United States Department of Labor
Employees' Compensation Appeals Board

T.O., Appellant	)	
and	)	**Docket No. 16-1328**
	)	**Issued: March 13, 2017**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Denver, CO, 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 June 14, 2016 appellant, through counsel, filed a timely appeal from a May 3, 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 over the merits of this 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 established ratable permanent impairment causally related to her accepted injuries, warranting a schedule award.

FACTUAL HISTORY

OWCP accepted that appellant, a 52-year-old transportation security officer, sustained a neck sprain, right shoulder sprain, right elbow contusion, and left lower leg contusion on October 14, 2013 as a result of falling over a guard rail while in the performance of duty. It paid her wage-loss compensation and medical benefits.

On June 8, 2015 appellant, through counsel, filed a claim for a schedule award (Form CA-7).

In a September 26, 2014 report, Dr. Kathy McCranie, a Board-certified physiatrist, diagnosed low back and right lower extremity pain and paresthesias, mild diffuse degenerative changes in the lumbar spine, and prior history of low back pain and right lower extremity pain. She opined that appellant had reached maximum medical improvement (MMI) and opined that there was "no impairment rating for her condition."

On October 21, 2014 Dr. John Burris, a Board-certified occupational medicine specialist, diagnosed low back pain and concurred with Dr. McCranie that appellant had reached MMI and that there was no permanent impairment rating under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) (2009).

In a June 23, 2015 letter, OWCP notified appellant of the deficiencies of her claim and requested a medical report from a physician assessing her permanent impairment based on the sixth edition of the A.M.A., *Guides* and establishing that she had reached MMI. It did not receive any additional evidence.

By decision dated August 6, 2015, OWCP denied appellant's schedule award claim, finding that the medical evidence of record failed to establish ratable permanent impairment of a scheduled member.

On August 17, 2015 counsel requested reconsideration and submitted an August 7, 2015 report from Dr. Jack Rook, a Board-certified physiatrist, who opined that appellant had nine percent permanent impairment of the right lower extremity based on the diagnosis of right hip "bursitis, a history of contusion, or other soft tissue lesion" under Table 16-4, page 512, of the A.M.A., *Guides*. Dr. Rook found that she had a chronically abnormal gait, which equated to seven percent permanent impairment. He noted that he did not utilize the grade modifier clinical studies because no clinical studies had been performed on appellant's right hip. Dr. Rook assigned grade modifiers of 2 for functional history and physical examination and concluded that the net adjustment of 2 resulted in a grade E of the class 1 impairment with a final rating of nine percent permanent impairment of the right lower extremity. He opined that appellant had not yet reached MMI because she had no diagnostic testing of the right hip joint. Dr. Rook further

opined that, if diagnostic testing did not demonstrate pathology, he believed that appellant could be considered to be at MMI.

OWCP referred appellant to Dr. John Douthit, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent and degree of any permanent employment-related impairment. In his September 21, 2015 report, Dr. Douthit reviewed a statement of accepted facts, appellant's medical history, and the medical evidence of record. He conducted a physical examination and diagnosed low back and right hip pain of uncertain origin. Dr. Douthit found no objective findings of elbow or left leg contusion or right shoulder sprain and concluded that these conditions had resolved. Appellant complained of right hip pain, which she alleged began on the date of injury. Dr. Douthit found limited range of motion of the right hip from volitional guarding and use of a cane, but otherwise no objective findings. Measurements were all equal and there was no atrophy. There was no evidence of muscle atrophy. Dr. Douthit recommended a magnetic resonance imaging (MRI) scan to determine the nature of appellant's right hip pain and determined that she had reached MMI on October 21, 2014, the date of Dr. Burris' report of examination.

OWCP subsequently referred appellant for second opinion diagnostic testing and the resulting MRI scan of the right hip dated November 3, 2015 revealed significant degenerative change in the lower lumbar discs and small anterior labral tear in the right hip with no paralabral cyst or chondral defect.

In an addendum report dated November 5, 2015, Dr. Douthit reviewed the November 3, 2015 MRI scan and opined that the clinical findings of severe hip pain with restricted motion, use of a cane, and limping did not correlate. He concluded that appellant's complaints were excessive and that she magnified her symptoms. Dr. Douthit explained that the finding of a small anterior labral tear would be ordinary and degenerative in nature and, if symptomatic, only mildly so. The absence of effusion or capsular edema was significant. Dr. Douthit diagnosed degenerative lumbar disc disease and opined that this condition was not work related and was common with appellant's age. He concluded that her accepted conditions had resolved without residuals.

On December 22, 2015 OWCP found a conflict in the medical opinion evidence between Dr. Rook and Dr. Douthit and referred appellant to Dr. Stephen Davis, a Board-certified orthopedic surgeon for an impartial medical examination.[3] In his January 18, 2016 report, Dr. Davis reviewed the medical evidence and her medical history. He conducted a physical examination and found that appellant used a cane to alleviate low back pain, but did not use the cane to protect her right hip. There was no focal tenderness to palpation in the thoracic spine, though there was some subjective complaint of mild discomfort with palpation of the lower lumbar region. Range of motion of the lumbar spine was subjectively painful at the extremes of movement, though flexion and extension, lateral bending and rotation, without apparent spasm. Straight leg raising examination on the right side did subjectively aggravate low back pain at 45 degrees, without distal radiation to the right lower extremity. The bulk and tone of the extremity

[3] The questions presented to the independent medical examiner did not request analysis on whether appellant had any permanent impairment. The questions were focused on her work capacity.

musculature was excellent, with a slight suggestion of extensor weakness at the left ankle and toes graded 4/5. Reflexes were symmetrically present. Sensation was intact distally throughout. Right hip examination revealed no particular tenderness with compression of the joint. Flexion, adduction, and internal rotation did not suggest an impingement problem. X-rays of the right hip were unremarkable. Dr. Davis opined that appellant's work-related cervical strain, right elbow contusion, and left leg contusion had resolved without residuals. He observed that there was no clinical indication of injury to the right hip and opined that the small labral tear was not clinically significant. Dr. Davis diagnosed severe degenerative disease of the lumbar spine and opined that there was objective evidence of continuing injury at the lumbar spine causally related to the October 14, 2013 work injury.

By letter dated February 1, 2016, OWCP informed appellant that it proposed to terminate her wage-loss compensation and medical benefits because the weight of the evidence established that she no longer suffered residuals or disability due to her accepted conditions.

By decision dated March 3, 2016, OWCP finalized the termination of appellant's medical and wage-loss compensation benefits, effective that date, as her accepted conditions had resolved without residuals.

On March 9, 2016 counsel requested an oral hearing of the schedule award decision before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on March 17, 2016.

By decision dated May 3, 2016, OWCP's hearing representative affirmed the August 6, 2015 schedule award decision.[4]

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of proof to establish 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.[5]

The schedule award provision of FECA[6] and its implementing regulations[7] 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

[4] The hearing representative found that there had not been a conflict in medical evidence relating to permanent impairment.

[5] *See A.M.*, Docket No. 13-0964 (issued November 25, 2013) (where the employee claimed entitlement to a schedule award for permanent impairment to the left lower extremity due to his employment-related lumbar condition, the Board found that the medical evidence did not establish a ratable impairment to the lower extremity resulting from his spinal condition and, therefore, denied his schedule award claim).

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

and to ensure equal justice under the law to all claimants, good administrative practice necessitates 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 the implementing regulations as the appropriate standard for evaluating schedule losses.[8] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[9] It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[10] A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.[11]

A schedule award is not payable for a member, function, or organ of the body not specified in FECA or in the implementing regulations.[12] As neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.[13] However, as FECA makes provision for the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.[14]

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 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.[15]

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[8] *Id*.

[9] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

[10] *See Raymond E. Gwynn*, 35 ECAB 247, 253 (1983); *id.*, at Chapter 3.700.3(a)(3) (January 2010). This portion of OWCP procedure provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

[11] *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

[12] *See Tania R. Keka*, 55 ECAB 354 (2004).

[13] *See id.* FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

[14] *See George E. Williams*, 44 ECAB 530 (1993). In 1966, amendments to FECA modified the schedule award provision 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.

[15] *See Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

ANALYSIS

The Board finds that appellant has not established ratable permanent impairment causally related to the accepted injuries, warranting a schedule award. The medical evidence of record fails to establish that appellant sustained any permanent impairment to a scheduled member of the body causally related to the October 14, 2013 employment injury. OWCP accepted her claim for neck sprain, right shoulder sprain, right elbow contusion, and left lower leg contusion. However, the medical evidence of record does not establish a permanent impairment to her upper or lower extremities due to the accepted conditions.

By decision dated May 3, 2016, an OWCP hearing representative properly found that there had not been a conflict in medical evidence as to permanent impairment. Thus, the January 18, 2016 report from Dr. Davis is not afforded the special weight of an impartial medical examiner, but will be reviewed as a second opinion evaluation. Dr. Davis found that appellant used a cane to alleviate low back pain, but did not use the cane to protect her right hip. He also found that x-rays of the right hip were unremarkable. Dr. Davis opined that appellant's work-related cervical strain, right elbow contusion, and left leg contusion had resolved without residuals. He observed that there was no clinical indication of injury to the right hip and opined that the small labral tear was not clinically significant.

The Board finds that Dr. Davis' report found no medical evidence of permanent impairment resulting from the accepted conditions and that, therefore, there was no ratable permanent impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

Dr. Douthit, a Board-certified orthopedic surgeon, in his September 21, 2015 report, reviewed a statement of accepted facts, appellant's medical history and the medical evidence of record. He conducted a physical examination and diagnosed low back and right hip pain of uncertain origin. Dr. Douthit found no objective findings of elbow or left leg contusion or right shoulder sprain and concluded that these conditions had resolved. He also found limited range of motion of the right hip from volitional guarding and use of a cane, but otherwise no objective findings. Measurements were all equal and there was no atrophy. There was no evidence of muscle atrophy.

In an addendum report dated November 5, 2015, Dr. Douthit reviewed a November 3, 2015 MRI scan and opined that the clinical findings of severe hip pain with restricted motion, use of a cane, and limping did not correlate. He explained that the finding of a small anterior labral tear would be ordinary and degenerative in nature and, if symptomatic, only mildly so. Dr. Douthit diagnosed degenerative lumbar disc disease and opined that this condition was not work related and common with appellant's age. He concluded that her accepted conditions had resolved without residuals.

The Board finds that Dr. Douthit's report also found no medical evidence of impairment to the upper or lower extremity resulting from the accepted conditions and that, therefore, there was no ratable impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

In his August 7, 2015 report, Dr. Rook opined that appellant had nine percent permanent impairment of the right lower extremity based on the diagnosis of right hip "bursitis, a history of

contusion, or other soft tissue lesion" under Table 16-4, page 512, of the A.M.A., *Guides*. He further opined, however, that she had not yet reached MMI. In its June 23, 2015 schedule award development letter, OWCP specifically requested a medical report from a physician assessing appellant's permanent impairment based on the sixth edition of the A.M.A., *Guides* and establishing that she had reached MMI. Dr. Rook failed to provide any further evidence. Consequently, appellant failed to establish permanent impairment of a schedule body member.[16]

Appellant has submitted no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides*, or *The Guides Newsletter*, addressing how she has permanent impairment of a schedule body member. Accordingly, the Board finds that OWCP properly accorded the weight of the medical opinion to Dr. Douthit's September 21 and November 5, 2015 reports and Dr. Davis' January 18, 2016 report.

On appeal, counsel contends that OWCP's decision is contrary to fact and law. However, the medical evidence of record fails to establish that appellant has a permanent impairment to a scheduled member of the body causally related to her accepted injuries. Consequently, appellant has not established entitlement to a schedule award.

Appellant may request a schedule award or an increased schedule award at any time 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.[17]

CONCLUSION

The Board finds that appellant has not established ratable permanent impairment causally related to her accepted injuries warranting a schedule award.

[16] *See J.Q.*, 59 ECAB 366 (2008) (when the examining physician does not provide an estimate of impairment that conforms to the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by an OWCP medical adviser).

[17] The Board notes that appellant has filed a request for an OWCP hearing on the termination decision. As OWCP has not issued a final decision on that issue, the Board lacks jurisdictions to review the termination.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 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