

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

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D.G., Appellant)	
)	
and)	Docket No. 24-0709
)	Issued: August 5, 2024
U.S. POSTAL SERVICE, FREEPORT POST)	
OFFICE, Freeport, FL, Employer)	
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Appearances:
Appellant, pro se
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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 21, 2024 appellant filed a timely appeal from an April 1, 2024 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.

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.

FACTUAL HISTORY

On August 26, 2014 appellant, then a 31-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed bulging discs in her neck and hemorrhaging due to factors of her federal employment. She noted that she first became aware of

¹ 5 U.S.C. § 8101 *et seq.*

her condition and its relation to her federal employment on August 1, 2013. OWCP accepted the claim for cervical herniated disc C3-4, cervical disc disorder with myelopathy, and headache. It paid appellant wage-loss compensation on the supplemental rolls effective September 11, 2014 and on the periodic rolls effective March 8, 2015.

On April 14, 2015 appellant underwent authorized anterior cervical discectomy and fusion at C3-4.

On May 16, 2023 appellant filed a claim for compensation (Form CA-7) requesting a schedule award.

In a development letter dated June 20, 2023, OWCP informed appellant of the deficiencies of her schedule award claim. It advised her of the type of medical evidence necessary, including an impairment rating utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)² and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment* (July/August 2009) (*The Guides Newsletter*). OWCP afforded appellant 30 days to submit the necessary evidence.

On December 21, 2023 OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. Tai Q. Chung, Board-certified in orthopedic surgery, for a second opinion examination to determine whether she sustained a permanent impairment due to her employment injury.

In a January 8, 2024 report, Dr. Chung recounted appellant's medical history and noted her current complaints of cervical pain radiating to the shoulders and the area between the scapula, and numbness in the hands. He noted that her physical examination revealed a well-healed incision, mild tenderness at the posterior midline of the cervical spine, and trapezius muscles normal muscle strength in the shoulders, elbows, wrist, fingers, hips, knees, ankles, and toes; negative Tinel's and Phalen tests bilaterally at the carpal and cubital tunnels; negative straight leg and Lasegue tests bilaterally; and normal grip strength. Dr. Chung also noted appellant's cervical range of motion (ROM) measurements. He also noted that a magnetic resonance imaging (MRI) scan of the cervical spine dated August 29, 2016, revealed status post anterior cervical discectomy and fusion (ACDF) with minimal degenerative changes and mild foraminal stenosis without significant thecal sac stenosis. Dr. Chung noted that an electromyogram and nerve conduction velocity (EMG/NCV) study dated July 31, 2018 revealed no nerve root damage. He noted that appellant's physical examination revealed loss of motion in the cervical spine; however, there were no sensory deficits, motor deficits, or deficit in the deep tendon reflexes. Dr. Chung concluded that she had no cervical nerve root impairment. He referenced *The Guides Newsletter* and the A.M.A., *Guides*, page 564 (the Cervical Spine Regional Grid, Table 17-2) and opined that the medical evidence of record did not demonstrate a loss of use of the upper extremities related to the diagnosed and accepted work-related conditions. Dr. Chung opined that appellant reached maximum medical improvement (MMI) on January 8, 2024, the date of his examination, and opined that she had an upper extremity permanent impairment rating of zero percent.

² A.M.A., *Guides* (6th ed. 2009).

On February 14, 2024 OWCP referred Dr. Chung's report to Dr. Kenechukwu Ugokwe, a Board-certified in neurosurgeon serving as an OWCP district medical adviser (DMA).

In a March 2, 2024 report, Dr. Ugokwe concurred with Dr. Chung's permanent impairment rating of zero percent. He explained that appellant was neurologically intact.

By decision dated April 1, 2024, OWCP denied appellant's claim for a schedule award, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body due to the accepted employment injury.

LEGAL PRECEDENT

The schedule award provisions of FECA³ and its implementing regulations⁴ 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. 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 and the Board has concurred in such adoption.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.⁶

No schedule award is payable for a member, function, or organ of the body that is not specified in FECA or the implementing regulations.⁷ The list of scheduled members includes the eye, arm, hand, fingers, leg, foot, and toes.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 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 using *The Guides Newsletter*, which is a supplemental publication of the sixth edition of the A.M.A., *Guides*. It

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404(a); *see R.M.*, Docket No. 20-1278 (issued May 4, 2022); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (March 2017); *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ *D.L.*, Docket No. 20-0059 (issued July 8, 2020); *W.C.*, 59 ECAB 374 (2008); *Anna V. Burke*, 57 ECAB 521 (2006).

⁸ 5 U.S.C. § 8107(c).

⁹ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁰ *Supra* note 6 at Chapter 2.808.5c(3) (March 2017).

offers an approach to rating spinal nerve impairments based on evidence of radiculopathy affecting the upper and/or lower extremities.¹¹

It is the claimant's burden of proof to establish permanent impairment of the scheduled member or function of the body as a result of an employment injury.¹² OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.¹³

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.¹⁴

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.

OWCP referred appellant for a second opinion examination with Dr. Chung. Dr. Chung noted appellant's accepted cervical diagnoses, and related her physical examination findings. He explained that her physical examination revealed loss of motion in the cervical spine; however, she had no sensory or motor deficits of the upper extremities due to peripheral nerve radiculopathy. Dr. Chung found that appellant had reached MMI, and concluded that she had an upper extremity permanent impairment of zero percent, according to *The Guides Newsletter* and the A.M.A., *Guides*, page 564 (the Cervical Spine Regional Grid, Table 17-2).

The Board notes that a schedule award cannot be granted for permanent loss of use of the spine.¹⁵ The rating must be based on evidence of radiculopathy affecting sensory and motor deficits of the extremities.¹⁶ Dr. Chung provided an upper extremity permanent impairment rating of zero percent, as he found no sensory or motor loss due to spinal nerve impairment from her accepted cervical conditions. He related that the medical evidence of record did not demonstrate a loss, or loss of use, relating to appellant's diagnosed cervical conditions.

¹¹ *Supra* note 6 at Chapter 3.700, Exhibit 4 (January 2010).

¹² *See Q.N.*, Docket No. 23-0636 (issued October 31, 2023); *E.D.*, Docket No. 19-1562 (issued March 3, 2020); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹³ *Supra* note 6 at Chapter 2.808.5a (March 2017).

¹⁴ *Supra* note 6 at Chapter 2.808.6(f) (March 2017).

¹⁵ *Supra* notes 10, 11.

¹⁶ *Supra* note 12.

OWCP properly referred Dr. Chung's report to the DMA and in a March 2, 2024 report, Dr. Ugokwe concurred with the zero percent permanent impairment rating (and explained that appellant was neurologically intact), and therefore no permanent impairment schedule award for the upper extremities was warranted.

As the medical evidence of record is insufficient to establish permanent impairment of a scheduled member or function of the body causally related to the accepted employment injury, the Board finds that appellant has not met her burden of proof.

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 her 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 April 1, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 5, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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