

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

D.S., Appellant)	
)	
and)	Docket No. 24-0870
)	Issued: October 23, 2024
U.S. POSTAL SERVICE, WAUKEGAN POST)	
OFFICE, Waukegan, IL, Employer)	
)	

Appearances: *Case Submitted on the Record*
Stephanie N. Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On August 27, 2024 appellant, through counsel, filed a timely appeal from a July 9, 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

This case has previously been before the Board on another issue.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 27, 2018 appellant, then a 62-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 23, 2018 she injured her low back when a car struck the rear of her mail truck while in the performance of duty.⁴

By decision dated June 28, 2023, OWCP accepted the claim for temporary aggravation of lumbar degenerative disc disease, temporary aggravation of lumbar degenerative facet arthritis, and temporary aggravation of lumbar spinal stenosis, which had all resolved as of March 2019. It paid appellant wage-loss compensation on the supplemental rolls from August 23, 2018 to March 31, 2019.

In a September 29, 2023 report, Dr. Neil Allen, a Board-certified internist and neurologist, noted appellant's diagnoses of lumbar unspecified inflammatory spondylopathy, lumbar intervertebral disc degeneration, and lumbar spinal stenosis. He noted appellant's diagnoses of lumbar other intervertebral disc degeneration, lumbar spinal stenosis, and lumbar other inflammatory spondylosis. Dr. Allen examined appellant and related intact discrimination across all bilateral dermatomal regions, normal bilateral L4, bilateral L5 spinal level, and bilateral S1 muscle strength. Rating appellant's permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), he found zero percent permanent impairment of the lower extremities due to the lack of sensory or motor deficits. Dr. Allen concluded that appellant had two percent whole person permanent impairment for pain using *The Guides Newsletter*, Chapter 2, Table 2-1 No. 12.

³ Docket No. 22-0430 (issued September 26, 2022). Based on the report of appellant's attending physician, Dr. Pessoolal S. Chharia, a Board-certified neurologist, the Board further instructed OWCP to refer appellant to a physician in the appropriate field of medicine to determine whether her diagnosed conditions were causally related to the accepted August 23, 2018 employment incident. *Id.*

⁴ OWCP assigned this claim OWCP File No. xxxxxx182. Under OWCP File No. xxxxxx926, it accepted a lumbar sprain due to a June 12, 2015 motor vehicle accident. At the direction of the Board, on remand OWCP combined the current OWCP File No. xxxxxx182 and OWCP File No. xxxxxx926, with the latter designated as the master file number.

⁵ A.M.A., *Guides* (6th ed. 2009).

On November 9, 2023 appellant filed claim for compensation (Form CA-7), for a schedule award.

In a development letter dated November 24, 2023, OWCP noted the evidence submitted was insufficient to support appellant's claim for a schedule award. It requested that she provide a medical report which included a permanent impairment rating utilizing the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* (July/August 2009). OWCP afforded appellant 30 days to submit the requested information.

In response to OWCP's November 24, 2023 letter, appellant submitted a December 15, 2023 addendum from Dr. Allen. Dr. Allen advised that she had reached maximum medical improvement (MMI) on or around August 23, 2019. Using Chapter 2, Table 2-1 of *The Guides Newsletter*, he found zero percent right lower extremity motor impairment, zero percent right lower extremity sensory impairment, two percent right lower extremity pain related impairment, zero percent left lower extremity motor impairment, zero percent left lower extremity sensory impairment, and two percent left lower extremity pain related impairment.⁶

OWCP referred the medical record and a statement of accepted facts (SOAF) to Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to provide an impairment rating in conformity with the A.M.A., *Guides* and *The Guides Newsletter*.

In a report dated February 28, 2024, Dr. Hammel noted that appellant was not entitled to a schedule award for a spinal nerve impairment based on Dr. Allen's normal examination findings. The DMA further explained that the A.M.A., *Guides* did not allow for whole person permanent impairment. He noted that the A.M.A., *Guides* were clear that pain alone cannot be an add-on to a diagnosis-based impairment (DBI), and in this case the DBI was zero percent. The DMA found the date of MMI to be September 29, 2023, the date of Dr. Allen's examination.

By decision dated March 26, 2024, 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.

On April 10, 2024 appellant, through counsel, requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

By decision dated July 9, 2024, OWCP's hearing representative affirmed the March 26, 2024 decision.

⁶ There is a typographical error as Dr. Allen refers to upper instead of lower for both right sensory and motor deficits.

LEGAL PRECEDENT

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. 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.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.¹⁰

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*.¹¹ 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 grade modifier for clinical studies (GMCS).¹² The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).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 Furthermore, the back is specifically excluded from the definition of an organ under FECA.¹⁵ The 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

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at § 10.404(a); *see also T.T.*, Docket No. 24-0079 (issued April 1, 2024); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹¹ A.M.A., *Guides*, page 3, section 1.3.

¹² *Id.* at 493-556.

¹³ *Id.* at 521.

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

¹⁵ *See id.* at § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that the July/August 2009 edition of *The Guides Newsletter* is to be applied.¹⁶

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.

In his September 29, 2023 report and December 15, 2023 addendum, Dr. Allen opined that, on physical examination, appellant had no sensory or motor deficits. The Board finds that he therefore properly concluded that under *The Guides Newsletter*, appellant had no ratable permanent impairment of the lower extremities based on neurologic deficits of sensory and motor loss.¹⁷ In his September 29, 2023 report, Dr. Allen opined that she had two percent whole person permanent impairment due to pain pursuant to *The Guides Newsletter*. However, FECA does not allow schedule awards for impairment of the body as a whole.¹⁸ Accordingly, the Board finds that Dr. Allen's whole person impairment rating does not comport with OWCP's procedures and is insufficient to establish any ratable impairment.¹⁹

In the December 15, 2023 addendum, Dr. Allen clarified that appellant had two percent right lower extremity permanent impairment due to pain and two percent left lower extremity permanent impairment due to pain pursuant to *The Guides Newsletter*.

In accordance with its procedures, OWCP properly routed the case record to Dr. Hammel, its DMA, who found that appellant had no ratable permanent impairment. Dr. Hammel found that pursuant to *The Guides Newsletter*, appellant was not entitled to a schedule award for a spinal nerve impairment based on Dr. Allen's normal sensory and motor examination findings. He also noted that FECA did not allow a schedule award for stand-alone pain to be added to a diagnosed impairment. The Board notes that Table 2 of *The Guides Newsletter* does not provide that pain alone is a ratable permanent impairment, in the absence of sensory and motor deficits. Dr. Hammel agreed with Dr. Allen that there was no permanent impairment of any spinal nerve due to motor or sensory deficits due to a spinal nerve, and thus no permanent impairment under FECA due to the accepted spinal conditions. He also properly found that appellant was not entitled to a whole person impairment, under FECA. The Board finds that the DMA properly used Dr. Allen'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 her lower extremities due to either a motor or sensory deficit of the spinal nerves.²⁰ As such, appellant has not met her burden of proof

¹⁶ *Supra* note 10 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁷ *T.T.*, Docket No. 24-0079 (issued April 1, 2024).

¹⁸ *J.U.*, Docket No. 21-1298 (issued February 16, 2023); *D.L.*, Docket No. 20-0059 (issued July 8, 2020); *W.C.*, 59 ECAB 374 (2008); *Anna V. Burke*, 57 ECAB 521 (2006).

¹⁹ *Supra* note 15.

²⁰ *J.U.*, *supra* note 18.

to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

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 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 July 9, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2024
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