

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

S.W., Appellant	)	
	)	
and	)	<b>Docket No. 24-0634</b>
	)	<b>Issued: August 5, 2024</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
South Bend, IN, Employer	)	
	)	

*Appearances:* *Case Submitted on the Record*  
*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*  
*Office of Solicitor, for the Director*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On May 24, 2024 appellant, through counsel, filed a timely appeal from a May 3, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (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 met her burden of proof to establish permanent impairment of her lower extremities, warranting a schedule award.

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<sup>1</sup> 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.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 4, 2019 appellant, then a 29-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her back and right leg when she bent over to sit in the driver's seat of her delivery vehicle and experienced low back pain and right leg weakness while in the performance of duty. Appellant did not stop work. OWCP accepted the claim for lumbar sprain.

A report of electromyography and nerve conduction velocity (EMG/NCV) study dated December 10, 2020 revealed no abnormalities with the exception of chronic neurogenic changes in the right rectus femoris muscle indicative of mild previous or chronic irritation of the right L3 and/or L4 nerve roots without evidence of ongoing denervation present.

On March 30, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a May 12, 2021 report, Dr. Sami Moufawad, Board-certified in physiatry, related that he had examined appellant and advised that she had reached maximum medical improvement (MMI) as of that date. He conducted a physical examination and found moderate sensory deficits in the L5 and S1 dermatomes and mild motor deficits in the S1 myotome, bilaterally. Dr. Moufawad applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>3</sup> and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) to his findings. He diagnosed low back strain and aggravation of a lower lumbar spine condition. Dr. Moufawad opined that appellant had eight percent permanent impairment of the right lower extremity and eight percent permanent impairment of the left lower extremity.

OWCP thereafter received a series of diagnostic study reports, including a magnetic resonance imaging (MRI) scan of the lumbar spine dated September 7, 2018, which demonstrated acquired lower lumbar spondylosis at L5-S1 with disc bulge and left central extrusion encroaching on the traversing left S1 nerve root and a disc bulge at L4-L5 causing mild lateral recess stenosis right greater than left. A report of MRI dated December 19, 2018 of the lumbar spine demonstrated postsurgical changes at L4-L5 and L5-S1 with mild residual right central disc bulge at L4-L5. A report of MRI of the lumbar spine dated December 19, 2020 demonstrated mild bilateral foraminal narrowing at L4-L5 and L5-S1 without flattening of the corresponding nerve roots. A report of computerized tomography (CT) of the lumbar spine dated December 22, 2020 revealed mild-to-moderate degenerative disc disease at L4-5.

On May 29, 2021 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed a statement of accepted facts (SOAF) and the

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<sup>2</sup> Docket No. 22-0917 (issued October 26, 2022).

<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

medical record. He noted that in a prior examination, a treating physician had documented a normal motor and sensory examination of both lower extremities and that Dr. Moufawad noted bilateral sensory and motor deficits in the lower extremities. Dr. Katz recommended a second opinion examination.

On July 27, 2021 OWCP referred appellant, a SOAF, the medical record, and a series of questions, to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second opinion examination and impairment rating evaluation.

In a September 13, 2021 report, Dr. Obianwu diagnosed a low back strain. He noted a prior history of disc abnormalities and lumbar surgery in 2018. Dr. Obianwu performed a physical examination, which revealed equal deep tendon reflexes bilaterally, negative straight leg raise bilaterally, no atrophy, good strength in the various muscle groups of the lower extremities, adequate bilateral extensor hallucis longus, and normal strength of dorsiflexion and plantar flexion of both ankles. He indicated he performed sensory testing of the left lower extremity and found no dermatomal sensory loss. Dr. Obianwu noted that appellant claimed to have diminished sensation throughout the entire right lower extremity when compared to the left, which he indicated did not allow for a diagnosis of a specific dermatomal pattern loss. He opined that she reached MMI on September 13, 2021, the date of his evaluation. Dr. Obianwu diagnosed a work-related low back strain and nonwork-related conditions of postoperative changes at L4-5 and L5-S1, right paracentral disc protrusion at L4-5, and disc bulging at L3-L4 without abutment of the nerve roots. He referenced the sixth edition of the A.M.A., *Guides*, and given his clinical examination of the lower extremities, he did not find a ratable impairment of the lower extremities.

OWCP subsequently referred the evidence of record, including the September 13, 2021 report of Dr. Obianwu, to Dr. Katz serving as a DMA. In an October 6, 2021 report, Dr. Katz noted that Dr. Obianwu found no physiologic myotomal motor or dermatomal sensory deficits in either lower extremity, and that these findings were consistent with the examination by a prior treating physician. Under proposed Table 2, Spinal Nerve Impairment; Lower Extremity Impairment, the DMA found for spinal nerves L3, L4, L5, and S1 of both lower extremities that there was no motor deficit and no sensory deficit with no net adjustment. Thus, he opined that each extremity had class 0, or 0 percent impairment. The DMA further opined that the A.M.A., *Guides* did not allow for an alternative range of motion impairment calculation for the accepted conditions.

By decision dated November 23, 2021, OWCP denied appellant's schedule award claim, finding that she had not met her burden of proof to establish permanent impairment of a scheduled member or function of the body. It noted that Dr. Obianwu concluded that permanent impairment did not exist, because no ratable condition was discerned in the clinical examination of both lower extremities, and that the DMA agreed with Dr. Obianwu.

On November 30, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on March 8, 2022.

By decision dated April 11, 2022, OWCP's hearing representative affirmed the November 23, 2021 decision.

On May 31, 2022 appellant, through counsel, appealed to the Board. By decision dated October 26, 2022,<sup>4</sup> the Board set aside the April 11, 2022 decision, finding a conflict of medical opinion regarding the nature and extent of any sensory or motor deficits on physical examination of appellant's lower extremities. The Board remanded the case for an impartial medical examination.

On September 6, 2023 OWCP referred appellant to Dr. Robert Schaefer, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 20, 2023, Dr. Schaefer, serving as the impartial medical examiner (IME), reviewed the SOAF and medical record, and performed a physical examination. He documented 5/5 muscle strength in all major muscle groups about the hip, knee, and ankle; no measurable weakness in the lower extremities; no obvious sensory loss to palpation from the hip to the knee to the ankle in the normal dermatomal patterns; and normal deep tendon reflexes at the knee and ankle bilaterally. Dr. Schaefer indicated that he agreed with Dr. Obianwu that there was no indication of spinal nerve root impairment on objective examination. He concluded that there was no relationship of a spinal nerve injury to the diagnosis of lumbar strain and noted that he did not detect any acute findings to suggest muscle spasm or significant palpable muscle strain. Dr. Schaefer referenced the A.M.A., *Guides* and *The Guides Newsletter*, and given his clinical examination of the lower extremities, he did not find a ratable impairment of the lower extremities.

A report of EMG/NCV study dated December 11, 2023 noted an impression of electrodiagnostic evidence of severe right lumbosacral radiculopathy at L5-S1 and to a lesser degree at L4-L5.

By *de novo* decision dated December 22, 2023, OWCP denied appellant's schedule award claim. It noted that the October 20, 2023 opinion of Dr. Schaefer constituted the special weight of the evidence and established that appellant did not sustain a permanent impairment of a scheduled member or function of the body.

On January 4, 2024 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A hearing was held on April 2, 2024.

By decision dated May 3, 2024, OWCP's hearing representative affirmed the December 22, 2023 decision.

### **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.<sup>5</sup>

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<sup>4</sup> *Supra* note 3.

<sup>5</sup> *See T.H.*, Docket No. 19-1066 (issued January 29, 2020); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

The schedule award provisions of FECA<sup>6</sup> and its implementing regulations<sup>7</sup> 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. 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.<sup>8</sup>

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.<sup>9</sup> However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.<sup>10</sup> 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.<sup>11</sup>

In addressing 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 class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).<sup>12</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>13</sup>

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.<sup>14</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of

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<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a. (March 2017); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>9</sup> 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); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

<sup>10</sup> *Supra* note 8 at Chapter 2.808.5c(3) (February 2022).

<sup>11</sup> *Supra* note 8 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).

<sup>12</sup> A.M.A., *Guides* 494-531; *see R.V.*, Docket No. 20-0005 (issued December 8, 2020); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

<sup>13</sup> A.M.A., *Guides* 521.

<sup>14</sup> 5 U.S.C. § 8123(a). *See R.C.*, Docket No. 18-0463 (issued February 7, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016).

resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>15</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her lower extremities, warranting a schedule award.

In its October 26, 2022 decision, the Board found that a conflict existed in the medical opinion evidence between Dr. Moufawad and Dr. Obianwu regarding the nature and extent of any sensory or motor deficits in appellant's lower extremities. OWCP properly referred her to Dr. Schaefer, for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a).

In his October 20, 2023 report, Dr. Schaefer reviewed the SOAF and medical record, and related appellant's physical examination findings, including 5/5 muscle strength in all major muscle groups about the hip, knee, and ankle; no measurable weakness in the lower extremities; no obvious sensory loss to palpation from the hip to the knee to the ankle in the normal dermatomal patterns; and normal deep tendon reflexes at the knee and ankle bilaterally. He agreed with Dr. Obianwu that there was no indication of spinal nerve root impairment on the objective examination. Dr. Schaefer concluded there was no relationship of a spinal nerve injury to the diagnosis of lumbar strain and noted that he did not detect any acute findings to suggest muscle spasm or significant palpable muscle strain. Referencing the A.M.A., *Guides* and *The Guides Newsletter*, and given his clinical examination of the lower extremities, Dr. Schaefer did not find a ratable impairment.

The Board finds that the special weight of the medical opinion evidence regarding the above-noted issues is represented by the thorough, well-rationalized opinion of Dr. Schaefer. Dr. Schaefer's October 20, 2023 report established that he conducted a thorough physical examination, including sensory and motor testing in the lower extremities, and found no deficits. He properly applied the A.M.A., *Guides* to his examination findings, and explained that appellant had no permanent impairment of the lower extremities warranting a schedule award. The Board finds that Dr. Schaefer's opinion has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issues of the present case. Dr. Schaefer provided a thorough factual and medical history, and he accurately summarized the relevant medical evidence. As his report is detailed, well rationalized, and based on a proper factual background, his opinion represents the special weight of the medical evidence. Consequently, appellant has not met her burden of proof to establish permanent impairment of her lower extremities, warranting a schedule award.

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.

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<sup>15</sup> 20 C.F.R. § 10.321. See also *J.H.*, Docket No. 22-0981 (issued October 30, 2023); *N.D.*, Docket No. 21-1134 (issued July 13, 2022); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her lower extremities, warranting a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 3, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 5, 2024  
Washington, DC

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

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board