the appropriate diagnosis using the relevant regional grade and then applying the appropriate grade modifiers. Neither Dr. Kollmer nor the medical adviser properly applied the sixth edition of the A.M.A., *Guides* in determining the extent of appellant's right lower extremity impairment. Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[19]

Accordingly, the case will be set aside and remanded for OWCP to obtain a supplemental, clarifying report from Dr. Kollmer explaining his impairment ratings under the sixth edition of the A.M.A., *Guides*.[20] Following this and any further development deemed necessary, it shall issue a *de novo* decision to protect appellant's appeal rights.

CONCLUSION

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

[18] *Richard R. LeMay*, 56 ECAB 341 (2005).

[19] *See Melvin James*, 55 ECAB 406 (2004).

[20] The Board notes that the sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, the AMA *Guides* Newsletter offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. OWCP has adopted this approach for rating impairments to the upper or lower extremities caused by a spinal injury. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 8, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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