

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

R.M., Appellant)	
)	
and)	Docket No. 17-0088
)	Issued: May 11, 2017
U.S. POSTAL SERVICE, POST OFFICE,)	
Cleveland, OH, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On October 20, 2016 appellant, through counsel, filed a timely appeal from an August 26, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has established a permanent impairment of the lower extremity for schedule award purposes.

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.*

FACTUAL HISTORY

On January 23, 2008 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on January 22, 2008, her vehicle was struck from behind by a school bus while it was parked at a curb. She alleged that she sustained injuries to her left buttock and left leg. Appellant stopped work after the injury and returned to restricted duties on or about April 1, 2008. On February 12, 2008 OWCP accepted her claim for lumbar sprain and sciatica. It paid appellant intermittent wage-loss benefits from March 8 to September 9, 2008.

By letter dated March 11, 2009, the employing establishment informed OWCP that appellant was in receipt of Office of Personal Management disability retirement benefits effective March 6, 2009. It noted that limited-duty work would have remained available to her, if she had not voluntarily retired.

Appellant filed a claim for a schedule award (Form CA-7) on August 13, 2010.

In a report dated April 8, 2011, Dr. Jerold P. Gurley, Board-certified in orthopedic surgery, related that appellant presented with complaints of chronic lumbosacral back pain, bilateral lower extremity pain with weakness and peristhesias, as well as chronic neck and left arm pain, with peristhesias, and weakness following a work-related injury of January 22, 2008. He noted that lower extremity neurological examination demonstrated grade 5 motor strength throughout, no muscular atrophy, and sensory examination intact to light touch and pinwheel. Dr. Gurley related an impression of chronic lumbago, chronic cervicalgia, chronic cervical and lumbar radiculopathy, lumbar spondylosis at L5-S1, and noncompressive lumbar disc herniation at L5-S1. He noted that the diagnostic studies did not correlate with appellant's symptoms. Dr. Gurley related that he lacked an explanation for her radicular leg symptoms and therefore recommended additional diagnostic studies.

By letter dated March 27, 2012, appellant was referred to Dr. Mahal A. Ghanma, a Board-certified orthopedic surgeon, for a second opinion to determine to the status of her accepted medical conditions.

On July 26, 2012 counsel wrote to OWCP requesting the status of her schedule award claim.

In a report dated August 2, 2012 appellant's treating physician, Dr. Ronald Celeste, a specialist in internal medicine, related that appellant had herniated discs of the spine, which were the product of the accepted injury in this claim.

In a report dated August 6, 2012, Dr. Ghanma related that appellant had no objective findings to support that she still had a low back, cervical, left shoulder, or thoracic strain. Appellant also had no objective evidence of sciatica. Dr. Ghanma explained that she no longer had residuals of the work-related injuries and that her claim should not be expanded to include the current condition of degenerative disc disease as this condition was age related and degenerative in nature.

By letter dated August 29, 2012, OWCP advised counsel that since appellant's treating physician requested that appellant's claim be expanded to include herniated disc, she did not appear to be at maximum medical improvement, and a second opinion evaluation was necessary.

In an August 28, 2015 report, Dr. Catherine Watkins Campbell, a Board-certified family practitioner, conducted an examination for the purpose of providing an impairment rating for counsel. She noted that there was diffuse tenderness of the left lumbar and gluteal tenderness, with sciatic notch tenderness on the left. Dr. Watkins Campbell noted a normal sensory examination in the lower extremities, with normal reflexes and normal lumbar lordosis maintained. She noted that there was grade 3/5 strength deficit with hip flexion and a grade 4/5 deficit with knee extension. Dr. Watkins Campbell noted that the right thigh measured 44 centimeters and that the left thigh measured 42.5 centimeters. She noted a positive Trendelenburg sign on the left. After applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009), Dr. Watkins Campbell found that appellant had six percent permanent left lower extremity impairment. She noted that appellant had a class 1 impairment based on mild sensory deficit of the left sciatic nerve, as indicated in Table 16-12 of the A.M.A., *Guides*.³ Dr. Watkins Campbell based this determination on a history of fluctuating symptoms and examination findings over time. She applied a grade modifier for functional history of 2 based on positive Trendelenburg sign. Dr. Watkins Campbell found that a grade modifier for physical examination was not applicable as the examination findings were used to determine diagnostic class. She also noted that no grade modifier for clinical studies was available. Dr. Watkins Campbell noted that the net adjustment was 1 ($2-1 = 1$) and determined that appellant had a final grade D impairment which yielded six percent permanent impairment for appellant left lower extremity.

In a September 26, 2015 report, OWCP's medical adviser reviewed the evidence, including the report of Dr. Watkins Campbell. He determined that there seemed to be consistent evidence of lack of objective sensory, motor or diagnostic evidence related to lower extremity deficits of the lumbar spinal nerve roots. The medical adviser noted that there was no diagnostic evidence of lumbar nerve root involvement. As such, he determined that there was no lower extremity impairment using *The Guides Newsletter*, Rating Spinal Nerve Impairment (July/August 2009). The medical adviser noted that appellant was found to have normal lower extremity sensory changes and 5/5 strength by other physicians of record. However, he noted that the grade 3/5 strength deficit and thigh atrophy found by Dr. Watkins Campbell (if related to the lumbar spine) would be a new finding, would be serious, and require follow up by a surgeon for additional diagnostic testing. The medical adviser indicated that, if there was further controversy, then a second opinion with an orthopedic surgeon would be appropriate.

By decision dated October 9, 2015, OWCP found that appellant's claim for a schedule award was denied as she had not met the requirements for establishing a schedule award. It determined that the weight of the medical evidence rested with the opinion of OWCP's medical adviser, as appellant's physician had not properly applied the A.M.A., *Guides*.

³ A.M.A., *Guides* 535.

On October 19, 2015 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. At a hearing held on June 14, 2016, counsel noted that OWCP's medical adviser indicated that a second opinion was advisable. He further contended that referral to an impartial medical examiner was necessary as there was a conflict between the opinion of appellant's treating physician and that of the medical adviser.

By decision dated August 26, 2016, OWCP's hearing representative affirmed the October 9, 2015 decision, finding that OWCP's medical adviser properly applied the A.M.A., *Guides* and found that appellant had no permanent impairment entitling her to a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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 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.⁶ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁷

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.⁸ Furthermore, the back is specifically excluded from the definition of organ under FECA.⁹ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, the July/August 2009, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.¹⁰

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*

⁷ 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).

⁸ See *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

⁹ See 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁰ *Supra* note 7.

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.¹¹

ANALYSIS

OWCP accepted appellant's claim for lumbar sprain and sciatica. Appellant's physician, Dr. Watkins Campbell, found that appellant had six percent permanent impairment based on the A.M.A., *Guides*. In reaching this conclusion, she found some mild physical findings on examination, including grade 3/5 strength deficit with hip flexion, a grade 4/5 deficit with knee extension, and a positive Trendelenburg sign. Dr. Watkins Campbell found that, pursuant to Table 16-12 of the A.M.A., *Guides*, appellant had a class 1 mild sensory deficit of the left sciatic nerve, resulting in six percent permanent impairment of the left lower extremity. OWCP's medical adviser found that Dr. Watkins Campbell's 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*.¹²

OWCP's medical adviser, thereafter determined that appellant had no permanent impairment as there was no diagnostic evidence of lumbar nerve root involvement. However, he did note that Dr. Watkins Campbell found grade 3/5 changes and thigh atrophy, that this would be a new finding, and that it would be serious and require follow up by a surgeon for additional diagnostic testing. The medical adviser indicated that, if there was further controversy, a second opinion with an orthopedic surgeon would be appropriate.

In addition to discrepancy in findings between Dr. Watkins Campbell and OWCP's medical adviser, the Board notes that in its August 29, 2012 development letter OWCP had determined a second opinion examination was necessary since appellant's treating physician had requested that the claim be expanded to include the condition of herniated discs.

The Board therefore finds that this case is not in posture for decision.

Accordingly, the Board remands this case so that a new physician can conduct an examination and make findings on physical examination with regard to the degree of permanent impairment of appellant's left lower extremity. Following any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹¹ See *supra* note 7 at Chapter 2.808.6(f) (February 2013).

¹² See *A.D.*, Docket No. 16-0841 (issued February 16, 2017).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 26, 2016 is set aside and the case is remanded for further consideration consistent with the above opinion.

Issued: May 11, 2017
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