

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

L.H., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
STATION NEWPORT, Newport, RI, Employer**

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**Docket No. 20-1550
Issued: April 13, 2021**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 3, 2020 appellant filed a timely appeal from a March 3, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

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.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 3, 2020 decision, OWCP received additional evidence. 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.*

FACTUAL HISTORY

On May 23, 2011 appellant, then a 45-year-old property disposal specialist, filed a traumatic injury claim (Form CA-1) alleging that on May 17, 2011 she injured her lower left back when picking up a shredder while in the performance of duty. She stopped work on May 17, 2011 and returned on June 6, 2011 in a full-time, limited-duty capacity. On June 8, 2011 OWCP accepted appellant's claim for lumbar back sprain.³

On September 11, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated October 3, 2018, OWCP informed appellant that the medical evidence of record was insufficient to establish her schedule award claim. It requested that she submit a detailed narrative medical report from her treating physician based upon a recent examination, including a date of maximum medical improvement (MMI), the diagnosis upon which the impairment rating was based, a detailed description of any preexisting impairment, and a final rating of the permanent impairment and discussion of the rationale for calculation of the impairment, with references to the applicable criteria and tables of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴

OWCP subsequently received x-ray and magnetic resonance imaging (MRI) scan reports of appellant's lumbar spine, dated November 1, 2017 and November 27, 2018. Appellant also submitted reports from Mohini Yalanis, a nurse practitioner, dated October 4, 2018 through January 17, 2019.

In a February 14, 2019 report, Dr. Sumit Das, a Board-certified neurosurgeon, noted that appellant had chronic back and bilateral leg pain with numbness. He examined appellant and diagnosed lumbar spondylosis. Dr. Das administered a lumbar epidural steroid injection at the L5-S1 level.

In a February 27, 2019 work excuse note, Dr. Das noted that appellant was permanently disabled.

Appellant submitted physical therapy treatment notes dated February 28 through April 1, 2019.

On August 28, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the case record, for a second opinion examination with Dr. John Golberg, a Board-certified orthopedic surgeon. In a September 16, 2019 report, Dr. Golberg reviewed the SOAF and medical record. He examined appellant and diagnosed lumbago, lumbar spondylosis, and intermittent sciatica of the bilateral legs. Dr. Golberg noted that appellant had preexisting lumbar spondylosis and found that the accepted May 17, 2011 employment injury permanently aggravated the condition. He opined that appellant's condition was stable and was unlikely to resolve. Utilizing the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, Rating Spinal Nerve

³ Appellant was removed from federal employment, effective August 1, 2017.

⁴ A.M.A., *Guides* (6th ed. 2009).

Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*), Dr. Golberg found that appellant did not have permanent impairment of a scheduled member or function of the body based on her physical examination findings. He opined that appellant reached MMI in January 2019.

On September 27, 2019 OWCP expanded acceptance of appellant's claim to include lumbar spine sprain and permanent aggravation of preexisting lumbar spondylosis.

On September 27, 2019 OWCP referred appellant's case record, along with an updated SOAF, for a schedule award impairment rating with Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA).

In an October 4, 2019 report, Dr. Katz reviewed the medical record and SOAF, including Dr. Golberg's September 16, 2019 report. He noted that Dr. Golberg failed to provide reasonably detailed motor and sensory examination findings to support that significant radiculopathy was not present. Utilizing the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, Dr. Katz indicated that a spinal nerve impairment rating could not be determined without a supplemental report from Dr. Golberg. He noted that a range of motion (ROM) rating was not appropriate under the A.M.A., *Guides*. Dr. Katz opined that the date of MMI was undetermined pending further information.

On November 6, 2019 OWCP requested clarification from Dr. Golberg regarding appellant's potential spinal nerve impairment. In a November 21, 2019 report, Dr. Golberg noted that he did not find any significant findings with respect to any substantial motor or sensory abnormalities. He indicated that there was no evidence of residual spinal nerve impairment and no diagnostic findings of significance. Dr. Golberg noted that he found no ROM impairment and only conducted one examination because there were no significant restrictions to record. He opined that appellant had reached MMI, but could not pick an exact retroactive date. Dr. Golberg indicated that appellant's lumbar spine sprain should have resolved within weeks of the injury.

On November 27, 2019 OWCP again referred appellant's case to Dr. Katz, the DMA, for a schedule award impairment rating. In a December 4, 2019 report, Dr. Katz reviewed the medical record and SOAF, including Dr. Golberg's November 21, 2019 report. Utilizing the diagnosis-based impairment (DBI) method of the A.M.A., *Guides* and *The Guides Newsletter*, he identified the class of diagnosis (CDX) as a class zero impairment for spinal nerves L3, L4, L5, and S1 for both the left and right lower extremities. Dr. Katz noted that appellant had no motor or sensory deficits, and there was no net adjustment. He, therefore, found that appellant had zero percent left lower extremity impairment and zero percent right lower extremity impairment. Dr. Katz indicated that a ROM impairment calculation was not appropriate under the A.M.A., *Guides*. He opined that appellant reached MMI on September 16, 2019.

On January 21, 2020 OWCP requested clarification from Dr. Katz, the DMA, regarding whether appellant had an upper extremity impairment. In a January 22, 2020 report, Dr. Katz noted that the medical record did not permit a recommendation for an upper extremity impairment. He indicated that appellant's accepted conditions could potentially only affect the lower extremities.

In a development letter dated January 29, 2020, OWCP requested that appellant submit a permanent impairment evaluation from her attending physician in accordance with the standards of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. It afforded her 30 days to submit the necessary evidence.

OWCP subsequently received duplicate copies of an x-ray and MRI scan reports dated June 21, 2016 through November 27, 2018. Appellant also submitted duplicate copies of reports and work excuse notes from Dr. Das and Ms. Yalanis, dated September 7, 2017 through September 26, 2019.

By decision dated March 3, 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.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁵ and its implementing federal regulations,⁶ 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.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

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.⁹ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹⁰ The sixth edition of the A.M.A., *Guides* 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.¹¹

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see T.W.*, Docket No. 20-0119 (issued January 12, 2021); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹⁰ *Supra* note 8 at Chapter 2.808.5(c)(3) (March 2017).

¹¹ *Supra* note 8 at Chapter 3.700, Exhibit 4 (January 2010); *see N.G.*, Docket No. 20-0557 (issued January 5, 2021).

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 permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹²

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.

In support of her claim, appellant submitted reports and work excuse notes from Dr. Das, dated February 27 through September 26, 2019. While Dr. Das diagnosed lumbar spondylosis, he did not address MMI, nor did he find permanent impairment resulting from a lumbar spine condition causally related to the accepted May 17, 2011 employment injury, in accordance with the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. Therefore, the evidence from Dr. Das is insufficient to establish permanent impairment of a scheduled member or function of the body causally related to appellant's accepted employment injury.¹³

OWCP obtained a second opinion from Dr. Golberg who provided schedule impairment ratings in September 16 and November 21, 2019 reports. Utilizing the A.M.A., *Guides* and *The Guides Newsletter*, Dr. Golberg found that appellant did not have permanent impairment of a scheduled member or function of the body based on her physical examination findings, including motor and sensory examination. He opined that appellant had reached MMI, but could not pick an exact retroactive date.

OWCP referred the case to its DMA, Dr. Katz, who correctly noted that FECA does not allow a schedule award for the spine, though it does allow for schedule awards for spinal nerve injuries resulting in impairment of the extremities.¹⁴ With reference to *The Guides Newsletter*, he concurred with Dr. Golberg's assessment of permanent impairment for appellant's spinal nerves L3, L4, L5, and S1 for the left and right lower extremities. Dr. Katz found that appellant had zero percent left lower extremity impairment and zero percent right lower extremity impairment. The DMA opined that appellant reached MMI on September 16, 2019.

The Board finds that the DMA properly applied the standards of the A.M.A., *Guides* and *The Guides Newsletter* to the physical examination findings of Dr. Golberg. The DMA accurately summarized the relevant medical evidence and reached conclusions about appellant's conditions that comported with these findings.¹⁵ He noted that the A.M.A., *Guides* did not allow for an impairment rating based on ROM for the relevant diagnoses.¹⁶ The DMA properly referred to *The Guides Newsletter* in determining that appellant did not have permanent impairment of a scheduled

¹² *Supra* note 8 at Chapter 2.808.6(f) (March 2017).

¹³ See *T.M.*, Docket No. 19-1126 (issued September 22, 2020); *M.G.*, Docket No. 19-0823 (issued September 17, 2019); *M.M.*, Docket No. 18-0292 (issued July 9, 2018).

¹⁴ *Supra* note 10.

¹⁵ See *C.W.*, Docket No. 19-1590 (issued September 24, 2020).

¹⁶ *Id.*

member or function of the body. As his report is detailed, well-rationalized, and based on a proper factual background, the DMA's opinion represents the weight of the medical evidence.¹⁷

Appellant has submitted no other medical evidence in conformance with the appropriate tables of the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter* establishing permanent impairment of a scheduled member or function of the body. The Board, therefore, finds that she has not met her burden of proof to establish her schedule award claim.

On appeal appellant alleges that OWCP improperly developed and delayed her schedule award claim. The Board finds, however, that OWCP properly developed her claim in accordance with its procedures and, as explained above, the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

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 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.

¹⁷ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 13, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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