United States Department of Labor
Employees' Compensation Appeals Board

A.D., Appellant	)	
and	)	**Docket No. 16-0841**
	)	**Issued: February 16, 2017**
DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION, Rio Grande City, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 17, 2016 appellant, through counsel, filed a timely appeal from a February 2, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish ratable permanent impairment to a scheduled member causally related to his June 11, 2000 employment injury.

On appeal counsel contends that OWCP's decision is contrary to fact and law.

FACTUAL HISTORY

On June 13, 2000 appellant, then a 30-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that, while working the sky watch on June 11, 2000, he leaned back and his chair broke, causing him to fall out of the chair. He noted that, at that time, the sky watch was fully extended, so he fell approximately 25 feet. Appellant alleged that, as a result of the fall, he bruised his heels, back, and buttocks. OWCP accepted his claim for closed fracture of lumbar vertebra at L2 without spinal cord injury and bilateral ankle sprain.[3]

On December 11, 2000 appellant filed a claim for compensation (Form CA-7) requesting a schedule award. By decision dated February 8, 2001, OWCP denied the claim. On October 20, 2011 appellant filed a claim for a recurrence of medical condition (Form CA-2a). OWCP denied his recurrence claim on January 9, 2012.

In a July 1, 2014 progress note, Dr. Gregory A. Ward, appellant's treating Board-certified neurosurgeon, diagnosed sciatica, lower back pain, spinal stenosis, lumbar region, and without neurogenic claudication, lumbosacral spondylosis without myelopathy, and other specified aftercare following surgery. He noted that appellant stated that he was doing fairly well, although he still had some paresthesias in his left leg and foot, but felt that his strength was back to normal. Dr. Ward also noted that appellant had some balance issues and a burning numbness from the left knee down into the left foot. He noted that appellant was able to heel and toe walk as well as tandem gait. Dr. Ward noted mildly limited lumbar range of motion.

In a September 9, 2014 report, Dr. Thomas Martens, an osteopath, provided results on examination, conducted range of motion measurements, and reviewed his medical and occupational history. He diagnosed the following conditions due to appellant's occupational claim: (1) closed fracture lumbar vertebrae without spinal cord injury, (2) bilateral ankle sprain, (3) contusion of foot and ankle, and (4) contusion of foot. Dr. Martens opined that the claimed traumatic work injury during the course of appellant's employment caused these injuries.

Utilizing Table 16-12 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), (6th ed. 2009) for peripheral nerve impairment -- lower extremity impairment,[4] Dr. Martens noted a diagnosis of multilevel lumbar disc herniation, end plate fracture, and lumbar radiculopathy was based on the diagnostic studies and

[3] The record does not indicate that appellant received wage-loss compensation on the supplemental or periodic rolls.

[4] A.M.A., *Guides* 535. The Board notes that while Dr. Martens clearly applied Table 16-12 of the A.M.A., *Guides*, he improperly references Table 16-2 of the A.M.A., *Guides* when discussing peripheral nerve impairment.

placed appellant in class 2 for a peripheral nerve impairment. Class 2 concerns the femoral nerve with moderate motor deficit, and notes a mid-range value of 14 percent. Dr. Martens assigned a grade modifier of 2 for functional history, as he noted that appellant had severe functional limitations. He found a grade modifier of 3 for physical examination, based on decreased protective sensibility with abnormal sensations for moderate pain in a clinically appropriate distribution that could prevent some activities. Dr. Martens determined that a modifier for clinical studies was not applicable as it had been used to determine the class. He determined appellant's net adjustment based on grade modifiers as follows: (2-1) + (3-1) + (n/a) = 3. Dr. Martens determined that a grade modifier of 3 moved the value from 14 percent impairment to 19 percent impairment within the same class. Accordingly, he determined that appellant had 19 percent permanent impairment of the left lower extremity for peripheral nerve impairment.

With regard to appellant's left ankle condition, Dr. Martens referenced Table 16-2 of the A.M.A., *Guides,* entitled "Foot and Ankle Regional Grid -- Lower Extremity Impairment.[5] He noted the diagnostic criteria for appellant's condition and placed him in class 1 for a diagnosis of moderate motion deficits and/or significant weakness, with a midrange default value of 10 percent. Dr. Martens noted a grade 1 modifier for functional history and a grade 2 modifier for physical examination based on moderate palpatory findings, consistently documented, and supported by observed abnormalities. He noted a grade modifier for clinical studies was not applicable. Dr. Martens then calculated the net adjustment as follows: (1-1) + (2-1) + (n/a) = 1. Accordingly, he found 12 percent left ankle permanent impairment.

With regard to the right ankle, Dr. Martens again applied Table 16-2, and noted that appellant had mild motion deficits on examination, for which he assigned a class 1 diagnostic criteria with a midrange default of five percent. He assigned a grade modifier of 1 for functional history and 1 for physical examination and he noted clinical studies were nonapplicable. Dr. Martens found a net adjustment of 0 based on the formula (1-1) + (1-1) + (n/a). Accordingly, he determined that appellant had a final right lower extremity impairment of five percent as it related to the right ankle condition. Using the Combined Values Chart, Dr. Martens indicated that appellant had 29 percent left lower extremity permanent impairment and 5 percent right lower extremity permanent impairment.

On October 21, 2014 appellant filed a claim for a schedule award (Form CA-7).

On November 4, 2014 OWCP asked its medical adviser to review Dr. Martens' report to determine an impairment rating. In a November 5, 2014 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed Dr. Martens' calculations and noted that he had incorrectly found 19 percent impairment based on the peripheral nerve impairment regional grid in that his calculations would actually yield 14 percent impairment, as the adjustment for grade modifiers would be +1 and move the default class to grade D. He also noted that Dr. Martens' use of Table 16-12 for lower extremity peripheral nerve impairment was not the accepted method for rating spinal nerve impairment for the purpose of determining a probative schedule award under FECA. Dr. Katz noted that spinal nerve impairment is best

[5] *Id.* at 501.

determined using the method described in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009) (*The Guides Newsletter*).

Dr. Katz found Dr. Martens' calculations for permanent bilateral ankle impairment proper. However, he had some questions with regard to his conclusions on physical examination, finding them inconsistent with the earlier findings of appellant's neurosurgeon, Dr. Ward. Dr. Katz noted that review of Dr. Ward's July 1, 2014 report indicated no complaints of focal weakness and intact motor strength and normal toe walking and was inconsistent with Dr. Martens' determination of moderate femoral nerve weakness on the left and motion deficits of both ankles, moderate on the left. He opined that these deficits, as reported by Dr. Martens, would be inconsistent with Dr. Ward's observation on physical examination that appellant's gait was normal and that he was able to heel and toe walk as well as tandem gait. Dr. Katz opined that there was a significant conflict between Dr. Ward's report of July 1, 2014 and Dr. Martens' impairment evaluation of June 9, 2014 that could not be resolved on the basis of a medical records review. He therefore recommended a second opinion impairment evaluation with a Board-certified physiatrist.

On February 19, 2015 OWCP referred appellant for a second opinion evaluation. In a March 6, 2015 second opinion evaluation, Dr. David Poindexter, a Board-certified physiatrist, conducted a physical examination and discussed appellant's history of injury as well as his medical history. He noted that, on evaluation, appellant's gait was within normal limits with normal heel and toe ambulation. Dr. Poindexter noted no tenderness to palpitation to the lumbar spine, and that his seated leg raise was positive at 70 to 80 degrees bilaterally. He found normal lumbar range of motion and that bilateral lower extremity sensory, motor, and reflexes were within normal limits. Dr. Poindexter noted that, under FECA, the lumbar injury is rated using *The Guides Newsletter* for spinal nerve injuries resulting in lower extremity impairment. He noted that appellant's lower extremity sensation was normal as well as the lower extremity motor examination was 5/5 throughout. Therefore, Dr. Poindexter found that appellant had zero percent permanent impairment of the bilateral lower extremities due to the lumbar injury.

Dr. Poindexter also noted that for the left ankle sprain, appellant's injury healed without residual pain, stiffness, or functional deficit. He related that the examination was within normal limits with full range of motion and no tenderness to palpation. Utilizing Table 16-2 of the A.M.A., *Guides*,[6] Dr. Poindexter placed appellant in class 0 with no significant objective abnormal findings and hence should receive zero percent permanent impairment for left lower extremity. For right ankle sprain, he determined that appellant's injury also healed without residual pain, stiffness, or functional deficit. The examination was within normal limits with full range of motion and no tenderness to palpation. Utilizing Table 16-2, Dr. Poindexter placed appellant as class 0 with no significant objective abnormal findings, and noted zero percent right lower extremity permanent impairment.

On April 7, 2015 OWCP referred Dr. Poindexter's report to a new OWCP medical adviser. In an April 13, 2015 report, Dr. Ronald Blum, a Board-certified orthopedic surgeon and

[6] *Id.* at 501.

an OWCP medical adviser, agreed with the report of Dr. Poindexter and opined that appellant had zero percent permanent impairment to each lower extremity.

By decision dated April 15, 2015, OWCP denied appellant's claim for a schedule award.

On April 24, 2015 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. At the hearing held on November 19, 2015 counsel argued that the reports of Dr. Poindexter and Dr. Blum contained no discussion of Dr. Martens' examination. Counsel contended that, at the very least, OWCP should have obtained an impartial medical examination due to the conflict between the opinions of Dr. Martens and Dr. Poindexter. He also argued that neither Dr. Poindexter nor OWCP's medical adviser mentioned objective test results, or the operative report which noted radiculopathy.

By decision dated February 2, 2016, OWCP's hearing representative affirmed the April 15, 2015 decision denying appellant's claim for a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing regulations[8] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for 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 insure equal justice under the law to all claimants, good administrative practice necessitates the use of single set of tables so that here may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[10]

The sixth edition requires identifying the impairment class for the diagnosed condition Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12]

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.[13] A

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id.*

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2. 808.5a (February 2013); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[11] A.M.A., *Guides* 494-531.

[12] *Id.* at 521.

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

schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA.[14]

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.[15]

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 lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter*, Rating Spinal Nerve Impairment using the sixth edition (July/August 2009) is to be applied.[16] The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.[17] In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[18]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.[19]

Section 8123(a) provides that, if there is a 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.[20] 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. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[21] In situations where there exist opposing medical reports of virtually equal

[14] *M.P.*, Docket No. 14-777 (issued July 18, 2014).

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

[16] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also supra* note 10 at Chapter 3.700, Exhibit 1, n.5 (January 2010).

[17] *D.S.*, Docket No. 14-12 (issued March 18, 2014).

[18] *R.L.*, Docket No. 14-1479 (issued October 28, 2014); *see also E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

[19] *See supra* note 10 at Chapter 2.808.6(f) (February 2013).

[20] *R.C.*, Docket No. 12-437 (issued October 23, 2012).

[21] 20 C.F.R. § 10.321.

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 rationale and based upon a proper factual background, must be given special weight.[22]

ANALYSIS

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical opinion evidence.

OWCP accepted appellant's claim for closed fracture of lumbar vertebra at L2 and bilateral ankle sprain. Dr. Martens, in conducting a permanent impairment evaluation for appellant, determined that appellant had 29 percent permanent impairment of the left lower extremity based on 12 percent left ankle impairment and 19 percent impairment for peripheral nerve impairment pursuant to Table 16-12. The first OWCP medical adviser, Dr. Katz, found that Dr. Martens' calculations of the peripheral nerve impairment were incorrect and that it was 14 percent. While he noted that Dr. Martens' calculations for bilateral ankle impairment were correct, he also noted that Dr. Martens' use of Table 16-12 was not the accepted method of rating spinal nerve impairment for the purpose of determining a schedule award. OWCP has implemented guidelines that impairment to the upper or lower extremities caused by a spinal injury should be evaluated in accordance with the article Rating Spinal Nerve Extremity Impairment using the six edition in the July/August 2009 edition of the *The Guides Newsletter* published by the A.M.A., *Guides*. OWCP has adopted *The Guides Newsletter* to rate spinal nerve impairments consistent with sixth edition methodology.[23] Dr. Katz also noted some discrepancies in the findings on physical examination between Dr. Martens and Dr. Ward with regard to residual impairment. Therefore, at his suggestion, OWCP properly ordered a second opinion evaluation.

The second opinion physician, Dr. Poindexter, determined that appellant had zero percent permanent impairment pursuant of the bilateral lower extremities due to the accepted lumbar injury pursuant to *The Guides Newsletter*. He also determined that pursuant to Table 16-2 of the A.M.A., *Guides*, appellant had no ratable impairment to either ankle. In reaching these conclusions, Dr. Poindexter found considerably less physical residuals than did the physician who conducted the permanent impairment rating on behalf of appellant, Dr. Martens.

The case was next referred to a new OWCP medical adviser, Dr. Blum, who agreed with Dr. Poindexter that appellant had no ratable impairment to his lower extremities. Neither Dr. Poindexter nor Dr. Blum, in reaching their conclusions, discussed the findings of Dr. Martens, who found greater residuals and, accordingly, greater impairment of appellant's lower extremities.

The Board finds that this case must be remanded as there are significant discrepancies in physical findings between the reports of the examining physicians. Dr. Ward, appellant's treating neurosurgeon, noted that appellant was doing fairly well. He noted that although

[22] *F.C.*, Docket No. 14-0560 (issued November 12, 2015).

[23] *See A.W.*, Docket No. 14-0199 (issued September 16, 2015).

appellant did have some paresthesias in his left leg and foot, his strength was back to normal. Dr. Ward noted some balance issues and a burning numbness from the left knee down to the left foot. However, he noted that appellant was able to heel and toe walk as well as tandem gait. Dr. Ward assessed appellant with a mildly limited lumbar range of motion. Dr. Martens, who conducted an examination of permanent impairment for appellant, found severe functional limitations, including significant fatigability of the lower extremity, leg paresthesias, and issues with activities of daily living. Dr. Poindexter, who conducted a second opinion examination on behalf of OWCP, noted that appellant's gait was within normal limits, that there was no tenderness to palpitation to the lumbar spine, that appellant had normal range of motion, and that bilateral lower extremity sensory, motor, and reflexes were within normal limits. He also determined that appellant's lower extremity sensation was normal. These discrepancies in appellant's physical status must be resolved in order for OWCP to make a proper schedule award.

Dr. Martens erred in that he did not properly apply the A.M.A., *Guides* with regard to peripheral nerve impairment, and OWCP properly noted this error. However, the impairment rating of Dr. Poindexter is based on findings on physical examination that conflict with the findings of Dr. Martens, who examined appellant at his request. Due to the discrepancy between the objective findings of appellant's physician, Dr. Martens, and the second opinion physician, Dr. Poindexter, the Board finds a conflict in medical evidence on the extent of appellant's impairment for schedule award purposes.[24]

For a conflict to arise, the opposing physician's opinions must be of equal weight.[25] The Board finds that the opinions of Drs. Marten and Poindexter are of equal weight regarding their physical examination findings. OWCP's medical advisers did not examine appellant. While an OWCP medical adviser may create a conflict in medical opinion, he or she may generally not resolve it.[26]

As the Board finds that a conflict exists in the medical evidence with regard to the degree of appellant's permanent impairment of his lower extremities, the Board will remand the case for referral to an impartial medical specialist for resolution of the conflict in the medical opinion evidence. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical opinion evidence.

[24] *See S.W.*, Docket No. 15-1740 (issued January 28, 2016).

[25] *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[26] *See L.S.*, Docket No. 15-1564 (issued March 4, 2016).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 2, 2016 is set aside, and the case is remanded for further consideration consistent with this opinion.

Issued: February 16, 2017
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board