

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

R.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Boston, MA, Employer**

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**Docket No. 21-1332
Issued: July 1, 2022**

Appearances:

Stephanie Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On September 3, 2021 appellant, through counsel, filed a timely appeal from an August 12, 2021 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 August 12, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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 his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On August 4, 1993 appellant then a 44-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on July 29, 1993 he sustained an injury to his lower back when he picked up a full tray of mail and turned to place the tray into a postal container while in the performance of duty. OWCP accepted lumbosacral sprain. Appellant stopped work on July 31, 1994 and worked intermittently thereafter. He retired on June 1, 2004. OWCP paid appellant compensation benefits on the supplemental rolls from November 20, 2002 through May 28, 2004.⁴

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

In a development letter dated October 18, 2018, OWCP requested that appellant submit an impairment evaluation addressing whether he had reached maximum medical improvement (MMI) and provide an impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ It advised that, if his physician was unable or unwilling to provide the required report, to notify OWCP in writing and if his case met the essential elements for a schedule award claim, he would be scheduled to be seen by a second opinion specialist. OWCP afforded appellant 30 days to submit additional medical evidence in support of his schedule award claim.

Appellant came under the treatment of Dr. Daniel Park, an osteopath specializing in family medicine, from September 13, 2018 through April 9, 2019 for degenerative disc disease of the lumbar spine. He associated the onset of symptoms with a lifting event at work. Appellant reported low back pain radiating from the left leg to the knee. Dr. Park diagnosed degenerative disc disease of the lumbar spine, failed back syndrome, cervicalgia, and chronic pain syndrome. He performed a series of trigger point injections.

On November 7, 2018 counsel notified OWCP that Dr. Park did not perform impairment ratings and requested that appellant be referred to another physician skilled in impairment ratings.

A magnetic resonance imaging (MRI) scan of the lumbar spine dated March 22, 2019 revealed multilevel degenerative changes, most prominent at L4-5 with disc herniation and

⁴ Appellant previously filed a traumatic injury claim (Form CA-1) for an injury sustained on March 9, 1972 when he was sitting and casing mail and bent down to pick up a letter and felt a sharp pain in his back. OWCP assigned that claim OWCP File No. xxxxxx936 and accepted it for spondylolisthesis L5-S1 and postlaminectomy syndrome. On July 14, 1972 appellant underwent an OWCP-authorized lumbar disc excision and spinal fusion at L4. He also has a claim for a January 26, 1993 injury, alleging that, while sitting on a rest bar and sorting mail into a distribution case, his seat collapsed and he injured his low back. OWCP assigned that claim OWCP File No. xxxxxx770 and accepted it for multiple contusions, back strain, and left shoulder strain. It has administratively combined OWCP File Nos. xxxxxx314, xxxxxx936, and xxxxxx770, with OWCP File No. xxxxxx770 designated as the master file.

⁵ A.M.A., *Guides* (6th ed. 2009).

anterolisthesis of C2 lobe. An MRI scan of the cervical spine of even date revealed multilevel degenerative changes.

OWCP referred appellant, an updated statement of accepted facts (SOAF), the medical record, and a series of questions, to Dr. Christopher Rynne, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether appellant's work-related condition resulted in permanent impairment thereby warranting a schedule award. It advised him that he should rate appellant's impairment using *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (The Guides Newsletter)*, a supplemental publication of the A.M.A., *Guides*.⁶

In a May 23, 2019 report, Dr. Rynne discussed appellant's factual and medical history, reviewed the SOAF and the medical record, and reported the findings of his physical examination of appellant. He noted that appellant's history was significant for an L4-5 fusion when he was 22 years old, which resulted in persistent back pain. On July 29, 1993 appellant aggravated his chronic back pain while picking up a tray of mail at work. Findings on examination revealed slight limitation of motion in his back, mildly positive straight leg raising maneuver, with no objective findings to suggest clinically significant nerve root entrapment. Dr. Rynne indicated that, with regard to spinal injuries, OWCP advised that individuals who sustained spinal injuries are rated based on the findings in the extremities attributable to the spine. Upon physical examination, appellant had no objective symptomology in the upper or lower extremities and no evidence that he sustained a condition in the extremities causally related to the injury of July 29, 1993. He diagnosed failed back surgery with chronic back pain, history of lumbosacral sprain July 29, 1993, resolved. Dr. Rynne opined that appellant did not have ratable impairment according to the *The Guides Newsletter*, which was used to rate spinal nerve extremity impairment using the A.M.A., *Guides*. He opined that appellant's current symptoms were related to the spine surgery in 1972.⁷ Dr. Rynne attributed appellant's new symptoms to degenerative disc herniation on the right side at L4-5, which was not work related. He noted that appellant reached MMI on May 23, 2019.

OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). In a June 4, 2019 report, Dr. Katz reviewed the SOAF and the medical record, including Dr. Rynne's report. He concurred with Dr. Rynne's opinion that there was no ratable impairment for the accepted conditions of this claim. Dr. Katz noted that the accepted condition was sprain of the lumbosacral spine. He further noted that FECA did not allow a schedule award for the spine. The DMA referred to *The Guides Newsletter*, Proposed Table 2, Spinal Nerve Impairment Lower Extremity Impairments, for no motor and/or sensory deficits at L3, L4, L5, S1 on the right and at L3, L4, L5, S1 on the left. He explained that appellant had no motor deficits at L3, L4, L5, S1 of the right and left lower extremities, which had a class zero impairment and a default value of zero. The DMA noted that there was no net adjustment and resulted in a class of zero for zero percent permanent impairment. For spinal nerves L3, L4, L5, S1 there was no sensory deficit of the right and left lower extremities.

⁶ A.M.A., *Guides* (6th ed. 2009).

⁷ The report notes the year as 1971, but this appears to be a typographical error as the case record establishes that appellant underwent surgery in 1972.

There was a class zero impairment and a default value zero. The DMA noted that there was no net adjustment and resulted in a class of zero for zero percent permanent impairment.

Based on Dr. Rynne's evaluation findings, Dr. Katz found that there was no ratable impairment of any spinal nerve and thus no ratable impairment under FECA for the accepted spinal conditions. He also noted that the A.M.A., *Guides* did not allow for an alternative range of motion impairment calculation based on the key diagnostic factors for the accepted conditions.

OWCP received additional evidence. Appellant submitted reports from Dr. Joseph Abate, a Board-certified orthopedist, dated November 10, 2015 and February 2, 2016, who diagnosed failed back syndrome and status post bilateral total knee arthroplasties. Dr. Abate noted that appellant was totally disabled from work.

By decision dated June 6, 2019, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

OWCP subsequently received additional evidence. Dr. Park treated appellant from June 11 through November 27, 2019 for chronic low back pain. He diagnosed degenerative disc disease of the lumbar spine, failed back surgical syndrome, chronic pain syndrome, and cervicgia.

On July 3, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on November 12, 2019.

An electromyogram (EMG) and nerve conduction velocity (NCV) study dated October 22, 2019 revealed moderate primarily axonal sensory motor polyneuropathy (PNP), mild-to-moderate, chronic, primarily L4-5 radiculopathy, worse on the right.

By decision dated January 22, 2020, OWCP's hearing representative found that the case was not in posture for decision and vacated OWCP's June 6, 2019 decision denying appellant's schedule award claim. The hearing representative remanded the case for OWCP to refer an updated SOAF and the medical record to Dr. Rynne for a supplemental report to identify the diagnosed conditions causally related to the work injury claims and explain whether appellant has any impairment of the upper and lower extremities causally related to his accepted spine conditions in conformance with the A.M.A., *Guides*.⁸ Following any further development deemed necessary, OWCP was to issue a *de novo* decision.

OWCP received additional evidence. In a February 3, 2020 report, Dr. Park diagnosed degenerative disc disease of the lumbar spine, failed back surgical syndrome, chronic pain syndrome, and cervicgia.

By decision dated April 23, 2020, OWCP expanded the acceptance of appellant's claim to include spondylolisthesis at L5-S1 and postlaminectomy syndrome under OWCP File No. xxxxxx936.

⁸ The hearing representative noted that Dr. Rynne's report contained an inaccurate history relating to the work injury of March 9, 1972 under OWCP File No. xxxxxx936.

OWCP referred an updated SOAF dated April 23, 2020, the medical record, and a series of questions, to Dr. Rynne for a supplemental second opinion report to determine whether appellant's work-related condition resulted in permanent impairment of a schedule member or function of the body warranting a schedule award.

In a May 7, 2020 report, Dr. Rynne noted examining appellant on May 23, 2019 who reported constant low back pain radiating down the right calf, numbness and anterior right thigh pain for the past year, but no further left leg symptoms. Findings on examination revealed a shuffling gait, a healed midline scar in the middle of his lower lumbar spine with a scar on the posterior aspect of the right iliac crest, mild diffuse tenderness throughout the lumbar spine, and no paraspinous spasms. Dr. Rynne noted that appellant could forward flex and bring his fingertips within three inches of the floor, he had 30 degrees left and right tilt, 45 degrees of left and right rotation, straight leg raising maneuver produced back pain at 60 degrees on the right and 80 degrees on the left, and a lateral flap in the distribution of the infrapatellar branch of the saphenous nerve consistent with prior knee replacements. He noted sensory examination of the lower extremities was normal. Dr. Rynne noted normal strength of the hip flexors, hip abductors, hip adductors, quadriceps, hamstring, tibialis anterior, great toes and lesser toe flexors, extensors digitorum, and gastrocnemius muscles, no measurable atrophy in either thigh or calf, and deep tendon reflexes were trace, but symmetrical.

Dr. Rynne noted that his opinion was unchanged and opined that appellant had chronic back pain dated to a surgery performed 50 years ago for spondylolisthesis. He explained that on physical examination there were no objective findings of spinal nerve injury and appellant's current symptoms were related to his 1972 spinal surgery. Dr. Rynne diagnosed failed spine surgery. He advised that appellant did not have any measurable loss of function due to a spinal cord injury in either leg, appellant's loss of function to the left lower extremity was zero and his right lower extremity was zero. Dr. Rynne noted no ratable loss of function due to spinal cord injury in either leg. He advised that appellant reached MMI on May 23, 2019.

By decision dated June 8, 2020, OWCP denied appellant's schedule award claim, finding that he had not established permanent impairment of a scheduled member or function of the body, warranting a schedule award.

OWCP received additional evidence. Reports from Dr. Park dated May 26 through September 9, 2020 diagnosed degenerative disc disease of the lumbar spine, failed back surgical syndrome, chronic pain syndrome, and cervicalgia.

In an appeal request form dated June 17, 2020, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on September 15, 2020.

In a statement dated October 15, 2020, counsel asserted that OWCP erred in failing to send Dr. Rynne's addendum report to the DMA for review prior to denying appellant's claim for a schedule award.

By decision dated November 24, 2020, an OWCP hearing representative found that the case was not in posture for decision and vacated OWCP's June 8, 2020 decision denying appellant's schedule award claim. The hearing representative determined that OWCP committed

a procedural error by not referring Dr. Rynne's addendum report to the DMA. OWCP remanded the case for OWCP to refer an updated SOAF and the medical record to the DMA to review the report, verify the correct application of the A.M.A., *Guides*, confirm the percentage of permanent impairment, and specify the reasons for assigning a percentage of loss of use to the measurements provided by the examining physician. Following any further development deemed necessary, OWCP was to issue a *de novo* decision.

OWCP received additional evidence. In reports dated October 5 and December 3, 2020, Dr. Park diagnosed degenerative disc disease of the lumbar spine, failed back surgical syndrome, chronic pain syndrome, and cervicalgia. An x-ray of the lumbar spine dated December 3, 2020, revealed no acute osseous abnormality, changes of lower thoracic and lumbar spondylosis, and stable multilevel lumbar spondylolisthesis likely degenerative.

OWCP referred an updated SOAF, the medical record, and a series of questions, to Dr. Rynne for a supplemental second opinion evaluation.

In a January 15, 2021 report, Dr. Rynne specifically noted reviewing copies of the March 22, 2019 cervical and lumbar MRI scan and an October 22, 2019 EMG/NCV study. He indicated that these diagnostic tests did not change his opinion as it related to the presence of impairment compensability under FECA. Dr. Rynne noted mild-to-moderate changes in his EMG/NCV, however, he found no objective sensory or motor deficits to substantiate claims for a spinal cord injury. He advised that appellant did not have a measurable loss of function due to a spinal nerve injury in either leg and his loss of function of the lower extremities was zero. Dr. Rynne reiterated that when he examined appellant two years prior he had no objective findings on physical examination to substantiate claims for a spinal nerve injury.

OWCP referred appellant's case to Dr. Katz serving as a DMA. In a February 24, 2021 report, Dr. Katz reviewed the SOAF and the medical record, including Dr. Rynne's reports dated May 23, 2019, May 7, 2020, and January 15, 2021. He concurred with Dr. Rynne's opinion that there was no ratable impairment for the accepted conditions of this claim. Dr. Katz referred to *The Guides Newsletter*, Proposed Table 2, Spinal Nerve Impairment Lower Extremity Impairments, for no motor and sensory deficits L3, L4, L5, S1 on the right and L3, L4, L5, S1 on the left. He reiterated his calculations and findings as set forth in his June 4, 2019 report and again opined that appellant had no ratable impairment.

The DMA referenced Dr. Rynne's May 23, 2019 report, which noted no myotomal motor dermatomal sensory deficits in either lower extremity and provided a detailed examination in support of finding that and he determined no ratable impairments under FECA for the accepted spinal conditions. He further opined that Dr. Rynne provided a detailed explanation as to how prior lumbar surgery and lumbar conditions do not necessarily imply a ratable impairment pursuant to FECA.

By decision dated March 24, 2021, OWCP denied appellant's schedule award claim, finding that he had not established permanent impairment of a scheduled member or function of the body, warranting a schedule award.

OWCP received additional evidence. An x-ray of the lumbar spine dated July 16, 2018 revealed grade 1 L4-5 anterolisthesis with mild-to-moderate spondylosis.

Dr. Park treated appellant from January 4 through July 6, 2021 and noted that his diagnosis remained unchanged.

On April 14, 2021 appellant, through counsel, requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

By decision dated August 12, 2021, OWCP's hearing representative affirmed the decision dated March 24, 2021.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations 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.⁹ 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.¹⁰ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹¹ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹²

No schedule award is payable for a member, function, or organ of the body that is not specified in FECA or the implementing regulations.¹³ The list of scheduled members includes the eye, arm, hand, fingers, leg, foot, and toes.¹⁴ Additionally, FECA specifically provides for compensation for loss of hearing and loss of vision.¹⁵ Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.¹⁶ Furthermore, the back is specifically excluded from the definition of organ under FECA.¹⁷ The

⁹ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

¹⁰ *Id.* at § 10.404. *See also* Ronald R. Kraynak, 53 ECAB 130 (2001).

¹¹ *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* at Chapter 2.808.5a (March 2017).

¹² *J.C.*, Docket No. 20-1071 (issued January 4, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹³ *D.L.*, Docket No. 20-0059 (issued July 8, 2020); *W.C.*, 59 ECAB 374 (2008); *Anna V. Burke*, 57 ECAB 521 (2006).

¹⁴ 5 U.S.C. § 8107(c).

¹⁵ *Id.*

¹⁶ *K.Y.*, Docket No. 18-0730 (issued August 21, 2019); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁷ *See* 5 U.S.C. § 8101(19); *see also* *G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

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's procedures indicate that *The Guides Newsletter* is to be applied.¹⁸ 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.¹⁹

The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.²⁰

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.²¹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

In reports dated May 23, 2019, May 7, 2020, and January 15, 2021, Dr. Rynne noted that appellant had no objective symptomology in the upper or lower extremities and no evidence to suggest clinically significant nerve root entrapment or that he sustained a condition in the extremities causally related to the accepted July 29, 1993 employment injury. He advised that sensory and motor examination of the lower extremities were normal. Dr. Rynne noted mild-to-moderate changes in appellant's EMG; however, he found no objective sensory or motor deficits to substantiate claims for a spinal cord injury. He diagnosed failed back surgery. Dr. Rynne opined that appellant did not have ratable impairment according to *The Guides Newsletter*, which was used to rate spinal nerve extremity impairment using the A.M.A., *Guides*. As noted, neither FECA, nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.²² Dr. Rynne advised that appellant did not have any measurable loss of function due to a spinal cord injury in either leg, appellant's loss of function to the left lower extremity was zero, and his right lower extremity was zero.

¹⁸ *Supra* note 11 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁹ *J.C.*, *supra* note 12; *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

²⁰ *See G.S.*, Docket No. 18-0827 (issued May 1, 2019).

²¹ *Supra* note 11 at Chapter 2.808.6(f) (March 2017).

²² 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see R.B.*, Docket No. 19-0848 (issued February 11, 2020); *C.S.*, Docket No. 19-0851 (issued November 18, 2019).

Based on Dr. Rynne's evaluation findings, Dr. Katz found that there was no ratable impairment of any spinal nerve for either motor or sensory defect and thus no ratable impairment under FECA for the accepted conditions. Under Proposed Tables of *The Guides Newsletter*, he explained that appellant had no motor or sensory deficits, therefore, appellant had zero percent permanent impairment of the upper and lower extremities. The DMA properly used Dr. Rynne's findings and provided an explanation in conformance with the A.M.A., *Guides* and *The Guides Newsletter*, that appellant had no permanent impairment of his upper and lower extremities due to either a motor or sensory deficit of the spinal nerves.²³ The Board, therefore, finds that the DMA represents the weight of the medical evidence.

As appellant has not submitted medical evidence in conformance with either the A.M.A., *Guides* or *The Guides Newsletter*, sufficient to establish permanent impairment of a scheduled member or function of the body, the Board finds that he has not met his burden of proof to establish his claim for a schedule award.²⁴

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

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

²³ *Id.*

²⁴ *See R.B., supra* note 22.

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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