United States Department of Labor
Employees' Compensation Appeals Board

K.Y., Appellant	)	
and	)	**Docket No. 18-0730**
	)	**Issued: August 21, 2019**
DEPARTMENT OF HEALTH & HUMAN SERVICES, HEALTH RESOURCES & SERVICES ADMINISTRATION, Bethesda, MD, 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
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 20, 2018 appellant filed a timely appeal from a January 11, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the January 11, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On October 25, 1999 appellant, a 34-year-old office automation clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a neck and back injury on October 21, 1999 as a result of moving conference tables and chairs for a meeting while in the performance of duty. By decision dated February 1, 2000, OWCP accepted the claim for cervical and lumbar sprains. It later expanded the claim to accept the additional conditions of displacement of lumbar intervertebral disc disorder without myelopathy. Appellant was placed on the periodic compensation rolls effective September 8, 2002.

On August 25, 2012 appellant filed a claim (Form CA-7) for a schedule award.

In an August 31, 2012 development letter, OWCP advised appellant of the deficiencies of her claim and requested medical evidence containing a detailed description of her permanent impairment specific to the accepted work-related condition(s), a date of maximum medical improvement (MMI), final rating of permanent impairment, and a discussion of the rationale for calculation of the impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

In response, appellant submitted reports dated July 30, September 5 and 20, and October 1 and 22, 2012 from Dr. Jose Suros, a physician specializing in pain medicine and neurology, who diagnosed lumbar spinal stenosis and noted her history of a fall, as well as the October 21, 1999 employment injury. Dr. Suros further diagnosed "lumbar radiculopathy, degenerative lumbar spine" and performed L4-5 epidural steroid injections. He also diagnosed "spinal headache, dural leakage" and performed an L4-5 epidural blood patch under fluoroscopy on October 1, 2012.

By decision dated November 6, 2012, OWCP denied appellant's schedule award claim finding that she had not submitted medical evidence to establish permanent impairment causally related to an accepted condition in her claim.

On November 18, 2012 appellant requested an oral hearing before a representative of the Branch of Hearings and Review.

A telephonic hearing was held on March 27, 2013. Appellant provided testimony and OWCP's hearing representative held the case record open for 30 days for the submission of additional evidence on the issue of permanent functional impairment.

Appellant subsequently submitted reports dated April 10 and May 22, 2013 from Dr. Christopher M. Magee, a Board-certified orthopedic surgeon, who diagnosed bilateral leg pain posteriorly and cervical and lumbosacral strain with cervical radiculopathy. Dr. Magee opined

[3] A.M.A., *Guides* (6th ed. 2009).

that these conditions were causally related to her work-related injury of October 21, 1999 and advised that she was totally disabled for work. He opined that appellant had reached MMI and had 19 percent whole body impairment.

By decision dated June 18, 2013, OWCP's hearing representative vacated the prior decision and remanded the case for further medical development.

In an August 21, 2013 report, Dr. Magee opined that appellant had reached MMI with regard to her October 21, 1999 work injury. He indicated that he had utilized the sixth edition of the A.M.A., *Guides* to determine that her diagnoses of chronic soft tissue derangement and spinal stenosis resulted in 10 percent whole-body impairment related to her cervical spine and 10 percent whole-body impairment related to her lumbar spine. Dr. Magee calculated that the combined value of her cervical and lumbosacral spine impairments was 19 percent whole-body impairment based on page 592 of the A.M.A., *Guides*. He indicated that Table 17-4 showed a class 2 impairment of 12 percent related to a sprain with foraminal narrowing and disc protrusion. Dr. Magee opined that the pain in appellant's extremities was not primarily related to injury to her upper or lower extremities, but reflected referred pain from her neck and lower back. He determined that there was no additional ratable impairment for her upper or lower extremities related to her work injury of October 21, 1999.

OWCP referred appellant to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her permanent impairment due to her accepted employment-related conditions. In his November 21, 2014 report, Dr. Draper reviewed a statement of accepted facts (SOAF) and the medical evidence of record, and noted the history of injury. He conducted a physical examination and found that an examination of the motor function in the upper extremities revealed that appellant had +5 in all muscles tested and +1 in all reflexes tested. Motor functions in the lower extremities demonstrated +5 in all muscles tested and +2 in all reflexes tested. Light touch sensation was tested and found to be normal in all body areas tested. Dr. Draper concluded that appellant had degenerative changes involving the cervical and lumbar spine which were not causally related to the accepted employment injury. He determined that she had reached MMI and was capable of performing light-duty work with a restriction of lifting no more than 20 pounds occasionally and 10 pounds frequently. Dr. Draper concluded that appellant did not have clinical physical examination evidence for a neurological impairment to the lower extremities. He found no evidence for lumbar radiculopathy based on his examination and consequently no impairment rating for the lower extremities based on the A.M.A., *Guides*.

On January 2, 2015 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser (DMA), reviewed the medical evidence of record and concurred with Dr. Draper's assessment that appellant had reached MMI and had a zero percent permanent impairment of the bilateral lower extremities.

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

On June 16, 2015 Dr. Phillip Omohundro, a Board-certified orthopedic surgeon, indicated that appellant's prognosis was poor and diagnosed cervical disc disorder, cervical radiculopathy,

lumbar radiculopathy, and degeneration of lumbosacral intervertebral disc. He opined that she had 5 percent permanent impairment of the body as a whole due to her cervical spine injury and 6 percent permanent impairment of the body as a whole due to her lumbar spine injury, for a combined value of 11 percent permanent impairment to the body as a whole.

On September 1, 2017 appellant again filed a claim (Form CA-7) for a schedule award.

In a September 20, 2017 report, Dr. Magee reiterated his opinion that appellant had reached MMI and had 10 percent whole body permanent impairment.

In an October 11, 2017 development letter, OWCP advised appellant of the deficiencies of her schedule award claim and afforded her 30 days to submit additional evidence and respond to its inquiries.

On November 28, 2017 Dr. Omohundro diagnosed degeneration of lumbar intervertebral disc, cervical trigger point syndrome, degeneration of cervical intervertebral disc, lumbosacral radiculitis, and contusion of rib.

In reports dated November 29 through December 11, 2017, Dr. Magee diagnosed neck pain and lumbar radiculopathy.

OWCP referred appellant to Dr. Matthew L. Drake, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of the permanent functional impairment due to her accepted employment-related conditions. In his December 13, 2017 report, Dr. Drake reviewed a SOAF and the medical evidence of record, and noted her history of injury. He conducted a physical examination and found that under no circumstances were appellant's current condition and complaints related to the employment injury of 1999. Dr. Drake noted that she had sustained cervical lumbar strains at that time and there were benign soft tissue conditions which would have resolved within a matter of weeks. He indicated that appellant's magnetic resonance imaging (MRI) scan showed evidence of a mild disc bulge at the L4-5 level, but opined that this was an incidental age-related finding with no relationship to the injury in question. Dr. Drake concluded that she was at a preinjury status approximately six to eight weeks after the event in 1999. He determined that ongoing medical treatment was not needed because appellant's cervical and lumbar strains had long since resolved and MRI scan findings of the lumbar disc were incidental in nature and had no evidence of radiculopathy. Dr. Drake further indicated that her nerve studies showed no evidence of radiculopathy. He observed that appellant's case was highly characterized by subjective pain complaints and he advised that she was not disabled and could return to her preinjury employment position without restrictions. Dr. Drake concluded that her back condition was not causing consequential injuries because she had a lumbar strain which had resolved. He opined that if appellant was falling, it was not related to a lumbar strain or a lumbar disc displacement. Dr. Drake determined that there was no basis for a rating of permanent impairment because she had only subjective complaints, her diagnostic imaging was benign, and her nerve studies were normal.

In a December 14, 2017 report, Dr. Magee diagnosed lumbar radiculopathy and cervical spondylosis with radiculopathy and revised his opinion to find that appellant had three percent whole person impairment.

On December 29, 2017 Dr. Kim Hoang, a Board-certified anesthesiologist and pain management specialist, diagnosed low back pain, lumbar spondylosis, chronic pain syndrome, and displacement of lumbar intervertebral disc without myelopathy.

On January 10, 2018 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, reviewed the medical evidence of record and found that Dr. Magee's impairment evaluation could not be considered probative for schedule award purposes under FECA because it lacked sufficient detail to permit assignment of an impairment rating on the basis of a records review. He explained that Dr. Magee's rating was based on whole person impairment, which was improper because cervical and lumbar spine regional grids could not be considered as there was no definitive radicular findings and the spine itself was not eligible for a schedule award. The DMA further noted no verifiable findings of radiculopathy of record. He concurred with Dr. Drake's findings and concluded that appellant had no spinal nerve impairment of the upper or lower extremities based on the medical evidence of record. The DMA determined that she had reached MMI on December 13, 2017, the date of Dr. Drake's second opinion evaluation.

By decision dated January 11, 2018, OWCP denied appellant's schedule award claim finding that she had not met her burden of proof to establish, through the medical evidence of record, a ratable impairment of a scheduled member.

LEGAL PRECEDENT

The schedule award provision of FECA,[4] and its implementing federal 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*. at § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] *See L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[9] *See* 5 U.S.C. § 8101(19); *see also G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

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 Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (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] 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.[11]

The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.[12]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a permanent impairment of a scheduled member or function of the body, warranting a schedule award.

OWCP properly referred appellant to Dr. Drake for a second opinion evaluation to determine the nature and extent of any permanent functional impairment due to her accepted employment-related conditions. In his December 13, 2017 report, Dr. Drake found that her nerve studies showed no evidence of radiculopathy and her presentation was highly characterized by subjective pain complaints. He noted that appellant had sustained cervical lumbar strains at that time and there were benign soft tissue conditions, which would have been resolved within a matter of weeks. Dr. Drake indicated that her MRI scan showed evidence of a mild disc bulge at the L4-5 level, but opined that this was an incidental age-related finding with no relationship to the injury in question. He determined that there was no basis for an impairment rating because appellant had only subjective complaints, her diagnostic imaging was benign, and her nerve studies were normal. The Board finds that Dr. Drake's opinion represents the weight of medical evidence.

In accordance with its procedures, OWCP properly referred the evidence of record to its DMA, Dr. Katz, who found that the impairment evaluation of the attending physician, Dr. Magee, could not be considered probative for the purpose of recommending a schedule award under FECA because it lacked sufficient detail to permit assignment of an impairment rating on the basis of a records review. The DMA concurred with Dr. Drake's findings and concluded that appellant had no spinal nerve impairment of the upper or lower extremities based on the medical evidence of record.

The Board finds that the DMA applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to Dr. Drake's clinical findings. His calculations were mathematically accurate. There is no medical evidence of record utilizing the appropriate tables

[10] *Supra* note 7 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

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

[12] *See G.S., supra* note 9; *Veronica Williams*, 56 ECAB 367 (2005).

of the sixth edition of the A.M.A., *Guides* demonstrating a percentage of permanent impairment. The DMA explained that Dr. Magee's rating was based on a whole person impairment, which was improper because cervical and lumbar spine regional grids could not be considered as there was no definitive radicular findings and the spine itself was not eligible for a schedule award. He further noted that no verifiable findings of radiculopathy were noted. The Board finds that the DMA in this case properly applied the standards of the A.M.A., *Guides* and OWCP properly relied on his assessment of zero percent permanent impairment of the right and left upper extremity and zero percent permanent impairment of the right and left lower extremity.[13]

Dr. Magee and Dr. Omohundro provided a rating for whole person impairment. There is no statutory basis for the payment of a schedule award for whole body impairment under FECA.[14] Payment is authorized only for the permanent impairment of specified members, organs, or functions of the body.[15] For these reasons, the Board finds that the opinions of Drs. Magee and Omohundro are of limited probative value and insufficient to establish that appellant is entitled to a schedule award.

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 a ratable permanent impairment of a scheduled body member. Accordingly, the weight of the medical opinion evidence is accorded Dr. Drake's September 22, 2016 second opinion report and the report of the DMA.

Appellant may request a schedule award or increased schedule award at any time 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 met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

[13] *See id.*

[14] *See N.H.*, Docket No. 17-0696 (issued July 19, 2017).

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

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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