

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

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R.A., Appellant)	
)	
and)	Docket No. 23-0408
)	Issued: August 14, 2023
U.S. POSTAL SERVICE, BUENA VISTA POST)	
OFFICE, Miami, FL, Employer)	
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Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 30, 2023 appellant, through counsel, filed a timely appeal from a January 5, 2023 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 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 a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

This case has been previously before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 9, 2004 appellant, then a 42-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on September 8, 2004 she developed back pain radiating down her left leg when delivering mail while in the performance of duty. OWCP accepted the claim for lumbosacral strain and herniated lumbar disc at L4-5 and L5-S1.

On May 18, 2007 appellant returned to limited-duty work until her position was withdrawn by the employing establishment on December 1, 2010. On December 5, 2011 she again returned to limited-duty work.

Appellant filed a claim for compensation (Form CA-7) on June 4, 2012, for a schedule award.

Thereafter, OWCP received a medical report dated June 20, 2012 from Dr. Martin Fritzhand, a Board-certified urologist, who advised that appellant had reached maximum medical improvement (MMI) as of September 2006. Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), he also determined that she had a Class 1 impairment or four percent permanent impairment of each lower extremity due to a severe level 3 sensory deficit of the S1 nerve root.

On August 1, 2012 Dr. H.P. Hogshead, a Board-certified orthopedic surgeon, serving as an OWCP district medical adviser (DMA), reviewed Dr. Fritzhand's June 20, 2012 report and noted deficiencies in the report regarding the severity of S1 sensory nerve loss in appellant's bilateral lower extremities. He recommended a second opinion permanent impairment evaluation.

On October 8, 2014 Dr. Hogshead again reviewed the case file as requested by OWCP. He reiterated his recommendation for a second opinion impairment evaluation.

On June 27, 2017 QTC Medical Services (QTC), OWCP's scheduling service, referred appellant, together with a statement of accepted facts (SOAF), the case record, and a series of questions, to Dr. Clinton G. Bush, III, a Board-certified orthopedic surgeon, for a second opinion

³ Docket No. 19-0288 (issued July 12, 2019).

⁴ A.M.A., *Guides* (6th ed. 2009).

evaluation to determine the extent of her employment-related permanent impairment based on the sixth edition of the A.M.A., *Guides*, and the date she reached MMI.

In a July 6, 2017 report, Dr. Bush found that appellant had no sensory or motor neurological deficits consistent with radiculopathy in the lower extremities. Referencing the sixth edition of the A.M.A., *Guides*, he determined that she had nine percent whole person permanent impairment due to a Class 1 impairment for intervertebral disc herniation. Dr. Bush concluded that appellant had reached MMI on March 31, 2014.

On December 12, 2017 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP DMA, reviewed the SOAF and medical record, including Dr. Bush's July 6, 2017 report. He found that appellant had reached MMI on July 6, 2017. Utilizing the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, the DMA determined that she had zero percent permanent impairment of each lower extremity. He noted the discrepancies in Dr. Bush's impairment rating and date of MMI.

OWCP, by decision dated January 11, 2018, denied appellant's claim for a schedule award based on the opinion of Dr. Harris, the DMA.

On January 19, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated September 21, 2018, an OWCP hearing representative affirmed the January 11, 2018 decision finding that the opinion of the DMA, Dr. Harris constituted the weight of the medical evidence.

On November 20, 2018 appellant appealed to the Board. By decision dated July 12, 2019,⁵ the Board set aside OWCP's September 21, 2018 decision, finding a conflict in the medical opinion evidence between Dr. Fritzhand, appellant's physician, and Dr. Harris, OWCP's DMA, regarding the extent of permanent impairment to appellant's bilateral lower extremities. The Board remanded the case to OWCP for referral of appellant to an impartial medical examiner (IME) to resolve the conflict in medical opinion evidence, pursuant to 5 U.S.C. § 8123(a).

On December 18, 2019 OWCP referred appellant, together with a SOAF, the medical record, and a series of questions, for an impartial impairment evaluation with Dr. Warren Grossman, a Board-certified orthopedic surgeon.

In a January 7, 2020 report, Dr. Grossman noted appellant's history of injury, reviewed medical records, and provided his essentially normal findings on physical, neurological, and x-ray examination. He related her complaint of low back pain dating back to September 2004 for which she received medical treatment. Dr. Grossman observed that appellant's magnetic resonance imaging (MRI) scan results revealed mild degenerative changes without any significant central or lateral recess findings. He indicated that she related to him that she had recently undergone a lumbar MRI scan and she had a broken disc. Dr. Grossman requested that OWCP forward the

⁵ *Supra* note 3.

most recent MRI scan for his review. Alternatively, he requested to review an October 12, 2015 MRI scan and February 28, 2017 lumbar spine computerized tomography (CT) scan.

On July 13, 2020 OWCP forwarded the requested diagnostic test results to Dr. Grossman for review and comment. Dr. Grossman did not submit an addendum report.

On March 18, 2022 OWCP referred appellant to Dr. Marc Z. Hammerman, a Board-certified orthopedic surgeon, for an impartial permanent impairment evaluation.

In a May 15, 2022 report, Dr. Hammerman reviewed the medical record and noted the history of appellant's September 8, 2004 employment injury and the accepted conditions of lumbosacral strain and L4-5 and L5-S1 disc herniation. He provided her extensive physical examination findings. Dr. Hammerman noted that there was no evidence of nerve root impingement or stenosis at that time. He observed that the most recent MRI scan performed on October 12, 2015 showed mild narrowing of the neuroforamina consistent with degeneration overtime and mild narrowing at the L5-S1 level of the neuroforamina. No disc herniations were noted. Dr. Hammerman indicated that during his x-ray examination appellant had brief seizure activity on the x-ray table and only an anterior-posterior (AP) view of the pelvis showing the hips and AP and oblique views of the lumbar spine were obtained. The lumbar spine x-rays showed satisfactory alignment of the vertebral bodies. There was degeneration at L4-5 and to a lesser extent LS-S1 on the AP and oblique views. Disc spaces appeared to be satisfactory on the oblique views, but there was some narrowing at the L4-5 level on the AP view. Dr. Hammerman noted that the lateral view could not be obtained to further determine disc space narrowing. He noted that the AP view of the pelvis showed satisfactory appearance of the pelvic architecture and satisfactorily maintained hip joints. Dr. Hammerman advised that the prior x-ray and MRI scan findings were consistent with his x-ray examination findings which were consistent with lumbar pain although no objective neurologic deficit was noted. He further advised that appellant's complaints of radicular pain extending down the right lower extremity were inconsistent with examination using different techniques to produce radicular symptoms. No sensory deficit was identified. Dr. Hammerman considered appellant's lethargy secondary to medication she was taking for seizure control. Nevertheless, he obtained reflexes that were satisfactory. Dr. Hammerman noted that the role diabetes plays in any neuropathic complaints was uncertain at that time. As such, he advised that appellant's findings of mechanical back pain appeared to be secondary to the underlying degenerative changes that seemingly progressed over the years based upon MRI scan changes. Dr. Hammerman opined that she had zero percent permanent impairment of each lower extremity under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. Utilizing Table 17-9, page 531, he assigned a grade modifier for clinical studies (GMCS) of 0, as the electrodiagnostic testing studies previously performed were normal and MRI scan findings showed degenerative changes which progressed overtime with the most recent MRI scan showing no significant nerve root impingement, which was consistent with his clinical examination finding of no neurologic deficit involving the lower extremities. Dr. Hammerman thus concluded that appellant had zero percent permanent impairment of the bilateral lower extremities. He determined that she had reached MMI on January 18, 2007.

On June 8, 2022 Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as an OWCP DMA, reviewed the SOAF and medical record, including Dr. Hammerman's May 12, 2022 report. He concurred with Dr. Hammerman's opinion that appellant had zero percent permanent

impairment of the bilateral lower extremities in accordance with the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. Dr. Fellars referred to *The Guides Newsletter*, Proposed Table 2, Spinal Nerve Impairment Lower Extremity Impairments. The DMA explained that appellant had no objective evidence of radiculopathy. He further noted that although she complained about sensory disturbances, an electromyogram was normal and an MRI scan showed no evidence of nerve root compression. The DMA indicated that appellant's physical examination revealed 5/5 strength and normal reflexes. Based on Dr. Hammerman's findings, he opined that she had zero percent bilateral lower extremity permanent impairment. Thus, the DMA concluded that appellant had zero percent permanent impairment of the lower extremities. He determined that she had reached MMI as of May 15, 2022, the date of Dr. Hammerman's impairment evaluation.

By decision dated June 30, 2022, OWCP denied appellant's schedule award claim. It found that the opinion of Dr. Hammerman as the IME, and Dr. Fellars, its DMA, represented the weight of the medical opinion evidence and established that appellant had no permanent impairment of either lower extremity as a result of her September 8, 2004 employment injury.

On July 11, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 17, 2022.

By decision dated January 5, 2023, a second OWCP hearing representative affirmed the June 30, 2022 decision.

LEGAL PRECEDENT

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.⁶

The schedule award provisions of FECA⁷ and its implementing regulations⁸ 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. OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

⁶ See *T.H.*, Docket No. 19-1066 (issued January 29, 2020); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

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

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*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The 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

In addressing lower extremity impairment due to peripheral or spinal nerve root involvement, the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* require identifying the class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and GMCS.¹³ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁴

Section 8123(a) of FECA provides that, 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.¹⁵ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁶ Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹⁷

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 at Chapter 2.808.5c(3) (March 2017).

¹² *Supra* note 9 at Chapter 3.700, Exhibit 4 (January 2010); *see L.H.*, Docket No. 20-1550 (issued April 13, 2021); *N.G.*, Docket No. 20-0557 (issued January 5, 2021).

¹³ A.M.A., *Guides* 494-531; *see R.V.*, Docket No. 20-0005 (issued December 8, 2020); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹⁴ *Id.* at 521.

¹⁵ 5 U.S.C. § 8123(a). *See R.C.*, Docket No. 18-0463 (issued February 7, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016).

¹⁶ *See M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁷ *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

ANALYSIS

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.

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata*, absent further review by OWCP under section 8128 of FECA. It is, therefore, unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's September 21, 2018 decision as the Board considered that evidence in its July 12, 2019 decision.¹⁸

In the prior appeal, the Board found a conflict in medical opinion between Dr. Fritzhand, appellant's attending physician, and Dr. Harris, the DMA for OWCP, regarding the extent and degree of appellant's permanent impairment of the bilateral lower extremities. On remand, OWCP properly referred her to Dr. Hammerman, pursuant to 5 U.S.C. § 8123(a), for an impartial medical evaluation.

In a May 12, 2022 report, Dr. Hammerman opined that appellant had zero percent permanent impairment of the lower extremities under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. He discussed her history of injury and reviewed her medical record, including diagnostic test results. Dr. Hammerman diagnosed the accepted condition of L4-S and L5-S1 disc herniation. He noted that x-ray and MRI scan findings, including his own x-ray findings revealed lumbar pain, but no objective neurologic deficit. Dr. Hammerman explained that appellant's complaints of radicular pain extending down the right lower extremity did produce radicular symptoms using different examination techniques. He further explained that no sensory deficit was identified. Dr. Hammerman also explained that appellant had 5/5 motor strength and satisfactory reflexes. He referred to Table 17-9, page 531, and assigned a GMCS of 0 because electrodiagnostic testing studies previously performed were normal and MRI scan findings showed degenerative changes which progressed overtime with the most recent MRI scan showing no significant nerve root impingement, which was consistent with his clinical examination finding of no neurologic deficit involving the lower extremities. Dr. Hammerman thus determined that appellant had zero percent permanent impairment of the bilateral lower extremities. OWCP's DMA, Dr. Fellars, agreed with Dr. Hammerman's findings and conclusions.¹⁹

As noted, when a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.²⁰ The Board finds that Dr. Hammerman's May 12, 2022 report is entitled to special weight and establishes that appellant had no bilateral lower

¹⁸ *M.S.*, Docket No. 20-1095 (issued March 29, 2022); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

¹⁹ OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified. *See supra* note 9 at Chapter 2.808.6f (February 2013). *See also A.H.*, Docket No. 23-0335 (issued July 28, 2023); *D.S.*, Docket No. 20-0670 (issued November 2, 2021); *Frantz Ghassan*, 57 ECAB 349 (2006).

²⁰ *Supra* note 17.

extremity permanent impairment.²¹ Dr. Hammerman's opinion was based on a proper factual and medical history, which he reviewed, and his essentially normal examination findings regarding sensory and motor loss. Moreover, he provided medical rationale for his impairment rating.

The record contains no other probative, rationalized medical opinion which supports that appellant had bilateral lower extremity impairment based upon the A.M.A., *Guides* and *The Guides Newsletter*. As such, the Board finds that she has not met her burden of proof.

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 permanent 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.

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

²¹ See *M.E.*, Docket No. 21-0281 (issued June 10, 2022); *V.G.*, Docket No. 19-1728 (issued September 2, 2020); *H.K.*, Docket No. 18-0528 (issued November 1, 2019); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).