United States Department of Labor
Employees' Compensation Appeals Board

G.F., Appellant	)	
and	)	**Docket No. 16-0997**
	)	**Issued: November 15, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Dripping Springs, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 11, 2016 appellant filed a timely appeal from a February 18, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (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 established permanent impairment to a scheduled member or function of the body causally related to her accepted lumbar sprain entitling her to a schedule award.

[1] Appellant timely requested oral argument before the Board. By order dated July 27, 2016, the Board exercised its discretion and denied the request as the arguments on appeal could be adequately addressed in a decision based on a review of the record. *Order Denying Request for Oral Argument*, Docket No. 16-0997 (issued July 27, 2016).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 15, 2002 appellant, a 38-year-old retail specialist, sustained a back injury after lifting a parcel in the performance of duty. OWCP accepted the claim for lumbar sprain. Appellant continued to work a modified position with restrictions until she resigned on November 7, 2003.

In an initial January 16, 2002 report, Dr. Anthony Hicks, an occupational medicine specialist, advised that appellant experienced low back pain on January 14, 2002 when she squatted to get a package for a customer. He diagnosed sprain/strain of the lumbar, sacroiliac ligament, elbow, and forearm. Possible radiculitis of the lower extremity and herniated nucleus pulposus were also assessed. On examination Dr. Hicks noted antalgic gait, approximately 30 degrees forward flexion, 10 degrees extension, 10 degrees lateral flexion, 10 degrees rotation, and tenderness in the midline, paravertebral muscles, and lumbosacral region.

In an undated report received on September 9, 2004, Dr. Hicks provided a permanent impairment rating. He noted that, using Table 15-3 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had eight percent whole person impairment.

On September 1, 2004 appellant requested a schedule award (Form CA-7). By decision dated January 24, 2005, OWCP denied her request for a schedule award, as the medical evidence of record did not establish a permanent employment-related impairment.

On April 24, 2006 appellant underwent a nerve conduction study (NCS). It revealed no evidence of L5 and S1 lumbosacral radiculopathy. A December 3, 2012 NCS revealed that polyneuropathy and L5-S1 radiculopathy were unlikely.

On June 6, 2015 appellant requested a schedule award.

In an August 27, 2014 report, Dr. Hicks provided another impairment rating. He advised that appellant was likely at maximum medical improvement (MMI). Dr. Hicks indicated that she had findings of impairment and diagnosed sensory radiculopathy. He noted that OWCP did not accept impairment ratings related to the spine. Dr. Hicks explained that objective studies did not indicate objective neurologic deficits. However, physical examination revealed consistent radicular numbness and burning pain in the bilateral lower extremities through the toes. Dr. Hicks referenced the sixth edition of the A.M.A., *Guides* and indicated that appellant had five percent lower extremity permanent impairment for sensory radiculopathy based upon the history of a painful mechanical lumbar injury with ongoing overt musculoskeletal and neurologic findings.

In a December 18, 2014 report, Dr. Hicks provided an impairment evaluation. On examination he noted no visible distress, nonantalgic gait, tenderness to palpation in the left paraspinous muscles of the lumbosacral region from L4-5 and S1, and spasm in the lumbar spine paraspinous muscles. Dr. Hicks noted that examination findings were abnormal when compared to the standards found within the sixth edition of the A.M.A., *Guides*. He advised that using the impairment class for dysesthetic pain, Table 13-17, page 339, appellant had 10 percent

permanent impairment for each lower extremity and 19 percent total lower extremity permanent impairment using the Combined Values Charts.

On September 24, 2015 an OWCP medical adviser reviewed the medical evidence, including Dr. Hicks' report. He advised that Dr. Hick's selected severe dysesthetic pain as the impairment class as he assessed peripheral neuropathy or spinal cord injury consistent with dysesthetic pain. However, this was not an accepted condition under this claim. The medical adviser recommended that appellant be referred for a second opinion impairment evaluation.

On December 9, 2015 OWCP referred appellant, together with a statement of accepted facts (SOAF), to Dr. John Sklar, a Board-certified physiatrist, for a second opinion. In a January 28, 2016 report, Dr. Sklar reviewed the SOAF and provided a history of appellant's injury. He noted that she underwent diagnostic testing in 2012 which was said to be consistent with probable chronic S1 radiculopathy. Dr. Sklar opined that reviewing testing data was far from conclusive for that diagnosis. He noted that there was no documentation consistent with a clear diagnosis of radiculopathy. On examination Dr. Sklar noted normal gait, minimally decreased lumbar range of motion, intact sensation, no atrophy in the lower extremity, negative straight leg raise, and moderate tenderness to palpation in the left lumbar paraspinal and gluteal muscles. He noted that the examination was consistent with chronic myofascial pain and tightness in the bilateral lower extremity, but it was unclear if it was related to the work-related condition. Dr. Sklar indicated that appellant would have reached MMI three to six months following the date of injury and opined that appellant did not have a ratable impairment. He explained that spinal impairment was not acceptable under FECA and that there was no evidence of lower extremity neuropathy or radiculopathy.

On February 7, 2016 an OWCP medical adviser reviewed Dr. Sklar's report. He agreed that there was no basis for lower extremity impairment as Dr. Sklar found no lower extremity sensory or motor deficits related to the lumbar spine.

By decision dated February 18, 2016, OWCP denied appellant's request for a schedule award because medical evidence was insufficient to establish a measurable impairment.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations 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. FECA, however, does not specify the manner in which the percentage of 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 the appropriate standards for evaluating schedule losses.[4]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404; *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.[5] 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.[6]

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.[7] 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 as outlined in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment (July/August 2009 edition) of the sixth edition.[8]

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[9]

ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain. On June 6, 2015 appellant requested a schedule award. In support of her claim, appellant submitted several reports from Dr. Hicks. In an August 27, 2014 report, Dr. Hicks provided a permanent impairment rating. He diagnosed sensory radiculopathy and noted that OWCP did not accept impairment ratings related to the spine. Dr. Hicks explained that objective studies did not indicate objective neurologic deficits. However, physical examination revealed consistent radicular numbness and burning pain in the bilateral lower extremities through the toes. Dr. Hicks indicated that appellant had five percent lower extremity impairment based upon the history of a painful mechanical lumbar injury with ongoing overt musculoskeletal and neurologic findings. In a December 18, 2014 report, he provided another impairment evaluation. On examination Dr. Hicks noted no visible distress, nonantalgic gait, tenderness to palpation in the left paraspinous muscles of the lumbosacral region from L4-5 and S1, and spasm in the lumbar spine paraspinous muscles. He advised that using the impairment class for severe dysesthetic pain, Table 13-17, page 339,

[5] *W.D.*, Docket No. 10-274 (issued September 3, 2010); *Richard R. LeMay*, 56 ECAB 341 (2005); *Pamela J. Darling*, 49 ECAB 286 (1998).

[6] *K.H.*, Docket No. 09-341 (issued December 30, 2009); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

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

[8] 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.

[9] *Veronica Williams*, 56 ECAB 367 (2005).

appellant had 10 percent permanent impairment for each lower extremity and 19 percent total lower extremity permanent impairment using Combined Values Charts.

On December 9, 2015 OWCP referred appellant to Dr. Sklar for a second opinion. In a January 28, 2016 report, Dr. Sklar reviewed the SOAF and provided a history of appellant's injury. He noted that there was no documentation consistent with the clear diagnosis of radiculopathy. Examination revealed normal gait, minimally decreased lumbar range of motion, intact sensation, no atrophy in the lower extremity, negative straight leg raise, and moderate tenderness to palpation in the left lumbar paraspinal and gluteal muscles. Dr. Sklar noted that the examination was consistent with chronic myofascial pain and tightness in the bilateral lower extremity, but it was unclear if it was related to the work-related condition. He indicated that appellant would have reached MMI three to six months following the date of injury and opined that appellant did not have a ratable impairment. Dr. Sklar explained that spinal impairment was not acceptable under FECA and that there was no evidence of lower extremity neuropathy or radiculopathy. OWCP then referred the medical evidence to an OWCP medical adviser, who agreed with Dr. Sklar's determination that there was no basis for any lower extremity impairment.

The sixth edition of the A.M.A., *Guides* does not provide for a schedule award for injury to the spine.[10] However, impairment of a scheduled member of the upper or lower extremities is payable under FECA, if it originates from the spine.[11] The approach of rating impairment of the upper or lower extremities caused by a spinal injury is provided in section 3.700 of OWCP procedures, which memorializes proposed tables as outlined in a July/August 2009, *The Guides Newsletter*.[12] The Board notes that Dr. Hicks did not reference or provide an evaluation in accordance with the July/August 2009, *The Guides Newsletter*. Dr. Hicks did not rate appellant's impairment pursuant to *The Guides Newsletter*, and his rating is therefore insufficient to establish that she is entitled to a schedule award due to her accepted lumbar sprain. The Board also notes that Dr. Hicks did not provide a rationalized medical opinion explaining how appellant's lower extremity conditions were related to the accepted January 14, 2002 employment incident. Thus, the Board finds that the weight of the evidence rests with the well-reasoned report of Dr. Sklar who advised that appellant had no sensory or motor deficits, and, thus, no finding of radiculopathy resulting in zero percent lower extremity impairment.

On appeal appellant contends that Dr. Sklar deliberately misdiagnosed her and advised that she was filing a formal complaint against him. However, the Board has held that mere allegations are insufficient to establish bias. There must be evidence of actual bias or unfairness by the physician used by OWCP as a referral physician.[13] Here, appellant did not provide evidence showing that Dr. Sklar acted in a biased manner toward her.

[10] *W.D., supra* note 5; *Richard R. LeMay, supra* note 5; *Pamela J. Darling, supra* note 5.

[11] *K.H., supra* note 6; *Thomas J. Engelhart, supra* note 6.

[12] *Supra* note 8.

[13] *J.C.*, Docket No. 08-1833 (issued March 23, 2009).

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 has not established permanent impairment to a scheduled member or function of the body causally related to her accepted lumbar sprain entitling her to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board