United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 17-0534**
	)	**Issued: May 25, 2017**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, East Boston, MA, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 10, 2017 appellant, through counsel, filed a timely appeal from a December 5, 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 has met her burden of proof to establish permanent impairment of her lower extremities due to her accepted employment injuries, thereby warranting a schedule award.

FACTUAL HISTORY

On September 14, 2010 appellant, then a 48-year-old screener, filed a traumatic injury claim (Form CA-2) claiming that on August 24, 2010 she sustained injury when she tripped on a mat and fell to the floor at work. She stopped work on August 31, 2010 and received continuation of pay.

On December 9, 2010 OWCP accepted appellant's claim for lumbar contusion, lumbar strain, right knee contusion, and right knee strain. It paid wage-loss compensation beginning November 10, 2010. Appellant returned to limited-duty work on a full-time basis on November 17, 2010 and later returned to regular duty on a full-time basis with intermittent work stoppages.

The findings of an April 7, 2011 magnetic resonance imaging (MRI) scan of appellant's right knee contained an impression of no meniscal tear.

In a report dated May 16, 2011, Dr. Joseph Abate, an attending Board-certified orthopedic surgeon, reported the findings of his physical examination on that date. He noted that appellant had significant subjective complaints during the examination with no significant swelling, over reactive nonlocalized tenderness throughout, good full extension, full flexion, no instability, no crepitation, and no instability.

In June 2011 OWCP referred appellant to Dr. Stanley Hom, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation of the nature and extent of her work-related medical condition.

In a July 13, 2011 report, Dr. Hom discussed appellant's factual and medical history, including the circumstances of her August 24, 2010 work injury and her preexisting fibromyalgia condition. He noted that there were minimal right knee findings during the physical examination he conducted on July 13, 2011 and indicated that the MRI scan for appellant's right knee was negative for meniscal tear. The findings were suggestive of some degenerative changes in the right medial compartment. Dr. Hom posited that, without a specific diagnosis, it was not medically reasonable to relate appellant's current right knee symptoms to the accepted August 24, 2010 work injury. He indicated that it was possible that some of the right knee symptoms were related to the preexisting fibromyalgia. Dr. Hom noted appellant's complaints of low back pain but indicated that the MRI scan of her low back did not show any evidence of disc herniation or impingement of nerve roots. In a form report dated July 13, 2011, he indicated

that appellant could work eight hours per day with restrictions, including lifting, pushing, and pulling no more than 15 pounds.[3]

A January 18, 2012 MRI scan of her lumbar spine contained an impression of disc bulge at L4-5. The report indicated that there was no significant change compared with the last MRI scan of the lumbar spine obtained on November 15, 2010.

In a report dated January 9, 2013, Dr. George Mina, an attending Board-certified orthopedic surgeon, reported his physical examination findings noting that appellant's right knee had full range of motion with no effusion, no medial or lateral instability, mild tenderness over the patella, and negative anterior drawer sign. He further indicated that appellant ambulated well, not using any assistive devices, and that she had no trouble getting on or off the examining table. Dr. Mina provided the diagnosis of chronic strain of the right knee with preexisting osteoarthritis. He determined that appellant had one percent permanent impairment of her right lower extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter A.M.A., *Guides*). In making this determination, Dr. Mina referenced Table 16-3 (Knee Regional Grid) beginning on page 509 of the sixth edition. Citing Table 17-4 (Lumbar Spine Regional Grid) beginning on page 570, he also calculated one percent permanent impairment of the lumbar spine which he felt was preferable to preexisting lumbar degenerative disc disease disclosed by MRI scan. Dr. Mina placed appellant at maximum medical improvement (MMI) as of one year following the August 24, 2010 date of injury.

On November 9, 2012 appellant filed a claim for a schedule award (Form CA-7) claiming a schedule award due to her accepted employment injuries.

OWCP referred the case record to Dr. David I. Krohn, a Board-certified internist serving as an OWCP medical adviser, for evaluation and an opinion on permanent impairment of the lower extremities.

In a report dated November 1, 2015, Dr. Krohn discussed the medical evidence of record, including the reports of Dr. Hom and Dr. Mina. He noted that, using Table 16-3 of the sixth edition of the A.M.A., *Guides* for "strain" of the right knee, in the absence of significant objective abnormal findings of muscle or tendon injury at MMI, he would assign a class 0 impairment which correlated with no permanent impairment of the right lower extremity. Dr. Krohn felt that the only abnormality on right knee examination, namely mild patellar tenderness, was a nonspecific physical finding subjectively reported by appellant with no objective support for a specific diagnosis. He indicated that this was in agreement with the conclusions of Dr. Hom and that Dr. Abate had indicated on May 16, 2011 that appellant's subjective complaints were out of proportion to objective findings. Dr. Krohn noted that his impairment rating was contradictory to that assigned by Dr. Mina but he noted that Dr. Mina's

[3] In a supplemental report dated August 8, 2011, Dr. Hom noted that appellant's symptoms localized to her low back appeared to be causally related to the August 24, 2010 work injury. He advised that her recommended work restrictions were based on all of appellant's musculoskeletal conditions including "what may also be a component of fibromyalgia."

findings on physical examination did not provide objective evidence for injury to muscles or tendons. He found that appellant had reached MMI in August 2011.

In a decision dated February 24, 2016, OWCP denied appellant's claim for a schedule award. It found that appellant failed to meet her burden of proof to establish permanent impairment of her lower extremities due to her accepted employment injuries.

Appellant requested a telephone hearing with a representative of OWCP's Branch of Hearing Review. During the hearing held on November 2, 2016, counsel argued that the opinion of Dr. Mina established permanent impairment of the lower extremities.

By decision dated December 5, 2016, OWCP's hearing representative affirmed the February 24, 2016 decision denying appellant's claim for a schedule award. He determined that appellant had not met her burden of proof to establish permanent impairment of her lower extremities due to her accepted employment injuries. The hearing representative found that the weight of the medical evidence, with respect to appellant's permanent impairment, rested with the November 1, 2015 opinion of the Dr. Krohn, the medical adviser.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[5] 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 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.[6] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[7]

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.[8] A 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.[9] Moreover, neither FECA nor its implementing regulations provide for

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.

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

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

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

a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.[10]

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.[11]

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 Extremity Impairment Using the Sixth Edition" (July/August 2009) (hereinafter *The Guides Newsletter*) is to be applied.[12] 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.[13] 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.[14]

ANALYSIS

OWCP accepted that on August 24, 2010 appellant sustained a work-related lumbar contusion, lumbar strain, right knee contusion, and right knee strain. On November 9, 2012 appellant filed a claim (Form CA-7) for schedule award compensation due to her accepted employment injuries. OWCP denied appellant's claim finding that the weight of the medical opinion evidence rested with Dr. Krohn, OWCP's medical adviser, who found no permanent impairment of the lower extremities under the standards of the sixth edition of the A.M.A., *Guides*.

The Board finds that appellant failed to meet her burden of proof to establish permanent impairment of her lower extremities due to her accepted employment injuries.

In support of her claim, appellant submitted a January 9, 2013 report from Dr. Mina, an attending physician, who determined that appellant had one percent permanent impairment of her right lower extremity impairment under the sixth edition of the A.M.A., *Guides*. In making this

[10] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

[11] *Supra* note 9.

[12] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* 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.

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

[14] *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

determination, Dr. Mina referenced Table 16-3 (Knee Regional Grid) beginning on page 509 of the sixth edition. He noted findings of patellar tenderness, full range of motion, and no instability. Citing Table 17-4 (Lumbar Spine Regional Grid) beginning on page 570, Dr. Mina also calculated one percent permanent impairment of the lumbar spine which he felt was preferable to preexisting lumbar degenerative disc disease disclosed by MRI scan.

The Board notes that, after receiving Dr. Mina's January 9, 2013 report, OWCP referred the case for review by an OWCP medical adviser, Dr. Krohn. OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP 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.[15]

The Board finds that Dr. Krohn properly determined that appellant had no permanent impairment of her lower extremities under the standards of the sixth edition of the A.M.A., *Guides.* In his November 1, 2015 report, Dr. Krohn properly indicated that the right knee symptoms described by Dr. Mina were subjective in nature and could not support a ratable impairment. He explained that, using Table 16-3 of the sixth edition of the A.M.A., *Guides* for "strain" of the right knee, in the absence of significant objective abnormal findings of muscle or tendon injury at MMI, he would assign a class 0 impairment which correlated with no impairment of the right lower extremity. It is noted that Table 16-3 of the sixth edition of the A.M.A., *Guides* provides that, for a ratable impairment based on muscle strain, the examination findings must show objective palpatory findings, radiographic findings, motion deficits, or significant weakness.[16] Dr. Krohn explained that no such true objective findings were reported in appellant's case.

The Board notes that Dr. Mina found impairment referable to preexisting lumbar degenerative disease, but that he did not identify permanent impairment causally related to the accepted August 24, 2010 lumbar strain or contusion. The Board has held that a preexisting impairment may be included in the calculation of percentage of loss referable to a work-related injury. However, where there is no demonstrated permanent impairment due to an accepted workplace injury, the claim is not ripe for consideration of any preexisting impairment.[17] The Board further notes that Dr. Mina's opinion on lower extremity impairment of the lumbar spine is also deficient because he improperly applied the standards of Table 17-4[18] to find a lumbar spine impairment, rather than applying the standards of *The Guides Newsletter.* The Board has held that *The Guides Newsletter* provides the standards for evaluating any permanent impairment in the lower extremities referable from the lumbar spine.[19]

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6f (February 2013).

[16] *See* A.M.A., *Guides* 509, Table 16-3.

[17] *M.F.*, Docket No. 16-1089 (issued December 14, 2016); *Thomas P. Lavin*, 57 ECAB 353 (2006).

[18] *See* A.M.A., *Guides* 570, Table 17-4.

[19] *See supra* note 12.

Because Dr. Mina's impairment evaluation was not conducted in accordance with the standards of the sixth edition of the A.M.A., *Guides*, it is of limited probative value regarding appellant's lower extremity impairment. OWCP properly accorded the weight of the medical opinion evidence to the opinion of Dr. Krohn.[20] Appellant has not submitted probative medical evidence supporting lower extremity impairment. Thus a schedule award is not warranted.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her lower extremities due to her accepted employment injuries, thereby warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 25, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[20] *See Linda Beale*, 57 ECAB 429 (2006); *James Kennedy, Jr.*, 40 ECAB 620 (1989).