

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

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<b>T.D., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 16-0030</b>
	)	<b>Issued: March 4, 2016</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp; DISTRIBUTION CENTER, Jacksonville, FL, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 7, 2015 appellant filed a timely appeal from an August 18, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has proven a claim for schedule award compensation.

**FACTUAL HISTORY**

On April 15, 2013 appellant, then a 35-year-old laborer/custodian, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her lower back while lifting a bag from

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

a recycling hamper. By decision dated June 6, 2013, OWCP accepted her claim for displacement of the lumbar vertebral disc without myelopathy at L4-5 and L5-S1.

Dr. Zachary Brown, a Board-certified diagnostic radiologist, in a September 29, 2014 report, examined the results of a magnetic resonance imaging scan of appellant's lumbar spine. He reported impressions of a broad-based disc protrusion at L4-5, mildly narrowing the lateral recesses without significant spinal canal stenosis, trace broad-based disc protrusion at L5-S1 without significant spinal canal stenosis, and a posterior annular fissure at L4-5.

On January 9, 2015 Dr. Claudio E. Vincenty, Board-certified in anesthesiology and pain medicine, diagnosed displacement of the lumbar intervertebral disc without myelopathy, sciatica, and lumbago. He noted that conservative treatment had failed. Appellant told Dr. Vincenty that she experienced tingling in the left lower extremity and that she experienced pain radiating to the left thigh, left calf, and left great toe. She also communicated to him that these symptoms were exacerbated by lifting, bending, twisting, sitting, driving, standing, and walking.

On neurologic examination, Dr. Vincenty noted normal muscle strength of all muscles. He noted that appellant had no impairment of tandem walking, impairment of walking on toes, or impairment of walking on heels. On examination of her musculoskeletal system, Dr. Vincenty noted back pain with decreased range of motion and muscle pain. He noted a medical history of a left ankle fracture in 2004. Dr. Vincenty repeated these examination results in a later report of March 9, 2015.

In a report dated May 6, 2015, Dr. Vincenty noted that appellant had undergone a selective nerve root block since her last visit, and that the pain had diminished after this procedure. He noted that her current symptoms included back stiffness, without back pain, or left lower extremity tingling. Dr. Vincenty remarked that appellant had a current pain level of zero and that the pain did not radiate. He repeated his evaluation of no impairment of tandem walking, impairment of walking on toes, or impairment of walking on heels.

On June 9, 2015 appellant requested a schedule award (Form CA-7).

In a report dated June 9, 2015, Dr. Vincenty noted that appellant experienced a pain level of 3 out of 10, located in the lower back, radiating to the left buttock, thigh, calf, great toe, and lateral foot. He noted associated symptoms of difficulty walking. Dr. Vincenty noted normal posture and gait, with decreased sensitivity to light touch of the left great toe, but with normal muscle strength and no impairment of tandem walking, walking on toes, or walking on heels. He found that appellant had reached maximum medical improvement as of June 9, 2015 and that her percentage of impairment was six percent, without elaboration.

By letter dated June 11, 2015 addressed to Dr. Vincenty, OWCP noted that schedule awards for the spine are not payable under FECA. However, it also noted that such awards could be paid for impairment of the upper or lower extremities caused by injury to a spinal nerve. OWCP requested that Dr. Vincenty submit a report containing an impairment rating rendered according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and with reference to *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009).

By letter dated June 25, 2015, Dr. Vincenty noted that appellant was at maximum medical improvement as of June 9, 2015 with a 12 percent permanent impairment rating “from an interventional pain management point of view.” He noted that the rating of impairment was made according to the A.M.A., *Guides*, of a “moderate problem in the lumbar spine with a range of 10 percent to 15 percent.” Dr. Vincenty indicated that appellant’s work-related injury was a disc herniation at L4-5 and a bulge at L5-S1.

On July 30, 2015 OWCP referred the case to a district medical adviser (DMA). He was asked to review the medical evidence and provide a calculation of appellant’s permanent percentage of loss of use of the bilateral lower extremities along with a date of maximum medical improvement, in accordance with the sixth edition of the A.M.A., *Guides*.

On August 4, 2015 Dr. James Dyer, a Board-certified orthopedic surgeon and DMA, reviewed the medical evidence of record and responded to OWCP’s inquiries. He noted a date of maximum medical improvement of June 9, 2015. Dr. Dyer observed that Dr. Vincenty had suggested 12 percent whole person impairment rating for a schedule award based on a spinal impairment rating. He noted that FECA does not provide schedule awards for spinal impairment nor does it consider extent of whole person impairment. Dr. Dyer advised that appellant did not have any deficits of the lower extremities on physical examination, and that, as such, she had zero percent permanent impairment of the right lower extremity and zero percent permanent impairment of the left lower extremity.

In a report dated August 6, 2015, Dr. Vincenty noted that appellant’s pain had improved and that she was able to walk for extended periods, but that there remained numbness in her left toes. He noted normal gait and posture, with normal muscle strength of all muscles.

By decision dated August 18, 2015, OWCP denied appellant’s claim for a schedule award. It found that the medical evidence failed to establish that she had sustained a ratable permanent impairment to any scheduled member or function of the body.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>2</sup> and its implementing federal regulations<sup>3</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions, and organs of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.<sup>4</sup> The A.M.A., *Guides* has been adopted by the implementing

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<sup>2</sup> *Id.* at § 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

regulations as the appropriate standard for evaluating schedule losses.<sup>5</sup> For decisions issued after May 1, 2009, the sixth edition is used to calculate schedule awards.<sup>6</sup>

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.<sup>7</sup> A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under FECA.<sup>8</sup> Moreover, neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.<sup>9</sup>

In 1960, amendments to FECA modified the schedule award provisions 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. Therefore, as the schedule award provisions of FECA include 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.<sup>10</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) is to be applied.<sup>11</sup> The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.<sup>12</sup> In particular, 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.<sup>13</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.*, Part 2 -- Claim, *Schedule Awards and Permanent Disability Claim*, Chapter 2.808.5a (February 2013).

<sup>7</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>8</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>9</sup> *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

<sup>10</sup> *Supra* note 8.

<sup>11</sup> See *G.N.*, Docket No. 10-850 (issued November 12, 2010); see also *supra* note 6 at, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>12</sup> *D.S.*, Docket No. 14-12 (issued March 18, 2014).

<sup>13</sup> See *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to its medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.<sup>14</sup>

### ANALYSIS

Appellant filed a claim for a schedule award due to her accepted work injury. The Board finds that the medical evidence of record does not establish any permanent impairment.

The only report of record assigning a rating for permanent impairment is the June 25, 2015 report of Dr. Vincenty. In this report, Dr. Vincenty noted that appellant had been placed at maximum medical improvement as of June 9, 2015 with 12 percent impairment rating “from an interventional pain management point of view.” He noted that the rating was made in accordance with the A.M.A., *Guides*, for a “moderate problem in the lumbar spine with a range of 10 [percent] to 15 [percent].” Dr. Vincenty indicated that appellant’s work-related injury was a disc herniation at L4-5 and a bulge at L5-S1.

On August 4, 2015 Dr. Dyer, a DMA, observed that Dr. Vincenty had assigned 12 percent whole person impairment rating for a schedule award based on a spinal impairment rating. He correctly noted that FECA does not provide schedule awards for spinal impairment nor does it consider the extent of whole person impairment. A schedule award is not payable under FECA for injury to the spine. Neither FECA, nor its implementing regulations, provide a schedule award for impairment to the back and the back is specifically excluded from the definition of organ under FECA.<sup>15</sup> As such, appellant is not entitled to a schedule award for her spinal condition.

Dr. Dyer also considered whether appellant could be eligible for a schedule award based for permanent impairment of the lower extremities. He reviewed the medical reports of Dr. Vincenty and found no deficits of the lower extremities on physical examination, and that, as such, she had a zero percent impairment of the right lower extremity and zero percent permanent impairment of the left lower extremity. A review of the medical evidence confirms that Dr. Dyer’s impairment rating was correctly rendered. Although appellant reported subjective complaints of tingling and pain in her left lower extremity to Dr. Vincenty, there was no objective medical evidence on examination of deficits in her left or right lower extremities.

Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

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<sup>14</sup> See *supra* note 6 at Chapter 2.808.6(f) (February 2013).

<sup>15</sup> See *supra* notes 7 through 13.

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish a ratable impairment of her lower extremities due to her accepted lumbar vertebral disc injury resulting in a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 18, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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