

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

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**P.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Bellmawr, NJ, Employer**

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**Docket No. 13-1890  
Issued: January 24, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 12, 2013 appellant, through her attorney, filed a timely appeal from the July 9, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 met her burden of proof to establish that she has more than a four percent permanent impairment of her left leg, for which she received a schedule award.

**FACTUAL HISTORY**

On April 21, 2000 appellant, then a 58-year-old rural letter carrier, filed an occupational disease claim alleging that she had constant back pain, numbness in her right toes and pain down

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

her back to her knees causally related to her job duties. OWCP accepted that she sustained a lumbar sprain with bilateral L5-S1 radiculopathies.

On January 26, 2010 Dr. David Weiss, an attending osteopath, stated that appellant had cumulative and repetitive trauma disorder, discogenic disease of the lumbar spine at L5 and S1, facet joint syndrome superimposed upon age-related facet joint arthropathy and bilateral lumbar radiculopathy. He advised that the conditions were work related. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Weiss determined that appellant had 39 percent permanent impairment of her right leg and 39 percent permanent impairment of her left leg.

In a June 25, 2010 report, Dr. James Dyer, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, determined that appellant had 14 percent permanent impairment of her right leg and 4 percent permanent impairment of her left leg under the sixth edition of the A.M.A., *Guides*.

In a September 14, 2010 decision, OWCP granted appellant a schedule award for 14 percent impairment of her right leg and 4 percent impairment of her left leg.

On December 28, 2010 OWCP's hearing representative set aside the September 14, 2010 decision. He found that there was a conflict in medical opinion between Dr. Weiss and Dr. Dyer regarding the extent of appellant's impairment. The hearing representative directed OWCP to refer appellant to an impartial medical specialist for an examination and opinion on the matter.

OWCP referred appellant to Dr. Timothy R. Wagner, a Board-certified orthopedic surgeon, for an impartial medical examination. In a May 29, 2012 report, Dr. Wagner related his impression as "complaints of unusual lower back and lower leg pain, with a neurological examination which is essentially normal except for right radicular pain on recumbent straight leg raising." He stated that a prior May 1, 2000 magnetic resonance imaging (MRI) scan was very mild for a person who was 59 years old at the time of the study. The changes were consistent with the normal aging process and could not be directly attributed or caused by appellant's federal employment. Dr. Wagner referenced electromyogram (EMG) and nerve conduction velocity (NCV) tests from May 18, 2000 that he considered to be normal with respect to the L5 and S1 nerve distributions for a person of appellant's age. He concluded that appellant's only impairment was a four percent sensory loss in the right leg associated with the L5 and S1 nerves under the sixth edition of the A.M.A., *Guides*.<sup>2</sup>

In an August 20, 2012 decision, OWCP denied appellant's claim for additional schedule award compensation based on the opinion of Dr. Wagner.

On March 19, 2013 OWCP's hearing representative affirmed the right leg finding and set aside the August 20, 2012 decision in part and remanded the case to OWCP for further consideration and development regarding appellant's left lower extremity condition.

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<sup>2</sup> Dr. Wagner referenced *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July to August 2009) and applied its standards.

OWCP requested that Dr. Wagner clarify his opinion regarding continuing disability and the impairment to appellant's left leg. Dr. Wagner was advised that the claim was accepted for a bilateral radiculopathy into the lower extremities and requested to provide an opinion explaining whether the accepted radiculopathy into the left lower extremity had resolved or if the condition continued and caused permanent impairment. If he found impairment, he was asked to explain the extent of the impairment citing to the sixth edition of the A.M.A., *Guides* while taking into consideration appellant's prior four percent left lower extremity rating.

In a May 6, 2013 report, Dr. Wagner opined that appellant's accepted radiculopathy into the left lower extremity had resolved. He stated that when he performed the physical examination of her on May 29, 2012, there was no clinical evidence of her having a left lower extremity radiculopathy. Appellant was examined by a neurologist on August 14, 2011 who also stated that the neurological examination revealed no objective neurologic abnormality. The diagnosis of the left lower extremity radiculopathy was not corroborated by EMG/NCV studies available for his review. Dr. Wagner stated that, in his medical opinion, the accepted radiculopathy into the left lower extremity had resolved and there was no permanent impairment to appellant's left lower extremity under the A.M.A., *Guides*.

In a July 9, 2013 decision, OWCP found that appellant did not have more than four percent permanent impairment of her left leg based on the opinion of the impartial medical specialist, Dr. Wagner.

### **LEGAL PRECEDENT**

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim, including that he or she sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.<sup>3</sup> The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>4</sup>

Section 8123(a) of FECA provides in pertinent part: "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."<sup>5</sup> When there are

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<sup>3</sup> See *Bobbie F. Cowart*, 55 ECAB 476 (2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

<sup>4</sup> *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

<sup>5</sup> 5 U.S.C. § 8123(a).

opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.<sup>6</sup> 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.<sup>7</sup>

### ANALYSIS

The Board finds that OWCP properly determined the percentage of impairment to appellant's left leg based on the May 29, 2012 and May 6, 2013 reports of Dr. Wagner, a Board-certified orthopedic surgeon, who served as an impartial medical specialist.<sup>8</sup> These reports were based on a complete and accurate factual and medical history and properly applied the standards of the sixth edition of the A.M.A., *Guides*. Dr. Wagner represents the weight of medical opinion on the issue of whether appellant had more than a four percent impairment of her left leg.

Dr. Wagner opined that appellant's accepted radiculopathy into the left lower extremity had resolved. He provided medical rationale for this opinion by stating that when he performed his physical examination of her on May 29, 2012 there was no clinical evidence of her having a left lower extremity radiculopathy. Dr. Wagner also noted that appellant was examined by a neurologist on August 14, 2011, who stated that the neurological examination revealed no objective neurologic abnormality. Further, the diagnosis of left lower extremity radiculopathy was not corroborated by EMG/NCV studies available for his review. On appeal, counsel argued that Dr. Wagner did not conduct an adequate examination and misinterpreted the diagnostic testing of record. The Board has reviewed his opinion and finds that Dr. Wagner conducted a comprehensive examination and properly evaluated the relevant medical evidence of record.

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

### CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she has more than a four percent permanent impairment of her left leg, for which she received a schedule award.

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<sup>6</sup> *William C. Bush*, 40 ECAB 1064, 1975 (1989).

<sup>7</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

<sup>8</sup> OWCP properly found a conflict in the medical opinion evidence between Dr. Weiss, an attending osteopath, and Dr. Dyer, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, and referred appellant to Dr. Wagner for an impartial medical examination and opinion on permanent impairment.

**ORDER**

**IT IS HEREBY ORDERED THAT** that the July 9, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2014  
Washington, DC

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

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

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