

FACTUAL HISTORY

OWCP accepted that appellant, then a 41-year-old part-time temporary mail handler, sustained a lumbar strain on December 19, 1998 while pulling an all purpose container (APC) full of trays.³ Following her December 19, 1998 injury, she worked five hours on December 22, 1998 and then stopped work. OWCP paid appellant temporary total disability benefits beginning January 1, 1999. By decision dated February 28, 2000, it reduced her wage-loss benefits based on the determination that she could work full time as a hand packager.

On March 7, 2008 appellant requested a schedule award. In a February 8, 2008 report, Dr. Martin Fritzhand, a Board-certified urologist, opined that maximum medical improvement had occurred by 2001. Under the fifth edition of the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he found that appellant had 19 percent permanent impairment to the left leg.⁴

In a March 22, 2008 report, OWCP's medical adviser reviewed the medical record and opined that the deficits described by appellant's physician were not covered or caused by the accepted lumbar strain condition. He explained that the deficits could have resulted from a subsequent and unrelated incident or the natural degenerative process.

OWCP referred appellant for a second opinion examination to Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon. In an April 10, 2009 report, Dr. Fisher reviewed appellant's medical record, provided examination findings and opined that the lumbar strain associated with the December 1998 injury was a soft tissue injury that healed and resolved within a few weeks to two months after the injury occurred. He noted that the magnetic resonance imaging (MRI) scan studies which he reviewed showed degenerative changes over the lumbar area with disc bulging on the right at L4-5 and arthrosis. A 1999 electromyogram (EMG) and nerve conduction tests (NCT) revealed a chronic left sided L5 radiculopathy and a 2000 EMG/NCT showed no radiculopathy over either lower extremity. On reviewing the medical records, Dr. Fisher noted that the treating physicians did not find neurological deficits over the lower extremities. He found no neurological deficits over the lower extremities in his examination. Dr. Fisher diagnosed a healed lumbar sprain, preexisting facet arthrosis and morbid obesity. He found no impairment to either lower extremity, advising that appellant had no objective findings.

In an April 20, 2009 letter, OWCP requested that Dr. Fisher clarify whether the work injury materially altered the pathology of appellant's preexisting L4-5 facet arthrosis and, if so, whether the aggravation was temporary or permanent in nature. In a May 4, 2009 report, Dr. Fisher opined that the December 19, 1998 injury did not contribute to the computerized tomography (CT) scan or MRI scan findings of moderate right sided facet joint arthrosis at L4-5 with resultant moderate right foraminal stenosis. He reported that the clinical symptoms for appellant had always been on the left side of the back and lower extremity while the CT scan and MRI scan findings were on the right side. There were no objective findings in the left leg or any

³ Appellant had a temporary appointment for the period December 5 to 31, 1998.

⁴ In one portion of his report, Dr. Fritzhand attributed the impairment to appellant's left arm. The context of his report indicates that he intended the impairment rating for the left leg.

neurological deficits over either lower extremity on examination or the reflexes were symmetrical and equal. There were no sensory neurological deficits or impairment to the common peroneal nerve on examination of either lower extremity.

OWCP determined a conflict in medical opinion arose between Dr. Fritzhand and Dr. Fisher as to whether appellant's lumbar strain had resolved, if a work-related material worsening of a preexisting back condition occurred and if she had any permanent impairment from the work-related condition. It referred appellant together with a statement of accepted facts, the medical record and a list of questions, to Dr. Arthur F. Lee, a Board-certified orthopedic surgeon, for an impartial opinion.

In an October 29, 2010 report, Dr. Lee addressed the medical history, physical examination and x-ray evaluation. He found there was no objective pathologic process involving appellant's lumbar spine that could be specifically related to the December 19, 1998 work injury. There was no objective indication of any post-traumatic arthritis, neurologic deficits, muscular atrophy or sensory/motor pathology. Appellant's lumbar strain relative to the work injury had resolved. Dr. Lee noted that her other diagnoses, including degenerative arthritic changes of the lumbar spine primarily focused at L4-5 and L5-S1, were not post-traumatic abnormalities, but rather degenerative in nature with no relationship to her lumbar strain on December 19, 1998. He stated that with appellant's preexistent arthritis and obesity, she probably recovered closer to the three-month time frame with resolution of her symptoms. Dr. Lee reiterated that she had no objective findings that could be related to the work incident and there were no neurologic deficits on physical examination. There was no indication that appellant's preexisting L4-5 facet arthrosis with moderate right foraminal stenosis was altered or changed in any way due to the work incident. Dr. Lee found that she had a resolved lumbar strain and there were other reasons for her low back pain, which had nothing to do with the December 19, 1998 injury. Under the sixth edition of the A.M.A., *Guides*, he opined that appellant had no permanent impairment relative to her left or right lower extremity and zero percent total body impairment.

By decision dated October 21, 2011, OWCP terminated appellant's wage-loss and medical benefits. On April 30, 2012 OWCP's hearing representative affirmed the October 21, 2011 decision.⁵

In a November 9, 2011 report, OWCP's medical adviser reviewed the statement of accepted facts and medical records. Based on Dr. Lee's report, he agreed there was no ratable impairment of the left lower extremity. Utilizing the July to August 2009 edition of *The Guides Newsletter*, the medical adviser found that appellant had class zero sensory impairment and class zero motor impairment based on Dr. Lee's October 29, 2010 examination findings of normal sensory motor examination involving both lower extremities.

By decision dated December 22, 2011, OWCP denied appellant's claim for a schedule award.

⁵ As noted, *supra* note 1, appellant has not appealed this decision.

Appellant requested a telephonic hearing, which was held April 18, 2012. No additional evidence was received. By decision dated June 26, 2012, OWCP's hearing representative affirmed the December 22, 2011 decision.

LEGAL PRECEDENT

FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁶ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.⁸

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.⁹ OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.¹⁰

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.¹¹ 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 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.¹²

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or

⁶ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁷ *A. George Lampo*, 45 ECAB 441 (1994).

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁹ *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(b) (August 2002).

¹¹ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹² *Thomas J. Engelhart*, 50 ECAB 319 (1999).

lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009) is to be applied.¹³

Section 8123(a) 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 The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.¹⁵ 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.¹⁶

ANALYSIS

OWCP accepted that on December 19, 1998 appellant sustained a lumbar strain. On March 7, 2008 she filed a claim for a schedule award, which OWCP denied on the grounds that there was no medical evidence supportive of a permanent impairment to a member or function of the body causally related to the December 19, 1998 lumbar strain.

OWCP properly determined that a conflict of medical opinion was created between Dr. Fritzhand, her attending physician and Dr. Fisher, the second opinion physician, regarding whether appellant's lumbar strain had resolved, whether her work injury aggravated any other condition and if she had permanent impairment due to her injury. It referred appellant to Dr. Lee for resolution of the conflict.

The Board finds that Dr. Lee's opinion is thorough and well rationalized. It represents the weight of the medical evidence with respect to whether appellant has permanent impairment due to her work injury.¹⁷ In an October 29, 2010 report, Dr. Lee reviewed appellant's medical history, the medical record and the statement of accepted facts. Based on the history, physical examination and x-ray evaluation, he found there was no objective indication of any post-traumatic arthritis, neurologic deficits, muscular atrophy or sensory/motor pathology that could be related to the December 19, 1998 work injury. Dr. Lee opined that there was no indication that appellant's preexisting L4-5 facet arthrosis with moderate right foraminal stenosis was altered or changed due to the work incident. He opined that her lumbar strain had resolved

¹³ See *G.N.*, Docket No. 10-850 (issued November 12, 2010); see also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁴ 5 U.S.C. § 8123(a).

¹⁵ 20 C.F.R. § 10.321.

¹⁶ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

¹⁷ *Id.* The Board is only addressing Dr. Lee's report with regard to whether appellant has permanent impairment under 5 U.S.C. § 8107. See *supra* notes 1, 5.

closer to the three-month time frame due to her preexistent arthritis and obesity and that there were other reasons for her low back pain, which had nothing to do with the December 19, 1998 event. Dr. Lee explained that appellant's other diagnoses, including degenerative arthritic change of the lumbar spine, were not post-traumatic abnormalities but degenerative ones which had no relationship to the lumbar strain or the December 19, 1998 injury. He concluded that there were no objective findings in the left lower extremity, no neurological deficits over either lower extremity and no sensory neurological deficits or impairment to the common peroneal nerve on his examination of either lower extremity with symmetrical and equal reflexes. Dr. Lee specifically found that appellant had no permanent impairment of either leg.

The Board has carefully reviewed the opinion of Dr. Lee and notes that it is well rationalized and based on a proper factual and medical history. Dr. Lee's opinion is consequently entitled to special weight as the impartial medical examiner and establishes that appellant has no lower extremity impairment due to her December 19, 1998 employment injury.

Based on the findings of Dr. Lee, OWCP's medical adviser found that, under the July to August 2009 "*The Guides Newsletter*,"¹⁸ there was no ratable impairment of the left lower extremity. His examination revealed normal sensory and motor findings in both lower extremities.

On appeal, counsel contends that the June 26, 2012 decision is contrary to law and fact. As noted, the weight of the medical opinion is represented by Dr. Lee who opined that there was no permanent impairment to a scheduled member of the body causally related to appellant's accepted injury. Consequently, appellant has not established entitlement to a schedule award.

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

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish entitlement to a schedule award for permanent impairment.

¹⁸ See *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 19, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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