United States Department of Labor
Employees' Compensation Appeals Board

P.R., claiming as representative of the estate of N.R., Appellant	)	
and	)	**Docket No. 19-1313** **Issued: August 11, 2020**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION BUTNER, Butner, NC, 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:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On May 28, 2019 appellant, through counsel, filed a timely appeal from a May 3, 2019 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 the employee's upper and lower extremities, warranting a schedule award.

FACTUAL HISTORY

On June 8, 2005 the employee, then a 45-year-old correctional officer, filed an occupational disease claim (Form CA-2) alleging that that he developed a lumbar condition due to factors of his federal employment. On April 19, 2006 OWCP accepted the claim for degenerative lumbar and cervical disc disease. It paid retroactive wage-loss compensation on the supplemental rolls from August 2, 2005 to August 5, 2006. OWCP placed appellant on the periodic rolls effective August 6, 2006. The employee did not return to work.

Dr. Thomas Dimmig, a treating Board-certified orthopedic surgeon, performed lumbar spine surgery on November 2, 2007 and cervical spine surgery in June 2008. He continued to see the employee in follow ups and in a treatment note dated February 24, 2009, he indicated that the employee had reached maximum medical improvement (MMI).

On April 3, 2009 the employee's then-counsel wrote OWCP asking that it review attached medical reports regarding the employee's impairment for schedule award purposes. Submitted in support thereof was correspondence, dated February 24, 2009, by Dr. Dimmig which indicated that MMI had been reached regarding the employee's work-related injuries to the neck and lumbar spine. Dr. Dimmig noted the employee's surgical history and advised that, due to a 50 percent loss of cervical range of motion, appellant had 12 percent whole body impairment, and due to decreased lumbar spine range of motion, he had an additional 10 percent whole body impairment. He further found an additional 10 percent whole body impairment for residual cervical pain following surgery, and an additional 11 percent whole body impairment for residual lumbar pain following surgery, which yielded a combined 43 percent whole body impairment.

In a March 31, 2009 report, Dr. Dimmig indicated that, utilizing Table 15-12, Table 15-15, Table 15-17, and Table 15-18 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] due to the employee's cervical radiculopathy of the left C5 and C6 nerve roots with decreased sensation and pain into those dermatomes, and due to his cervical disc surgery, he had 1.5 percent loss of the C5 nerve root, and 2.4 percent loss of the C6 nerve root of his left upper extremity. As to the employee's lower extremities, Dr. Dimmig noted his previous surgery and symptoms of bilateral L3 radiculopathy with decreased sensation and pain and found 1.5 percent bilateral lower extremity impairments at L3 and 1.5 percent bilateral impairments at L4. He then added the impairments to reach a combined 9.9 percent impairment of the employee's extremities.

On April 9, 2009 a district medical adviser (DMA) reviewed Dr. Dimmig's reports and the medical evidence of record. He found that Dr. Dimmig's impairment evaluation could not be considered probative for schedule award purposes under FECA. The DMA indicated that the

[3] A.M.A., *Guides* (5th ed. 2001).

employee needed to submit a medical report with objective findings in each extremity with pertinent imaging studies. He further noted that FECA did not recognize whole person impairments.

In a letter dated April 14, 2009, OWCP forwarded a copy of the DMA's April 9, 2009 report to Dr. Dimmig and asked that he address the DMA's findings. On June 15, 2009 Dr. Dimmig saw the employee in a follow-up and indicated no change was recommended. The record also includes a June 26, 2009 letter that the employee's then-counsel asked Dr. Dimmig to respond to OWCP's April 14, 2009 correspondence to the DMA.

On April 6, 2010 OWCP asked Dr. Dimmig to provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.[4]

In response, Dr. Dimmig submitted a July 6, 2010 report repeating the findings from his March 31, 2009 report in which he utilized the fifth edition of the A.M.A., *Guides*. On July 19, 2010 OWCP again asked Dr. Dimmig to provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides* and provided a worksheet for his completion.

In July 2010 OWCP referred the employee to Dr. William A. Somers, a Board-certified orthopedic surgeon, for a second opinion evaluation. It provided a statement of accepted facts (SOAF) and asked that Dr. Somers evaluate the extent and degree of the employee's permanent impairment due to the employment injury.

In a July 2, 2010 report, Dr. Somers described the employee's medical and surgical history and indicated that he had previously had been seen on February 7, 2007. He noted the employee's complaints of neck, low back, and leg pain and opined that Dr. Dimmig's impairment rating appeared to be accurate. A physical examination was completed and accompanying findings were provided as to both upper and lower extremities. For the lumbar spine and lower extremities, it was noted that the employee had: poor balance; he used a cane in the right hand due to left leg pain; lumbar extension at 10 degrees caused low back pain; flexion was fingertips to the mid tibia with diminished bend out of lordosis, and true flexion was approximately 15 degrees; lateral bend to 10 degrees left and 20 degrees right produced low back pain; right and left knee jerk and right ankle jerk reflexes were 2/4 with left ankle jerk trace/4; and straight leg raise sitting was negative and supine straight leg raising on the left caused low back pain at 80 degrees. For the cervical spine and upper extremities, physical examination showed slight head-forward posture, cervical extension was 30 degrees, flexion chin to chest was 3 cm, rotation 80 degrees bilaterally, and lateral bend was 30 degrees right and left without evident pain; the neck is not tender; shoulders had full range of motion without pain or tenderness; and impingement signs were negative, and biceps, triceps, and brachioradialis reflexes were 2/4. Dr. Somers diagnosed lumber disc disease, status post disc injury, status post lumbar surgery secondary to lumbar disc disease, L3 degenerative disc disease aggravated by prior injury and perhaps accelerated by prior surgery, cervical disc disease secondary to injury, and status post cervical spine surgery. He opined that the employee's cervical and lumbar conditions were employment related and noted that he was

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

doing quite well regarding his cervical condition, but was still having low back problems, likely due to acceleration of degeneration at L3.[5]

On July 29, 2013 Dr. David Musante, a Board-certified orthopedic surgeon and an associate of Dr. Dimmig, noted that the employee had a somewhat unstable gait, but was able to walk on his heels and toes. He was minimally tender to palpation of the lumbar spine with non-tender sacroiliac joints and greater trochanters, and painless range of motion of the hips and knees. Straight leg raise was negative and the employee had 5/5 strength grossly to motor examination. Sensation was altered over the anterolateral tibia and dorsum of the left foot. On September 16, 2013 Dr. Musante saw the employee in a follow-up. He noted that he would not change what Dr. Dimmig had written regarding MMI and an impairment rating and continued Dr. Dimmig's restrictions on a permanent basis. On December 13, 2013 Dr. Musante diagnosed lumbago and lumbosacral disc degeneration. He advised that the employee could return to work with a 30-pound restriction on lifting, pushing, and pulling with frequent change of sitting and standing. There is no additional medical evidence of record from an examining physician regarding the employee's condition.

The employee completed computer training and accepted employment as a security guard at a hospital on October 31, 2014.

The employee passed away on November 29, 2016.

In correspondence to OWCP dated December 27, 2016 and January 20, 2017, counsel for the employee's estate noted the employee's death and requested acknowledgement that the employee had filed a claim for a schedule award. On February 4, 2017 he forwarded a copy of the employee's death certificate, the marriage certificate of appellant and the employee, and an attorney authorization.[6] On May 23, 2017 and January 19, 2018 counsel maintained that a claim for a schedule award had been filed during the employee's lifetime and requested that OWCP issue a decision on his entitlement to a schedule award.

By decision dated June 14, 2018, OWCP denied the employee's claim for a schedule award, finding that the evidence of record was insufficient to establish that the claim was timely filed by the employee prior to his death.

On June 20, 2018 appellant, through counsel, requested an oral hearing before OWCP's Branch of Hearings and Review.

By decision dated September 27, 2018, an OWCP hearing representative vacated the June 14, 2018 decision and remanded the case for further medical development. The hearing representative found that, although there was no evidence that counsel had successfully filed a schedule award claim form in 2016, OWCP had previously acknowledged submission of evidence

[5] A July 19, 2013 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated postsurgical changes and a small annular tear at L3-4. Additional medical evidence submitted included an August 12, 2013 functional capacity evaluation (FCE) that was reported to be invalid due to self-limited effort, pain, apprehension, and limited trunk range of motion.

[6] The employee's immediate cause of death was listed as metastatic colon cancer.

in support of a schedule award, had sent several development letters and correspondence pertaining to the claim for a schedule award, and had forwarded evidence of file to the DMA for consideration. The hearing representative instructed OWCP to forward the medical record to a DMA for consideration of an extremity impairment award in conformance with the A.M.A., *Guides, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*).[7]

On October 9, 2018 OWCP asked that a DMA review the case regarding a schedule award for upper and/or lower extremity conditions emanating from the spine. It indicated that the accepted conditions were degeneration of cervical and lumbar or lumbosacral intervertebral discs, provided a SOAF, and advised that the employee had died. OWCP specifically referenced *The Guides Newsletter* and asked that the DMA comment on Dr. Dimmig's July 6, 2010 report. It did not indicate what, if any, additional medical evidence was forwarded.

In an October 11, 2018 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, noted his review of the SOAF and medical evidence provided, including Dr. Dimmig's July 6, 2010 report. He advised that Dr. Dimmig's impairment evaluation could not be considered probative for schedule award purposes under FECA, because he utilized the fifth edition of the A.M.A., *Guides* instead of the sixth edition and because he failed to apply *The Guides Newsletter* for rating the spine. The DMA indicated that the record lacked sufficient detail to permit assignment of an impairment rating on the basis of his record review. He recommended that a second opinion evaluation be obtained from a Board-certified specialist who is familiar with the sixth edition of the A.M.A., *Guides*, OWCP procedures, and how spinal nerve impairment is determined using the proposed tables. The DMA concluded that MMI was undetermined, pending further investigation.

By decision dated November 8, 2018, OWCP denied the employee's schedule award claim, finding that he had not met his burden of proof to establish, through the medical evidence of record, permanent impairment of a scheduled member or function of the body.

Appellant, through counsel, again requested a hearing before OWCP's Branch of Hearings and Review. At the hearing, held on March 20, 2019, counsel maintained that OWCP had not properly developed the medical evidence and noted that the DMA did not seem to be aware that the employee had died. The hearing representative advised counsel that he could submit additional evidence and held the case record open for 30 days for the submission of additional evidence. No further evidence was received.

By decision dated May 3, 2019, an OWCP hearing representative affirmed the November 8, 2018 decision.

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010).

LEGAL PRECEDENT

The schedule award provisions of FECA,[8] and its implementing federal regulations,[9] 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.[10] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[11]

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.[12] Furthermore, the back is specifically excluded from the definition of organ under FECA.[13] However, 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.[14] As the schedule award provision of FECA includes 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 impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairment consistent with the 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.[16] The Board has recognized the adoption of this methodology for rating extremity impairment as proper in order to provide a uniform standard

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Id*. at § 10.404(a).

[11] 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).

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

[13] *See* 5 U.S.C. § 8101(19); *see also V.J.*, Docket No. 19-1789 (issued April 8, 2020); *G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[14] *D.L.*, Docket No. 20-0059 (issued July 8, 2020); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[15] *D.L.*, *id.*

[16] *Supra* note 11 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

applicable to each claimant for a schedule award for extremity impairment originating in the spine.[17]

OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[18]

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.[19] OWCP procedures, however, further provide that if a claimant does not provide an impairment evaluation from his or her physician when requested, and there is an indication of permanent impairment in the medical evidence of file, the claims examiner (CE) should refer the claimant for a second opinion evaluation. The CE may also refer the case to the DMA prior to scheduling a second opinion examination to determine if the evidence in the file is sufficient for the DMA to provide an impairment rating. If the case is referred for a second opinion, the report should contain the information described in 6a above.[20] If it does not contain this information, clarification with the second opinion should be sought.[21]

Section 8109 of FECA,[22] provides that if an individual with a accepted injury files a valid schedule award claim during life and dies from a cause other than the employment-related injury before the end of the period specified by the schedule found in section 8107, the compensation specified by the schedule that is unpaid at death, whether or not accrued or due at death shall be paid under an award made before or after death for the period specified by the schedule to and for the benefit of persons specified. It continues that if there is no widow or widower, the award is made to the child or children.[23]

The Board has held that a schedule award claim must be filed by an injured employee or someone acting on his or her behalf during the employee's lifetime to establish a valid claim for

[17] *See A.H.*, Docket No. 19-1788 (issued March 17, 2020).

[18] *Supra* note 11 at Chapter 2.808.5b (March 2017).

[19] *Id*.

[20] Chapter 2.808.6a(1) provides that the medical evidence should include a detailed history of clinical presentation, physical findings, functional history, clinical studies or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment rating was calculated. *Supra* note 11 at Chapter 2.808.6a.

[21] *Supra* note 11 at Chapter 2.808.6d (March 2017).

[22] *Supra* note 2.

[23] 5 U.S.C. § 8109.

compensation under section 8107.[24] Additionally, OWCP's implementing regulations provide that "the right to claim compensation for disability other than medical expenses ceases and does not survive [the death of the employee]."[25]

OWCP procedures further provide that if at the time of the claimant's death, a schedule award claim is being developed but has not yet been paid, the claimant's dependent(s) would be entitled to the entire payment of the award.[26]

ANALYSIS

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

OWCP accepted that the deceased employee developed degenerative lumbar and cervical disc disease while in the performance of duty. The employee submitted medical evidence in support of a schedule award before he passed away of an unrelated cause.[27] OWCP began development of his schedule award claim in 2009. He had provided medical records containing physical examination findings as well as an impairment analysis in accordance with the fifth edition of the A.M.A., *Guides*. On May 1, 2009 the sixth edition of the A.M.A., *Guides* became effective, and by letter dated April 6, 2010, OWCP asked Dr. Dimmig to provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*. Dr. Dimmig, thereafter, submitted a July 6, 2010 report in which he rated the employee's impairment in accordance with the fifth edition of the A.M.A., *Guides*.

In July 2010 OWCP referred the employee to Dr. Somers, and while it did not specifically ask him to provide an impairment evaluation, he indicated that he agreed with Dr. Dimmig's impairment conclusions. Dr. Somers also provided extensive physical examination findings of all extremities. Likewise, Dr. Musante opined that he agreed with Dr. Dimmig's impairment analysis. He also described physical examination findings. At no time did OWCP ask either Dr. Somers or Dr. Musante to provide an impairment evaluation in accordance with the sixth edition of the A.M.A., *Guides*, nor did it issue a final schedule award decision at that time.

The Board finds that OWCP failed to properly develop the employee's schedule award claim. As noted, OWCP's procedures provide that if a claimant does not provide an impairment evaluation when requested and there is an indication of permanent impairment, the CE should refer the claimant for a second opinion evaluation.[28] While OWCP referred the employee to Dr. Somers for a second opinion evaluation in July 2010, it did not ask him to provide an impairment evaluation nor did it take additional action to further develop a schedule award claim until the file was sent to a DMA in February 2014. It did not issue a schedule award decision while the

[24] 5 U.S.C. § 8107; *see J.B.*, Docket No. 16-1548 (issued April 7, 2017).

[25] 20 C.F.R. § 10.015(d); *J.B., id.*

[26] *Supra* note 11 at Chapter 2.808.7.a(7).

[27] *Supra* note 12.

[28] *Supra* note 11 at Chapter 2.808.6d.

employee was alive and did not again develop the employee's schedule award claim until after his death on November 27, 2016 when present-counsel requested that OWCP acknowledge that the employee had filed a schedule award claim. OWCP denied the schedule award claim on June 14, 2018.

Following a September 27, 2018 remand by an OWCP hearing representative, on September 27, 2018, OWCP asked Dr. Katz, serving as a DMA, to provide an opinion regarding the employee's entitlement to a schedule award. When referring the record to the DMA on October 10, 2018, it listed the accepted conditions and indicated that the employee had died. OWCP also provided an SOAF and asked that the DMA comment on Dr. Dimmig's opinion. It, however, did not indicate specifically what, if any, additional medical evidence was sent to the DMA. In his October 11, 2018 report, the DMA did not exhibit awareness that the employee had died and, in fact, recommended that he be referred for a second opinion for further evaluation. He did not address the examination findings of Dr. Somers or any other medical evidence in the case record.

It is well established that proceedings under FECA are not adversarial in nature and, while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[29] OWCP has an obligation to see that justice is done.[30] When OWCP undertakes to develop the evidence it has an obligation to seek clarification from its physician upon receiving a report that did not adequately address the issues that OWCP sought to develop.[31]

The issue before the DMA was the determination of whether the deceased employee had any extremity impairment that would warrant a schedule award in accordance with the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. As there is medical evidence of record which includes physical examination findings that could be utilized in determining whether the employee had impairment of an extremity due to his accepted cervical and lumbar conditions, the Board finds that the May 3, 2019 decision must be set aside. On remand OWCP should further develop the medical evidence with a medical specialist qualified to perform an impairment rating calculation, utilizing the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* from existing medical findings.. Following this and such further development as may be deemed necessary, OWCP shall issue a *de novo* decision on the employee's schedule award claim.

CONCLUSION

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

[29] *T.L.*, Docket No. 19-1572 (issued March 12, 2020).

[30] *Id*.

[31] *See M.N.*, Docket No. 19-0132 (issued May 20, 2020).

ORDER

IT IS HEREBY ORDERED THAT May 3, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: August 11, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board