

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

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| D.C., Appellant |) | |
| |) | |
| and |) | Docket No. 20-0897 |
| |) | Issued: August 11, 2021 |
| U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, 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:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 18, 2020 appellant, through counsel, filed a timely appeal from a February 10, 2020 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 over the merits of this case.³

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.*

³ The Board notes that, following the February 10, 2020 decision, appellant submitted additional evidence to OWCP. 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 additional 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 May 4, 2004 appellant, then a 46-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that she sustained an aggravation of a preexisting back injury due to factors of her federal employment including constant bending, twisting, and lifting. She indicated that she first became aware of her claimed injury on October 1, 2001 and first realized its relation to factors of her federal employment on January 9, 2004. OWCP assigned OWCP File No. xxxxxx755 and accepted the claim for temporary aggravation of lumbar facet arthrosis. Under a separate traumatic injury claim (Form CA-1), assigned OWCP File No. xxxxxx644, it accepted that appellant sustained an acute lumbar strain due to a February 3, 2011 fall at work. Under another traumatic injury claim, assigned OWCP File No. xxxxxx342, appellant claimed a back injury due to handling a mail tray on May 6, 2016 and OWCP paid limited medical expenses without formally adjudicating the claim. She also claimed that she sustained a new occupational injury in early-2013 and OWCP accepted the claim, assigned OWCP File No. xxxxxx813, for a lumbar sprain which had resolved no later than June 3, 2015. OWCP administratively combined OWCP File Nos. xxxxxx644, xxxxxx342, xxxxxx815, and xxxxxx755, designating the latter as the master file.

In an April 6, 2015 report, Dr. Catherine Watkins Campbell, a Board-certified orthopedic surgeon, determined that appellant had 14 percent permanent impairment of her right lower extremity. She applied the standards of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), which is a supplemental publication of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ On August 5, 2015 appellant filed a claim for compensation (Form CA-7) for a schedule award due to her accepted employment injuries.

After extensive development of the medical evidence, including referral of appellant to Dr. Mark Berkowitz, a Board-certified orthopedic surgeon serving as an impartial medical specialist, OWCP issued a May 5, 2017 decision denying her claim for a schedule award, finding that she had not met her burden of proof to establish, through the medical evidence of record, permanent impairment of a scheduled member or function of the body.⁵

In a November 16, 2018 report, Dr. Sami Moufawad, Board-certified in pain medicine, discussed appellant's factual and medical history and reported the findings of his physical examination. He indicated that she presently complained of pain in her low back and lower extremities, worse on the right. Dr. Moufawad noted that appellant's knee flexion and extension

⁴ (6th ed. 2009).

⁵ OWCP found a conflict in the medical opinion evidence regarding permanent impairment between the opinion of Dr. Watkins Campbell, and the opinions of Dr. Richard Deerhake, a Board-certified orthopedic surgeon serving as an OWCP referral physician, and an OWCP district medical adviser (DMA). In a March 30, 2017 report, Dr. Berkowitz found no permanent impairment of appellant's lower extremities under *The Guides Newsletter*.

exhibited full strength bilaterally, as did the hips. Knee reflexes were intact and symmetrical, but the right ankle reflex was absent. Appellant had a mildly weak right big toe extension of 4+/5, compared to 5/5 on the left side. Dr. Moufawad advised that the sensory examination showed decreased sensation to light touch on the lateral and posterior aspect of the right leg into the dorsum of both feet, which he rated as 4/5. He discussed appellant's accepted active lumbar spondylosis and opined that a right L5-S1 radiculopathy was well documented on electrodiagnostic studies. Dr. Moufawad noted that her hypersensitivity to light touch on examination was a symptom of muscle spasms. He applied the standards of *The Guides Newsletter* and found that appellant had a grade modifier for functional history (GMFH) of 3 and a grade modifier for clinical studies (GMCS) of 3, and that the grade modifier for physical examination (GMPE) was not applicable. Dr. Moufawad applied the net adjustment formula and found that she had 10 percent permanent impairment of the right lower extremity due to L5 nerve sensory/motor deficits and 4 percent permanent impairment of the right lower extremity due to S1 nerve sensory/motor deficits. He concluded that appellant had 14 percent permanent impairment of her right lower extremity based on motor and sensory deficits in the right L5 and S1 dermatomes. Dr. Moufawad found that she had reached maximum medical improvement (MMI).

On December 20, 2018 appellant filed a new Form CA-7 for a schedule award.

In an April 9, 2019 report, Dr. Michael Katz, a Board-certified orthopedic surgeon serving as a DMA, questioned how Dr. Moufawad was able to determine a work-related impairment of 14 percent when prior examinations recorded no sensory or motor deficits. He recommended a second opinion examination in order to better determine permanent impairment.

On April 24, 2019 OWCP referred appellant for a second opinion examination with Dr. Victoria Langa, a Board-certified orthopedic surgeon, and requested that she provide an opinion on permanent impairment. In a May 29, 2019 report, Dr. Langa discussed appellant's factual and medical history and reported the findings of her physical examination. She noted that appellant had tenderness over the lower lumbar spine at midline, but that the paravertebrals were not tender. The bilateral sacroiliac joints were mildly tender, but the iliac crests, sciatic notches, and greater trochanters were not tender. Dr. Langa indicated that active back motion was recorded on flexion, extension, and lateral flexion, and that straight leg raising was negative bilaterally. She noted that no swelling or atrophy was found on examination, and that the knees and ankles demonstrated symmetric motion. Reflexes were diminished, but equal and no motor deficit or sensory deficit was identified in either leg. Dr. Langa opined that had appellant had symptoms of lumbosacral radiculitis, without any motor or sensory deficits consistent with radiculopathy. She indicated that appellant had reached MMI. Dr. Langa noted that, although earlier electrodiagnostic studies of October 4, 2011 and October 7, 2014 were positive, appellant did not exhibit motor or sensory deficit on her physical examination and, therefore, concluded that she did not qualify for a permanent impairment rating under *The Guides Newsletter*.

In a July 2, 2019 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA, indicated that he had reviewed the medical evidence of record, including Dr. Langa's May 29, 2019 report. He opined that he concurred with Dr. Langa's assessment that appellant's lack of neurologic deficits in the legs demonstrated that no ratable permanent impairment was present according to *The Guides Newsletter*. Dr. Harris asserted that appellant's condition had improved since his visit with Dr. Moufawad on November 16, 2018.

By decision dated August 8, 2019, OWCP denied appellant's claim for schedule award compensation due to permanent impairment of any scheduled member or function of the body. It based its determination on Dr. Langa's May 29, 2019 report and Dr. Harris' July 2, 2019 report.

On August 19, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on December 10, 2019 counsel argued that there was a conflict in the medical opinion evidence regarding appellant's permanent impairment. By decision dated February 10, 2020, OWCP's hearing representative affirmed the August 8, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ and its implementing federal 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 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.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.¹⁰ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹¹

The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*, which is a supplemental publication of the sixth edition of the A.M.A., *Guides*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.¹²

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* See also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); see also Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹¹ *Supra* note 9, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3) (March 2017).

¹² *Supra* note 9, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

Section 8123(a) of FECA provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”¹³ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴

ANALYSIS

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

The Board finds that a conflict remains in the medical opinion evidence between the opinion of Dr. Moufawad, an attending physician, and the opinions of Dr. Langa, an OWCP referral physician, and Dr. Harris, a DMA, regarding the permanent impairment of appellant’s lower extremities.¹⁵

In a November 16, 2018 report, Dr. Moufawad determined that appellant had 14 percent permanent impairment of her lower extremities. He noted that she had a mildly weak right big toe extension of 4+/5, compared to 5/5 on the left side. Dr. Moufawad advised that the sensory examination showed decreased sensation to light touch on the lateral and posterior aspect of the right leg into the dorsum of both feet, which he rated as 4/5. He applied the standards of *The Guides Newsletter* and found that appellant had a GMFH of 3 and a GMCS of 3, and that the GMPE was not applicable. Dr. Moufawad applied the net adjustment formula and found that she had 10 percent permanent impairment of the right lower extremity due to L5 nerve sensory/motor deficits and 4 percent permanent impairment of the right lower extremity due to S1 nerve sensory/motor deficits. He concluded that appellant had 14 percent permanent impairment of her right lower extremity based on motor and sensory deficits associated with the right L5 and S1 dermatomes.

In contrast, Dr. Langa determined in her May 29, 2019 report that appellant did not have permanent impairment of appellant’s lower extremities. She indicated that active back motion was recorded on flexion, extension, and lateral flexion, and that straight leg raising was negative bilaterally. Dr. Langa noted that no swelling or atrophy was found on examination, and that the knees and ankles demonstrated symmetric motion. Reflexes were diminished, but equal and no motor deficit or sensory deficit was identified in either leg. Dr. Langa opined that appellant had symptoms of lumbosacral radiculitis, without any motor or sensory deficits consistent with radiculopathy. She noted that, although earlier electrodiagnostic studies were positive, appellant did not exhibit motor or sensory deficit on examination and, therefore, she concluded that she did not qualify for a permanent impairment rating under *The Guides Newsletter*. As well, Dr. Harris indicated in his July 2, 2019 report that he concurred with Dr. Langa’s assessment that appellant’s

¹³ 5 U.S.C. § 8123(a).

¹⁴ *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁵ *See supra* note 13.

lack of neurologic deficits in the legs demonstrated that no ratable permanent impairment was present according to *The Guides Newsletter*.

Consequently, the case must be referred to an impartial medical specialist, pursuant to 5 U.S.C. § 8123(a), to resolve the existing conflict in the medical opinion evidence regarding permanent impairment.¹⁶ On remand OWCP shall refer appellant, along with the case file and the statement of accepted facts, to a specialist in the appropriate field of medicine for an impartial medical evaluation and report including a rationalized opinion on this matter. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding her schedule award claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2020 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: August 11, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁶ See *supra* note 14.