

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

R.S., Appellant)	
)	
and)	Docket No. 24-0217
)	Issued: April 12, 2024
DEPARTMENT OF THE AIR FORCE, AIR)	
EDUCATION & TRAINING COMMAND,)	
Lackland, TX, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On December 29, 2023 appellant filed a timely appeal from a November 16, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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 OWCP assigned the present claim OWCP File No. xxxxxx587. Appellant has a prior claim for a November 6, 2008 employment injury under OWCP File No. xxxxxx209, which OWCP accepted for several cervical and thoracic conditions. OWCP has administratively combined OWCP File Nos. xxxxxx587 and xxxxxx209, with the latter serving as the master file. Appellant also has an accepted claim under OWCP File No. xxxxxx676 for an April 1, 2008 tear of the left medial meniscus. OWCP File No. xxxxxx676 has not been administrative combined with the present claim.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the November 16, 2023 decision, a appellant submitted additional evidence on appeal. 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.*

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 September 15, 2014 appellant, then a 57-year-old air conditioning mechanic, filed a traumatic injury claim (Form CA-1) alleging that on September 8, 2014 he strained his neck and back while opening a window in the performance of duty. He stopped work on September 10 2014 and returned on September 15, 2014. OWCP accepted the claim for neck and lumbar sprain.

On February 14, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a development letter dated March 17, 2023, OWCP explained that no medical evidence had been received in support of appellant's schedule award claim. It requested that he submit a detailed narrative medical report from his 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 afforded appellant 30 days to submit the requested information.

In letters dated April 3 and 11, 2023, appellant requested an extension of time to provide his permanent impairment rating, noting that his physician was unable to provide a rating.

By letter dated April 21, 2023, OWCP referred appellant, along with the case record, a statement of accepted facts, and a series of questions to Dr. Charles W. Kennedy, Jr., Board-certified in orthopedic surgery, for a second opinion examination. By letter dated April 26, 2023, appellant requested that the second opinion evaluation be canceled. He related that he would provide a permanent impairment rating report from his treating physician, Dr. Salvador P. Baylan, Board-certified in physical medicine and rehabilitation.

On June 27, 2023 OWCP expanded the acceptance of the claim to include sprain of ligaments of the cervical spine, and sprain of ligaments of lumbar spine.

In an August 17, 2023 report, Dr. Baylan noted appellant's history of injury and medical course. He determined that appellant had reached MMI on July 27, 2023. Dr. Baylan referred to section 2.5e of the A.M.A., *Guides* and the July/August 2009 edition of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The*

⁴ A.M.A., *Guides* (6th ed. 2009).

Guides Newsletter)⁵ and opined that appellant had a 53 percent upper extremity impairment due to cervical radiculopathy.

On August 27, 2023 OWCP referred the claim to Dr. Nathan Hammel, Board-certified in orthopedic surgery and serving as an OWCP district medical adviser (DMA), to provide a permanent impairment rating in conformity with the A.M.A., *Guides* and *The Guides Newsletter*. In a September 16, 2023 report, the DMA reviewed appellant's history of injury and noted his accepted conditions of neck and lumbar sprains, and sprains of ligaments of the cervical and lumbar spines. Dr. Hammel explained that Dr. Baylan did not provide any calculations related to his permanent impairment rating and the findings in his report were so diffuse that the validity of the report was called into question.

In a letter dated September 22, 2023, OWCP provided Dr. Baylan with a copy of the DMA's report finding zero percent permanent impairment of the upper extremities and requested a report from Dr. Baylan explaining his findings using the A.M.A., *Guides*.

On September 27, 2023 OWCP provided an updated statement of accepted facts (SOAF) and requested clarification from the DMA. It explained that appellant was previously awarded compensation for 8 percent left upper extremity permanent impairment, 20 percent right upper extremity permanent impairment, and 13 percent left lower extremity permanent impairment. OWCP provided Dr. Hammel with a copy of an electromyography (EMG) study dated August 17, 2023, read by Dr. Baylan, which revealed bilateral L5-S1 nerve root irritation without active denervation and mild sensory peripheral neuropathy affecting both lower extremities.

In an October 7, 2023 report, Dr. Hammel reviewed appellant's history of injury and noted his accepted conditions and prior schedule awards. The DMA indicated that, recent clinical notes documented radiating neck and back pain, the EMG showed bilateral L5 and S1 nerve root irritation, and appellant's examination revealed diffuse weakness and decreased sensation. Dr. Hammel explained that there were no detailed calculations presented for the upper or lower extremities. He noted that his physical examination of the lower extremities did not correlate to very mild changes on the EMG, indicating that the pain and sensory changes were diffuse and not ascribable to a single spinal nerve. The DMA explained that the upper extremities were similarly diffusely involved and there was no postoperative nerve conduction velocity study to indicate impairment to the upper extremities. He reported an MMI date of July 27, 2023.

In an October 19, 2023 supplemental report, Dr. Baylan noted that he evaluated appellant on June 8, 2023 for a permanent impairment rating and was given a rating of 53 percent upper extremity permanent impairment based on radiculopathy involving the C5 through C8 levels. He explained that appellant had another injury, for which he did not evaluate appellant, but the rating was the same 53 percent permanent impairment. Dr. Baylan further noted that he was in agreement with the DMA that appellant had zero percent permanent impairment as a result of the 2014 injury.

In a November 7, 2023 report, Dr. Baylan reiterated his opinion that he agreed with the DMA that appellant's permanent impairment rating for the second injury in 2014 was zero percent.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

He noted that his original opinion of 53 percent permanent impairment arose from appellant's work-related injury on November 6, 2008, under OWCP File No. xxxxxx209.

By decision dated November 16, 2023, 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.

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. FECA, however, does not specify the manner in which the percentage of loss of a member 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

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 (ICF): A Contemporary Model of Disablement*.¹⁰ Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and/or grade modifier for clinical studies (GMCS).¹¹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹² 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.¹³

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.¹⁴ However, a schedule award is permissible where the employment-related spinal condition affects the upper

⁶ See *J.J.*, Docket No. 23-0440 (issued December 21, 2023); *R.B.*, Docket No. 22-0954 (issued December 29, 2022); *T.H.*, Docket No. 19-1066 (issued January 29, 2020); *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁷ *Supra* note 1.

⁸ 20 C.F.R. § 10.404.

⁹ *Supra* note 5 at Chapter 2.808.5a (February 2022); see also *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ A.M.A., *Guides* 3, section 1.3.

¹¹ *Id.* at 493-556.

¹² *Id.* at 521.

¹³ See *S.H.*, Docket No. 23-0216 (issued December 7, 2023); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁴ 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).

and/or lower extremities.¹⁵ 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.¹⁶ In addressing upper or 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 impairment CDX, which is then adjusted by the GMFH and the GMCS. The effective net adjustment formula is (GMFH - CDX) + (GMCS - CDX).¹⁷

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 support of his claim, appellant provided an August 17, 2023 report from his treating physician, Dr. Baylan, who opined that appellant reached MMI on July 27, 2023. Dr. Baylan referred to section 2.5e of the A.M.A., *Guides* and *The Guides Newsletter*¹⁸ and opined that appellant had a 53 percent upper extremity impairment. The Board notes that this report provided no calculations nor explanation of how Dr. Baylan arrived at this rating, and therefore finds that this report does not comport with OWCP's procedures and is insufficient to establish permanent impairment.¹⁹ Furthermore, Dr. Baylan clarified in his October 19 and November 7, 2023 reports that his impairment rating was for appellant's previous work-related injury on November 6, 2008 under OWCP File No. xxxxxx209, and that he concurred with Dr. Hammel, the DMA, that appellant had no additional impairment as a result of his 2014 injury.

In an October 7, 2023 report, Dr. Hammel, the DMA, reviewed appellant's history of injury and noted his accepted conditions and prior schedule awards. He discussed appellant's injury and reviewed the medical record, including diagnostic test results, and his examination findings. Dr. Hammel explained that there were no detailed calculations presented for the upper or lower extremities. He noted that his physical examination of the lower extremities did not correlate to very mild changes on the EMG, indicating that the pain and sensory changes were diffuse and not ascribable to a single spinal nerve. Dr. Hammel noted that, on physical examination, the pain and sensory changes were diffuse and not ascribable to any spinal nerve and there was no postoperative nerve conduction study to indicate impairment to the upper extremities. The Board finds that the DMA's opinion was based on a proper factual and medical history, which he reviewed, and his examination findings, which demonstrated no permanent impairment from the September 8, 2014 work-related injury. The Board further finds that the DMA provided medical rationale for his

¹⁵ *Supra* note 5 at Chapter 2.808.5c(3) (February 2022).

¹⁶ *Id.* 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).

¹⁷ *G.W.*, Docket No. 22-0301 (issued July 25, 2022); *see also The Guides Newsletter*; A.M.A., *Guides* 430.

¹⁸ *Supra* note 9.

¹⁹ *See J.U.*, Docket No. 21-1298 (issued February 16, 2023); *M.M.*, Docket No. 17-0197 (issued May 1, 2018).

impairment rating and that the treating physician, Dr. Baylan, concurred with the DMA that there was no additional impairment as a result of the September 8, 2014 work-related injury.

As the medical evidence of record is insufficient to establish permanent impairment of a member or function of the body listed in FECA or its implementing regulations, under this claim, the Board finds that appellant has not met his burden of proof.²⁰

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 his 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 November 16, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

²⁰ See *A.B.*, Docket No. 23-0673 (issued December 5, 2023); *G.S.*, Docket No. 17-1318 (issued October 11, 2017); *Leroy M. Terska*, 53 ECAB 247 (2001).