

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

R.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Lincoln, NE, Employer**

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**Docket No. 11-80
Issued: August 15, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 13, 2010 appellant, through her representative, filed a timely appeal of a September 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of OWCP's October 5, 2009 schedule award decision. Pursuant to the Federal Employees' Compensation Act¹ 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 met her burden of proof to establish that she sustained permanent impairment of a scheduled member.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² On August 11, 2010 the Board issued an order remanding case as OWCP's medical adviser failed to use the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2008) (hereinafter A.M.A., *Guides*) in rating permanent impairment. The Board remanded the case to OWCP to further develop, as appropriate, whether appellant had any ratable impairment of the lower extremities pursuant to the sixth edition of the A.M.A., *Guides*. In a July 13, 2009 decision, the Board found that it properly refused to authorize appellant's request for lumbar surgery. The facts and history contained in the prior appeal are incorporated by reference.

In an August 6, 2009 report, Dr. Richard T. Katz, a Board-certified physiatrist, noted appellant's history of injury and treatment and listed findings upon examination. He determined that she had normal cervical range of motion in flexion, extension, lateral flexion and rotation. Furthermore, appellant's cervical mobility was "unremarkable." Dr. Katz noted a negative Spurling maneuver and that she had soft tissue pain "everywhere." He determined that appellant was able to heel and toe walk and had a normal tandem gait. Additionally appellant was able to perform 10 plantar extensions. Dr. Katz advised that straight leg raising was normal bilaterally. He advised that lumbar range of motion was normal in flexion, extension, bilateral flexion and rotation. Manual examination of the lumbar paraspinal musculature was unremarkable. Furthermore, straight leg raising was negative, crossed leg raising was negative, "FABER" movement and Thomas tests were also negative. Dr. Katz noted that prone position revealed normal internal rotation and external rotation of the hips and that prone on the elbows was also "well performed." He determined that the sensory and muscle strength tests were normal in both the upper and lower extremities. Dr. Katz referred to the A.M.A., *Guides* and explained that appellant did not have radiculopathic features. He explained that appellant had documented disc degeneration with positive discography with a known pain generator. Dr. Katz opined that, based on appellant's known pain generator, alteration in known anatomy and PDQ score of 126, she was entitled to a whole person impairment of two percent pursuant to Table 3.1 of the A.M.A., *Guides*.³

Following the Board's August 11, 2010 order, OWCP's medical adviser noted appellant's history in an August 29, 2010 report, including Dr. Katz's August 6, 2009 report, who explained that it was possible to process an impairment rating for radicular pain, sensory deficit and weakness using the history and findings on physical examination by utilizing Table 16-12.⁴ OWCP's medical adviser noted Dr. Katz's finding that appellant was "histrionic" and reported soft tissue pain "everywhere." Dr. Katz also reported that appellant had no radicular pain, sensory change or weakness in her lower extremities. OWCP's medical adviser concluded that there was no medical basis for a schedule award for either lower extremity. He noted that the whole body rating was not a basis for a schedule award. OWCP's medical adviser

² Docket No. 10-175 (issued August 11, 2010) and *R.H.*, Docket No. 09-103 (issued July 13, 2009). The claim was accepted for lumbar strain, L5-S1 disc protrusion and anterior posterior L5-S1 fusion.

³ A.M.A., *Guides* 40 (6th ed. 2008).

⁴ *Id.* at 535.

explained that the two percent award for appellant's "histrionic" pain complaints was not for radicular pain. He noted the rating of symptoms affecting the whole body could not be a basis for a schedule award due to the condition at the lumbar level. OWCP's medical adviser concluded that appellant had no permanent impairment to either leg based on her accepted lumbar condition.

In a September 22, 2010 decision, OWCP denied modification of its prior decision. It found that the medical evidence did not support ratable impairment under the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of FECA⁵ and its implementing federal 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. However, FECA does not specify the manner in which the percentage of loss 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.⁷ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸ For decisions issued after May 1, 2009, the sixth edition will be used.⁹

FECA does not authorize the payment of schedule awards for the permanent impairment of the whole person.¹⁰ Payment is authorized only for the permanent impairment of specified members, organs or functions of the body. No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.¹¹ Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,¹² no claimant is entitled to such an award.¹³ Amendments to FECA, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of FECA

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁹ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹⁰ *Ernest P. Govednick*, 27 ECAB 77 (1975).

¹¹ *William Edwin Muir*, 27 ECAB 579 (1976).

¹² FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

¹³ *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.¹⁴

ANALYSIS

In support of her claim for a schedule award, appellant submitted an August 6, 2009 report from Dr. Katz, a Board-certified physiatrist, who examined her and provided findings, which included normal cervical and lumbar range of motion, normal internal and external rotation, a normal tandem gait and normal sensory and muscle strength tests. Dr. Katz utilized the A.M.A., *Guides* and explained that she did not have radiculopathic features. However, appellant had soft tissue pain “everywhere” and disc degeneration with positive discography with a known pain generator. Dr. Katz opined that she had a whole person impairment of two percent pursuant to Table 3.1 of the A.M.A., *Guides*.¹⁵ As noted, FECA does not authorize schedule awards for permanent impairment of the whole person. Although FECA does permit an award for impairment to a leg that originates in the spine, Dr. Katz did not provide sufficient findings to rate impairment of appellant’s legs pursuant to the A.M.A., *Guides*. His opinion is insufficient to establish ratable impairment of a scheduled body member.

In an August 29, 2010 report, OWCP’s medical adviser reviewed Dr. Katz’s August 6, 2009 report. He explained that Table 16-12 was the appropriate table in the A.M.A., *Guides* to process an impairment rating for radicular pain, sensory deficit and weakness.¹⁶ OWCP’s medical adviser explained that Dr. Katz’s findings included that appellant was “histrionic” and reported soft tissue pain “everywhere.” He also noted that Dr. Katz reported that appellant had no radicular pain, sensory change or weakness in her lower extremities. As there was no radicular pain, sensory change or weakness in her lower extremities, OWCP’s medical adviser properly concluded that there was no medical basis for a schedule award for either lower extremity. He also explained that a two percent award for “histrionic” pain complaints would not qualify as radicular pain. In the instant case, OWCP’s medical adviser properly discussed the physical findings of appellant’s physician. He then determined that, pursuant to Table 16-12 of the A.M.A., *Guides*, with no objective sensory or radicular deficits that the individual would not be eligible for an impairment rating.¹⁷ OWCP’s medical adviser also explained, as noted above, that whole person impairments were not authorized by FECA.¹⁸ He found no basis on which to rate impairment of a scheduled body member under the A.M.A., *Guides*. The Board finds that OWCP’s medical adviser’s August 29, 2010 report properly applies Dr. Katz’s findings to the A.M.A., *Guides* and establishes that appellant is not eligible for a schedule award under the sixth edition of the A.M.A., *Guides*.

¹⁴ *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹⁵ A.M.A., *Guides* 40.

¹⁶ *Id.* at 535.

¹⁷ *Id.* at 535, Table 16-12.

¹⁸ *Id.*

As noted, OWCP evaluates schedule award claims pursuant to the standards set forth in the A.M.A., *Guides*. Appellant has the burden of proof to submit medical evidence supporting that she has permanent impairment of a scheduled member of the body.¹⁹ As such evidence has not been submitted, she has not established entitlement to a schedule award.²⁰

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she is entitled to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ See *Annette M. Dent*, 44 ECAB 403 (1993).

²⁰ Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.