

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

C.C., Appellant)	
)	
and)	Docket No. 24-0951
)	Issued: November 12, 2024
DEPARTMENT OF HOMELAND SECURITY,)	
FEDERAL PROTECTIVE SERVICE,)	
Fort Snelling, MN, Employer)	
)	

Appearances:
Allen Webb, Esq., for the appellant¹
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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 30, 2024 appellant, through counsel, filed a timely appeal from an August 29, 2024 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.

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.*

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 February 16, 2016 appellant, then a 45-year-old supervisory law enforcement specialist area commander filed a traumatic injury claim (Form CA-1) alleging that on February 9, 2016, she sustained bilateral neck and shoulder injuries when conducting ground defense maneuvers while in the performance of duty. She stopped work on February 16, 2016. OWCP accepted the claim for strain of muscle, fascia, and tendon at neck level, initial encounter. It subsequently expanded acceptance of the claim to include other cervical disc displacement, mid-cervical region; and cervical disc disorder at C5-6 level with radiculopathy. OWCP paid appellant wage-loss compensation on the supplemental rolls as of June 13, 2016 and on the periodic rolls from December 11, 2016 until October 13, 2018.³

On April 17, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

OWCP referred appellant for a second opinion examination with Dr. Robert Wengler, Board-certified in orthopedic surgery. In a September 26, 2019 report, Dr. Wengler noted appellant's history of injury and medical treatment. He referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁴ and opined that appellant had a 37 percent cervical spine impairment, pursuant to the Cervical Spine Regional grid, Table 17-2, page 564. Dr. Wengler related that appellant had diminished sensation in the C7-8 sensory distribution, with diminished left triceps reflex. He noted that he suspected pathology at C6-7 that should be evaluated with a magnetic resonance imaging (MRI) scan of the cervical spine and that the fusion should be extended if the scan revealed pathology at C6-7.

On December 9, 2019 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, serving as OWCP's district medical advisor (DMA), reviewed Dr. Wengler's September 26, 2019 report and noted that Dr. Wengler had not rated appellant's permanent impairment pursuant to *The Guides Newsletter*, Rating Spinal Nerve Impairment Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*).

In a supplemental report dated June 8, 2020, Dr. Wengler noted that, pursuant to *The Guides Newsletter*, only impairments resulting in radiculopathy may be rated. He recounted that

³ Appellant had undergone right C5-6 foraminotomy and decompression, partial discectomy, and decompression of the C5 nerve root on January 27, 2014. Anterior cervical discectomy with revision decompression was performed on January 24, 2017 for recurrent C5-6 disc herniation with radiculopathy.

⁴ A.M.A., *Guides* (6th ed. 2009).

appellant had described numbness over the ulnar distribution of the bilateral arms and forearms, and that she had a depressed left triceps reflex, which he indicated was of “type 2” severity.

On June 25, 2020 the DMA reviewed Dr. Wengler’s June 8, 2020 report. He concluded that appellant did not have any neurologic deficit of the upper extremities consistent with cervical radiculopathy, which could be rated under *The Guides Newsletter*.

By decision dated July 9, 2020, OWCP denied appellant’s schedule award claim.

On July 20, 2020 appellant requested a hearing before an OWCP hearing representative. By decision dated August 27, 2020, OWCP’s hearing representative vacated the July 9, 2020 decision, and remanded the case for further development. OWCP was to obtain a supplemental report from Dr. Wengler which addressed whether appellant’s herniated disc at C6-7 was causally related to the employment injury, whether it had reached maximum medical improvement (MMI), and whether it caused permanent impairment of the upper extremities, pursuant to *The Guides Newsletter*.

In a report dated February 4, 2021, Dr. Wengler explained that appellant had a nonwork related injury at C5-6, however, may have had an occult injury to the C6-7 disc as a result of the February 9, 2016 injury, on the other hand it was accepted by spine surgeons that the annular fibers of a disc adjacent to fusion are subjected to stresses which result in deformation. He also related that he did not consider appellant to be at MMI and that he felt that her clinical presentation as of September 26, 2019 justified consideration of the fusion to C6-7. Dr. Wengler recommended a repeat cervical MRI scan and possibly a discogram.

By decision dated April 19, 2021, OWCP expanded the acceptance of the claim to include cervical disc disorder at C6-7 level with radiculopathy. In a separate decision dated April 19, 2021, appellant was advised that the medical evidence did not establish that she was at MMI, and no further action would be taken on the schedule award claim.

On October 20, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF), the medical record, and a series of questions to Dr. Paul Cederberg, Board-certified in orthopedic surgery, for a second opinion examination.

In a report dated November 14, 2022, Dr. Cederberg related appellant’s physical examination findings. He noted that she had right C6 radiculopathy treated with anterior cervical discectomy and fusion. Dr. Cederberg diagnosed disc herniation at C5-6, status post anterior cervical discectomy and fusion. He noted that appellant’s herniated disc at C6-7 was not causally related to the employment injury, as it did not fit with her radicular pattern of pain, was a pre-existing condition, and that treatment was unnecessary. Dr. Cederberg utilized *The Guides Newsletter* and opined that appellant was at MMI as of the date of his examination on November 14, 2022. He concluded that appellant did not have a measurable permanent impairment to either of her upper extremities, as she did not have sensory or motor deficit loss on examination.

OWCP referred Dr. Cederberg’s report to Dr. Harris, the DMA. In a January 4, 2023 report, Dr. Harris concurred with Dr. Cederberg, and opined that appellant did not have ratable permanent impairment of the upper extremities.

By decision dated March 1, 2023, OWCP denied appellant's schedule award claim.

On March 26, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated August 8, 2023, OWCP's hearing representative vacated the March 1, 2023 decision, finding that the case was not in posture for a hearing as the second opinion physician and the DMA did not adhere to the SOAF. The case was remanded for further development.

On remand OWCP requested an updated opinion from Dr. Cederberg; however, he was not available. On August 28, 2023 it referred appellant, along with the case record and an updated SOAF to Dr. Wengler for a second opinion examination.

In an October 23, 2023 report, Dr. Wengler examined appellant and related her physical examination findings. He found that appellant did not have any demonstrable spinal nerve injury, and accordingly, had no residual upper extremity permanent impairment. Dr. Wengler opined that appellant had 7 percent whole person impairment, and referenced the A.M.A., *Guides* at Table 17-2, page 564-66, the Cervical Spine Regional Grid. Regarding MMI, he explained that there was a dramatic change in her neurologic examination since he saw her in 2019. Dr. Wengler noted that in 2019, she had a depressed left triceps reflex and numbness into the ulnar distribution of the left hand, suggesting a C7 radiculopathy, while she currently had markedly hyperactive reflexes in both arms and positive Hoffmann's signs bilaterally. He opined that these findings were characteristic of a spinal cord irritation that should be investigated with a repeat MRI scan. Dr. Wengler suspected that the small central disc herniation at C6-7 that was revealed on the April 24, 2019 MRI scan had increased to a space occupying lesion on the spinal cord resulting in a myelomalacia. He explained, "Until a space occupying lesion on the cord is effectively ruled out, I am reluctant to suggest she has reached MMI. If there is evidence of cord compression it should be surgically addressed."

On November 16, 2023 OWCP forwarded a copy of Dr. Wengler's report to the DMA for review.

In a report dated January 5, 2024, Dr. Harris, the DMA, noted that Dr. Wengler opined that appellant had 7 percent whole person impairment based on the A.M.A., *Guides* at Table 17-2, page 564-66, the Cervical Spine Regional Grid. He explained that a rating for permanent impairment of the cervical spine had to be based on the loss of use/impairment of the upper extremities, and not for spinal impairment. While Dr. Wengler found that appellant's examination was suggestive of cervical myelomalacia/myelopathy in that appellant had bilateral hyperreflexia and positive Hoffman sign; however, there were no objective findings of neurologic deficit in the upper extremities resulting from possible cervical myelomalacia/cervical myelopathy. The DMA concluded that the evidence of record therefore did not establish appellant's entitlement to a schedule award.

By *de novo* decision dated January 31, 2024, OWCP denied appellant's schedule award claim. It found that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On April 5, 2024 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a March 13, 2024 report, obtained on request of counsel, Dr. Wengler disagreed with the opinion of the DMA that appellant lacked objective findings of neurologic deficit in the upper extremities resulting from possible cervical myelomalacia/myelopathy. He explained that when he examined appellant on October 23, 2023 he was concerned about the dramatic change in her neurologic status, as she had marked hyperreactive reflexes in both arms with Hoffmann's signs bilaterally. Dr. Wengler opined that these physical findings were pathognomonic of a spinal cord lesion resulting in myelomalacia and a space occupying cervical disc lesion. He recommended that the MRI scan of the cervical spine be repeated.

On April 15, 2024 OWCP authorized another cervical MRI scan. A June 26, 2024 MRI scan of appellant's cervical spine without contrast, read by Dr. Martin Asis, Board-certified in diagnostic radiology and neuroradiology, revealed solid C5-6 plated disc fusion, C4-5, supra-adjacent segment disease with a 5 millimeter AP right central disc protrusion and cord impingement most pronounced on the right, C6-7, infra-adjacent segment disease with a 2 millimeter AP caudally directed right central disc protrusion with subtle flattening of the right ventral hemicord; no high-grade foraminal stenosis. Compared to October 24, 2019 MRI scan findings of C4-5/C6-7 disc herniation/cord distortion were new.

In a June 26, 2024 report, Dr. Wengler reviewed the June 26, 2024 MRI, and opined that it confirmed his clinical suspicions. He advised that appellant had a caudally directed right central disc herniation at C6-7 that was flattening the right ventral hemi cord. Dr. Wengler opined that appellant was in need of decompression and interbody fusion or disc replacement.

By decision dated July 3, 2024, OWCP affirmed its January 31, 2024 decision. It found that appellant's schedule award claim was denied as appellant had not reached MMI.

On July 28, 2024 appellant, through counsel, requested reconsideration.

In a July 8, 2024 supplemental report, obtained on request of counsel, Dr. Wengler opined that appellant had reached MMI and that he did not expect her condition to improve. He explained that she had a space occupying lesion that was compressing at least 50 percent of the right-sided portion of the spinal cord behind which remained a soft mucoid material that had the possibility of creating an additional space occupying lesion. Dr. Wengler advised that she may end up with a resection leaving her paralyzed or worse.

In an August 8, 2024 report, Dr. Harris, the DMA, opined that appellant did not have any neurologic deficits of the upper extremities consistent with cervical radiculopathy. He opined that appellant had 0 percent upper extremity impairment for cervical radiculopathy using the diagnosis-based impairment (DBI) methodology described in *The Guides Newsletter* July/August 2009. The DMA referred to the A.M.A., *Guides*, and found 0 severity under Table 15-14, Sensory and Motor Severity, at page 425, and a Class 0 impairment based on the Spinal Nerve Impairment: Upper Extremity Impairments, Table 1, in *The Guides Newsletter*. He also noted that the A.M.A., *Guides* did not allow for an impairment ratings to be calculated using the range of motion (ROM) method because the diagnosis did not contain an asterisk (*) in the DBI impairment grid and therefore

should not be calculated by the ROM method. Dr. Harris opined that appellant had 0 percent right upper extremity permanent impairment and 0 percent left upper extremity permanent impairment. He noted that the date of MMI was July 8, 2024, the date of Dr. Wengler's July 8, 2024 report.

By decision dated August 29, 2024, OWCP modified its prior decision to find that appellant's accepted medical conditions had reached MMI; however, the claim remained denied as the medical evidence of record was insufficient to establish entitlement to a schedule award in accordance with the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing regulations⁶ 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.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, 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*. 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 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 class of diagnosis (CDX), which is then adjusted by

⁵ *Supra* note 2.

⁶ 20 C.F.R. § 10.404.

⁷ *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).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (March 2017); *id.* at 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 A.G.*, Docket No. 18-0815 (issued January 24, 2019).

¹⁰ *Supra* note 7 at Chapter 2.808.5c(3) (February 2022).

¹¹ *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).

a grade modifier for functional history (GMFH) and/or a grade modifier for clinical studies (GMCS). The effective net adjustment formula is (GMFH - CDX) + (GMCS - CDX).¹²

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 impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹³

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 accepted appellant's claim for strain of muscle, fascia, and tendon at neck level, initial encounter; other cervical disc displacement, mid-cervical region; cervical disc disorder at C5-6 level with radiculopathy; and cervical disc disorder at C6-7 level with radiculopathy.

OWCP referred appellant to Dr. Wengler for a second opinion examination to evaluate appellant for an impairment rating. It received several reports from Dr. Wengler. In an October 23, 2023 report, Dr. Wengler related that appellant's physical examination had dramatically changed since he saw her in 2019. Dr. Wengler noted that in 2019, she had a depressed left triceps reflex and numbness into the ulnar distribution of the left hand, suggesting a C7 radiculopathy, while she currently had markedly hyperactive reflexes in both arms and positive Hoffmann's signs bilaterally. He opined that these findings were characteristic of a spinal cord irritation that should be investigated with a repeat MRI scan. Dr. Wengler related that appellant did not have any demonstrable spinal nerve injury, and accordingly had no residual upper extremity impairment due to a spinal nerve injury. However, he opined that appellant had 7 percent whole person impairment and referenced the A.M.A., *Guides* at Table 17-2, page 564-66, the Cervical Spine Regional Grid. The Board notes that 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 As such, this report fails to meet appellant's burden of proof.

OWCP also received reports from Dr. Wengler dated March 13, June 26, and July 8, 2024. However, these reports did not provide a permanent impairment rating. As such, these reports are insufficient to establish appellant's claim for a schedule award.

As noted, OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the DMA for an opinion concerning the nature and percentage of

¹² G.W., Docket No. 22-0301 (issued July 25, 2022); see also *The Guides Newsletter*; A.M.A., *Guides* 430.

¹³ See *supra* note 8 at Chapter 2.808.6f (March 2017).

¹⁴ *Supra* note 12.

impairment in accordance with the A.M.A., *Guides* and with the DMA providing rationale for the percentage of impairment specified.¹⁵

OWCP received reports from Dr. Harris, the DMA. In a report dated January 5, 2024, the DMA related that appellant had no objective findings of neurologic deficit in the upper extremities resulting from her accepted cervical conditions. In an August 8, 2024 report, he further explained that appellant did not have any neurologic deficit in the upper extremity consistent with cervical radiculopathy. The DMA opined that appellant had zero percent right upper extremity impairment and zero percent left upper extremity impairment using the DBI methodology, and also noted that the A.M.A., *Guides* do not allow for impairment ratings to be calculated on the ROM method for this diagnosis. He noted that the date of MMI was July 8, 2024, the date of Dr. Wengler's examination. As the DMA found that appellant had zero percent impairment of the upper extremities, these reports do not support appellant's claim for a schedule award.

The Board notes that a schedule award cannot be granted for permanent loss of use of the spine. The rating must be based on evidence of radiculopathy affecting sensory and motor deficits of the extremities.¹⁶ As there is no current medical evidence of record in conformance with the sixth edition of the A.M.A., *Guides* establishing sensory and motor deficits of appellant's upper extremities, the Board finds that she 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.

¹⁵ *Supra* note 12.

¹⁶ *See D.G.*, Docket No. 24-0709 (issued August 5, 2024); *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 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