

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

B.E., Appellant)	
)	
and)	Docket No. 24-0122
)	Issued: May 17, 2024
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE,)	
Philadelphia, PA, Employer)	

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 22, 2023 appellant, through counsel, filed a timely appeal from a June 2, 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 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 a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

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

On January 26, 2009 appellant, then a 50-year-old lead contact representative, filed a traumatic injury claim (Form CA-1) alleging that on that date she tripped when ascending stairs and injured her right leg, knee, and wrist while in the performance of duty. She stopped work on that day. On March 24, 2009 OWCP accepted appellant's claim for lumbar strain and closed dislocation subluxation at L5.⁴ It paid her wage-loss compensation on the supplemental rolls, effective March 28, 2009, and on the periodic rolls, effective July 5, 2009.⁵

Appellant underwent a series of lumbar intra-articular injections from February 5, 2010 through May 6, 2015.

On June 1, 2011 OWCP expanded the acceptance of appellant's claim to include aggravation of lumbar degenerative disc disease at L4-5 and chronic pain syndrome.⁶

Appellant returned to work in July 2015 at the employing establishment for four hours a day with restrictions. She remained under medical care.

By proposed notice dated January 10, 2018, and finalized February 23, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective February 24, 2018, because she no longer had disability or residuals causally related to the accepted January 26, 2009 employment injury.⁷

Appellant submitted a June 11, 2018 impairment rating from Dr. Michael M. Cohen, an osteopath Board-certified in orthopedic surgery. Dr. Cohen indicated that she had been injured at work on January 26, 2009 while ascending stairs and recounted her symptoms of lumbar pain and radiculopathy. On examination, he observed decreased sensation in the right lower extremity

³ Docket No. 16-1480 (issued March 22, 2017); Docket No. 18-0849 (issued January 7, 2019).

⁴ June 12, 2009 electromyography and nerve conduction velocity (EMG/NCV) studies of the bilateral lower extremities demonstrated right L4-5 lumbar radiculopathy.

⁵ December 30, 2010 EMG/NCV studies of the bilateral lower extremities demonstrated ongoing right-sided L4-5 radiculopathy.

⁶ March 30, 2012 EMG/NCV studies of the bilateral lower extremities were normal.

⁷ The Board affirmed the termination by decision dated January 7, 2019. See Docket No. 18-0849 (issued January 7, 2019).

throughout the L4, L5, and S1 dermatomes, with no sensory identification on Semmes-Weinstein monofilament testing at 3.61 milligrams. Dr. Cohen opined that the January 26, 2009 occupational injury was competent to cause appellant's subjective lumbar pain and objective sensory deficits. He referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), and utilized the diagnosis-based impairment (DBI) rating method to find that, under Proposed Table 2 of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), the class of diagnosis (CDX) for moderate sensory deficit in the right L4 nerve root resulted in a Class 1 moderate impairment with a default value of three percent. Dr. Cohen assigned a grade modifier for functional history (GMFH) of 2 based on appellant's pain disability questionnaire score of 95, according to Table 17-6, page 575 (Adjustment Grid Summary). He assigned a grade modifier for clinical studies (GMCS) of 4 according to Table 17-9, page 581 (Clinical Studies Adjustment: Spine). Dr. Cohen utilized the net adjustment formula, $(GMFH - CDX) + (GMCS - CDX) = (2 - 1) + (4 - 1) = +4$, which resulted in five percent permanent impairment of the right lower extremity. He again referred to Table 2 to find a Class 1 moderate impairment for sensory deficit in the right L5 nerve root, with a default value of three percent. Dr. Cohen found that a GMFH was not applicable, and assigned a GMCS of 4 according to Table 17-9. He applied the net adjustment formula, $(GMCS - CDX) = (4 - 1) = +3$, which resulted in five percent permanent impairment of the right lower extremity. Dr. Cohen again referred to Table 2 to find a Class 1 moderate impairment for sensory deficit in the right S1 nerve root, with a default value of two percent. He found that a GMFH was not applicable and assigned a GMCS of 1, according to Table 17-9. Dr. Cohen applied the net adjustment formula, $(GMCS - CDX) = (1 - 1) = 0$, which resulted in two percent permanent impairment of the right lower extremity. He concluded that appellant had 12 percent permanent impairment of the right lower extremity. Dr. Cohen opined that she had attained maximum medical improvement (MMI) as of June 11, 2018.

On August 16, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.⁸

On April 24, 2019 OWCP obtained a second opinion from Dr. Frank Corrigan, a Board-certified orthopedic surgeon, who reviewed the medical record and a statement of accepted facts (SOAF). Dr. Corrigan noted findings on examination of limited motion throughout the thoracic and lumbar spine, with normal sensation on pinwheel testing in the bilateral lower extremities. He diagnosed chronic lumbar strain and lumbar radiculopathy. Dr. Corrigan explained that he could not perform a valid impairment rating as appellant had not reached MMI because she had undergone right foot surgery in early April 2019 for an unrelated problem.

OWCP received a November 4, 2019 impairment rating by Dr. David Weiss, an osteopath Board-certified in psychiatry. Dr. Weiss found that appellant had reached MMI on the date of the examination and had no permanent impairment of the right foot related to the procedure.

⁸ By decision dated May 22, 2019, OWCP denied appellant's schedule award claim, finding that she was not entitled to a schedule award as she had not reached MMI. On May 30, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, later revised to a request for a review of the written record. By decision dated September 5, 2019, an OWCP hearing representative affirmed the May 22, 2019 decision.

On July 15, 2020 OWCP referred appellant's case and a SOAF to Dr. James W. Butler, a physician Board-certified in occupational medicine, serving as an OWCP district medical adviser (DMA), and requested that he provide an opinion regarding the appropriate percentage of permanent impairment. In an August 17, 2020 report, Dr. Butler disagreed with Dr. Cohen. He contended that the A.M.A., *Guides* did not mention Semmes-Weinstein monofilament testing as a method of sensory evaluation of lower extremity nerves. Dr. Butler opined that appellant had no ratable permanent impairment of the lower extremities originating in the spine.

By decision dated October 7, 2020, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

On October 14, 2020 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. Following a preliminary review, by decision dated November 24, 2020, OWCP's hearing representative set aside OWCP's October 7, 2020 decision and remanded the case to obtain an updated second opinion.

On February 5, 2021 OWCP obtained a second opinion from Dr. Stanley Askin, a Board-certified orthopedic surgeon. Dr. Askin reviewed the medical record and SOAF. On examination, he observed preserved light touch sensation in the bilateral lower extremities. Dr. Askin opined that appellant had no objective residuals of the accepted conditions and no permanent impairment of either lower extremity.

On February 24, 2021 OWCP referred appellant's case to Dr. Butler to determine the percentage of permanent impairment to the lower extremities. In a March 29, 2021 report, Dr. Butler opined that she had no ratable permanent impairment, as Dr. Askin, Dr. Cohen, and Dr. Weiss found no objective residuals of the accepted conditions.

In an April 22, 2021 development letter, OWCP requested that Dr. Cohen review Dr. Askin's February 5, 2021 report and Dr. Butler's March 29, 2021 report, and explain any points of disagreement with reference to specific clinical findings. It afforded him 30 days to respond.

In a May 24, 2021 report, Dr. Cohen noted his review of the reports provided. He explained that appellant sustained herniated discs at L2-3, L3-4, and L4-5, with right L4 and L5 radiculopathy demonstrated on June 12, 2009 and December 30, 2010 EMG/NCV studies. Dr. Cohen advised that, during a June 11, 2018 examination, she reported bilateral lower extremity radiculopathy, and Semmes-Weinstein monofilament testing demonstrated moderate sensory deficit in the right L4, L5, and S1 dermatomes, compatible with the prior determination of 12 percent permanent impairment of the right lower extremity. He noted that pages 532 and 533 of the A.M.A., *Guides* provided that Semmes-Weinstein monofilament testing was "the optimum choice for objective touch threshold exam[ination] because it is simple, inexpensive, easy to use, and provides a repeatable instrument stimulus." Dr. Cohen asserted that Dr. Askin's testing method was not compliant with the A.M.A., *Guides*.

By decision dated October 15, 2021, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

On October 25, 2021 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

A December 29, 2021 positron emission tomography and computerized tomography scan obtained in connection with a nonoccupational condition demonstrated incidental findings of degenerative changes in the cervical, thoracic, and lumbar spine, with the most severe narrowing in the lumbar region at L4-5.

On February 8, 2022 a telephonic hearing was conducted before an OWCP hearing representative.

By decision dated April 15, 2022, OWCP's hearing representative set aside OWCP's October 15, 2021 decision and remanded the case to obtain a supplemental report from Dr. Askin as he had not provided medical rationale explaining his opinion that appellant had no ratable permanent impairment.

OWCP received an April 11, 2002 lumbar MRI scan, which demonstrated minimal lumbar osteoarthritis, a small Schmorl's node and endplate degenerative changes along the inferior endplate of L4, bilateral face hypertrophy at L2-3 through L4-5, mild bilateral neural foraminal narrowing at L3-4 and L4-5, an L3-4 disc bulge with left foraminal component, a mild disc bulge at L4-5, and borderline mild spinal stenosis at L4-5.

On April 29, 2022 OWCP requested that Dr. Askin review an updated SOAF and the medical record, and provide an impairment rating according to the A.M.A., *Guides* with medical rationale supporting his opinion.

In a July 8, 2022 report, Dr. Askin opined that the December 29, 2021 and April 11, 2022 imaging studies demonstrated age-related degenerative changes, and that "nominally positive" electrodiagnostic studies of the lower extremities did not preclude that appellant might have recovered. He accepted Dr. Cohen's "critique regarding monofilament testing sensibility," but countered that it was a subjective test. Dr. Askin opined that as appellant had "no objective clinical manifestation of a disc herniation or radiculopathy," and no residuals of the accepted injury, he was "unable to confirm Dr. Cohen's perceptions regarding an impairment greater than [zero percent]."

On August 9, 2022 OWCP referred appellant's case to Dr. Butler to determine the percentage of permanent impairment to the lower extremities. In a September 22, 2022 report, Dr. Butler opined that the medical record lacked objective evidence of radiculopathy and that when one physician's "findings differ from multiple others, those results may be deemed invalid." He concluded that appellant had no ratable lower extremity impairment emanating from the spine.

By decision dated September 30, 2022, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of

a scheduled member or function of the body, warranting a schedule award. It accorded Dr. Butler the weight of the medical evidence.

On October 28, 2022 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on March 22, 2023.

Subsequently, OWCP received a March 16, 2023 report by Dr. Cohen, in which he disagreed with Dr. Butler that there was no objective evidence of lumbar radiculopathy. Dr. Cohen explained that appellant's treating physicians had diagnosed radiculopathy based on objective findings and performed intra-articular injections, which "certainly would not be a recommended approach for a case of a lumbar strain." He reiterated that she had 12 percent permanent impairment of the right lower extremity.

By decision dated June 2, 2023, OWCP's hearing representative affirmed the September 30, 2022 schedule award decision, finding that Dr. Askin's reports, as reviewed by Dr. Butler the DMA, were entitled to the weight of the medical evidence and established that appellant had no permanent impairment of a scheduled member warranting a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA⁹ and its implementing regulations¹⁰ 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. FECA, however, does not specify the manner in which the percentage of loss of a member 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 and the Board has concurred in such adoption.¹¹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.¹²

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning, Disability and Health: A Contemporary Model of Disablement*.¹³ Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the CDX, which is then adjusted by

⁹ 5 U.S.C. § 8107.

¹⁰ 20 C.F.R. § 10.404.

¹¹ *Id.* at § 10.404(a); *see also* *F.A.*, Docket No. 22-0167 (issued December 16, 2022); *J.C.*, Docket No. 21-0288 (issued July 1, 2021); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹³ A.M.A., *Guides* 3, section 1.3.

GMFH, GMPE, and GMCS.¹⁴ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁵ The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.¹⁶

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.¹⁷ Furthermore, the back is specifically excluded from the definition of an organ under FECA.¹⁸ 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 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 July/August 2009 edition of *The Guides Newsletter* is to be applied.¹⁹

OWCP's procedures provide that termination of wage-loss compensation and medical benefits due to a finding that the accepted condition(s) ceased without residuals "does not bar a subsequent schedule award." A schedule award claim filed after termination, if supported by "prima facie medical evidence reflecting permanent impairment as a result of the work-related injury or exposure," should be developed "even if a finding of no residuals has previously been made."²⁰

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.²¹ When there are opposing reports

¹⁴ *Id.* at 494-531; *see S.W.*, Docket No. 22-0917 (issued October 26, 2022); *R.V.*, Docket No. 20-0005 (issued December 8, 2020); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹⁵ *Id.* at 521.

¹⁶ *F.A.*, *supra* note 11; *J.C.*, *supra* note 12; *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁷ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see F.A., id.; J.C., id.; N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁸ *See id.* at § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁹ *Supra* note 12 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

²⁰ *Id.* at Chapter 2.808.11 (February 2013); *N.W.*, Docket No. 17-0427 (issued June 20, 2017); *A.A.*, 59 ECAB 726 (2008); *B.K.*, 59 ECAB 228 (2007).

²¹ 5 U.S.C. § 8123(a); *A.P.*, Docket No. 22-1246 (issued April 25, 2023); *L.L.*, Docket No. 15-0672 (issued September 23, 2016); *R.H.*, Docket No. 14-0737 (issued September 4, 2015).

of virtually equal weight and rationale, the case must be referred to an impartial medical examiner, pursuant to 5 U.S.C. § 8123(a), to resolve the conflict in the medical evidence.²²

OWCP's procedures further 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 OWCP's medical adviser providing rationale for the percentage of impairment specified.²³

ANALYSIS

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

Dr. Askin, in a February 5, 2021 report, found that appellant had normal light-touch sensation in the bilateral lower extremities and no objective residuals of the accepted conditions. In a July 8, 2022 supplemental report, he opined that imaging studies demonstrated idiopathic age-related changes, and acknowledged that electrodiagnostic studies had been "nominally positive" for radiculopathy. Dr. Askin noted that appellant's condition might have subsequently improved and asserted that monofilament light touch testing was subjective. He concluded that, as there were no objective findings of a lower extremity condition originating in the spine, she had zero percent permanent impairment of the right lower extremity.

In contrast, Dr. Cohen, in his June 11, 2018 report, observed decreased light touch sensation in the right L4, L5, and S1 dermatomes based on Semmes-Weinstein monofilament testing, and attributed these findings to the accepted January 26, 2009 employment injury. He referred to the A.M.A., *Guides* to calculate 12 percent permanent impairment of the right lower extremity due to sensory loss involving the right L4, L5, and S1 nerve roots. In his May 24, 2021 report, Dr. Cohen explained that the A.M.A., *Guides* provided that Semmes-Weinstein monofilament testing was the preferred method for assessing threshold objective touch. He asserted in his March 14, 2023 report, that the medical record supported the diagnosis of lumbar radiculopathy as appellant's treating physicians had prescribed lumbar epidural injections based on her radicular symptoms and clinical findings.

The Board finds, therefore, that there is a conflict in the medical opinion evidence between the opinions of Dr. Cohen, appellant's attending physician, and Dr. Askin, the second opinion physician, regarding the extent of right lower extremity impairment originating in the spine.

Because there remains an unresolved conflict in the medical opinion evidence regarding appellant's right lower extremity permanent impairment, pursuant to 5 U.S.C. § 8123(a), the case will be remanded to OWCP for referral of appellant, together with the case record and a SOAF, to a specialist in the appropriate field of medicine for an impartial medical examination to resolve the

²² V.C., Docket No. 23-0874 (issued November 30, 2023); D.C., Docket Nos. 22-0020 and 22-0279 (issued April 25, 2023); 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).

²³ See *supra* note 12 at Chapter 2.808.6f (March 2017).

conflict.²⁴ 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 June 2, 2023 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 17, 2024
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

²⁴ *S.M.*, Docket No. 23-0043 (issued October 5, 2023); *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).