

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

R.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Largo, FL, Employer**

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**Docket No. 12-1811
Issued: March 14, 2013**

Appearances:

*Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On September 2, 2012 appellant filed a timely appeal of a March 8, 2012 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 schedule award issue.

ISSUE

The issue is whether appellant sustained more than four percent permanent impairment of the left lower extremity and four percent permanent impairment of the right lower extremity, for which he received schedule awards.

FACTUAL HISTORY

On March 4, 1997 appellant, then a 44-year-old letter carrier, sustained left upper extremity pain while carrying a mailbag. OWCP accepted his traumatic injury claim, assigned File No. xxxxxx690, for cervical intervertebral disc displacement and lumbar spinal stenosis.

¹ 5 U.S.C. § 8101 *et seq.*

Thereafter, appellant tripped and fell during a parcel delivery on April 13, 1999. OWCP accepted this traumatic injury claim, assigned File No. xxxxxx417, for neck and lumbar sprains, lumbar intervertebral disc disorder with myelopathy and cervical and lumbar intervertebral disc displacements.² By decisions dated August 20, 2002, January 10 and November 13, 2006, it granted schedule awards for 25 percent permanent impairment of the left upper extremity, 10 percent permanent impairment of the right upper extremity and 3 percent permanent impairment of the left lower extremity, respectively.

On June 18, 2009 appellant filed an additional claim for a schedule award. By decision dated February 24, 2010, OWCP denied the claim.³

Counsel requested reconsideration on January 30, 2012 and submitted medical evidence. In January 24, 2012 reports, Dr. Larry D. Horvath, an osteopath specializing in neurological surgery, reviewed the medical file and found evidence of bilateral C5-C6, L4-5 and L5-S1 radiculopathy, including bilateral reduced radial and median nerve recruitment, anterior and lateral arm paresthesia and diminished biceps and deep tendon ankle reflexes. Applying Table 15-21 (Peripheral Nerve Impairment: Upper Extremity Impairments) and Appendix A (Combined Values Chart) of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),⁴ he determined that appellant sustained 17 percent permanent impairment of the right arm. Applying Table 13-12 (Station and Gait Disorders) and Table 16-10 (Impairment Values Calculated From Lower Extremity Impairment), Dr. Horvath determined that appellant sustained 29 percent permanent impairment of the left leg and 29 percent permanent impairment of the right leg.

On February 16, 2012 Dr. James W. Dyer, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, reviewed Dr. Horvath's January 24, 2012 reports and disagreed with his opinion. In particular, he pointed out that the ratings were not based on the standard set forth in the American Medical Association's supplemental publication "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition"⁵ (hereinafter *The Guides Newsletter*). Applying Proposed Table 1 (Spinal Nerve Impairment: Upper Extremity Impairments) and Table 2 (Spinal Nerve Impairment: Lower Extremity Impairments), of *The Guides Newsletter*, Dr. Dyer calculated impairment ratings of three percent each for the left and right upper extremities and four percent each for the left and right lower extremities, citing bilateral sensory deficits of the C6 and L5 nerve roots, both of which merited two percent impairment. He noted that OWCP already had granted schedule awards for 25 percent permanent impairment of the left arm, 10 percent permanent impairment of the right arm and 3 percent permanent impairment of the left leg. Taking these prior payments into consideration, Dr. Dyer concluded that appellant sustained four percent permanent impairment of the right leg as well as an additional one percent

² OWCP combined these claims under File No. xxxxxx690, which is designated as the master file.

³ On July 27, 2010 an OWCP hearing representative affirmed this holding. On February 25, 2011 OWCP reviewed the merits of the case and denied modification.

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2008).

⁵ Christopher R. Brigham, M.D., "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition," *The Guides Newsletter* (July-August 2009).

permanent impairment of the left leg. He identified September 28, 2006 as the date of maximum medical improvement.

By decisions dated March 2 and 8, 2012, OWCP vacated the February 25, 2011 decision and granted a schedule award for an additional one percent permanent impairment of the left lower extremity and four percent permanent impairment of the right lower extremity for the period November 28, 2006 to March 8, 2007.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss of or loss of use of scheduled members or functions of the body.⁶ 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷

Although the A.M.A., *Guides* presents methods for estimating impairment to the spine and to the whole person,⁸ FECA does not authorize schedule awards for loss of use of the spine or the body as a whole.⁹ Amendments to FECA, however, modified the schedule award provision to allow 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 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.¹⁰

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.¹¹ OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.¹²

⁶ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

⁷ *K.H.*, Docket No. 09-341 (issued December 30, 2011).

⁸ *See B.M.*, Docket No. 09-2231 (issued May 14, 2010); *Janae J. Triplette*, 54 ECAB 792 (2003).

⁹ *D.A.*, Docket No. 10-2172 (issued August 3, 2011); *J.Q.*, 59 ECAB 366 (2008). FECA expressly defines “organ” as “a part of the body that performs a special function, and for purposes of this subchapter excludes the brain, heart and back.” 5 U.S.C. § 8101(19). No schedule award is payable for a member, function or organ of the body not specified under FECA or the implementing regulations. *J.Q.*, *id.*

¹⁰ *W.D.*, Docket No. 10-274 (issued September 3, 2010); *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹¹ *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

ANALYSIS

OWCP accepted appellant's traumatic injury claims for neck and lumbar sprains, cervical and lumbar intervertebral disc displacements, lumbar spinal stenosis and lumbar intervertebral disc disorder with myelopathy and granted schedule awards for 25 percent permanent impairment of the left upper extremity, 10 percent permanent impairment of the right upper extremity and 3 percent permanent impairment of the left lower extremity. Thereafter, appellant filed another claim for a schedule award and furnished January 24, 2012 reports from Dr. Horvath citing various tables in the A.M.A., *Guides* and calculating impairment ratings of 17 percent for the right arm, 29 percent for the left leg and 29 percent for the right leg. As noted, while FECA does not authorize schedule awards for loss of use of the spine, a claimant may still be entitled to an award for loss of use of a limb where the cause of the impairment originated in the spine. Because the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities, OWCP has adopted the standard set forth in *The Guides Newsletter*. In this case, Dr. Horvath failed to utilize the proper standard. Therefore, his opinion on the extent of appellant's permanent impairment was of limited probative value.¹³

On the other hand, the Board finds that the February 16, 2012 report of OWCP's medical adviser, Dr. Dyer, constitutes the weight of the medical evidence. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹⁴ Dr. Dyer reviewed Dr. Horvath's impairment ratings and correctly pointed out that they were not based on the standards set forth in *The Guides Newsletter*. He identified bilateral sensory deficits of the C6 and L5 nerve roots, applied Proposed Table 1 and Table 2 of *The Guides Newsletter*, and arrived at ratings of three percent each for the left and right upper extremities and four percent each for the left and right lower extremities. In view of appellant's prior schedule awards, Dr. Dyer accordingly subtracted the percentage already paid for impairments to both upper extremities and the left lower extremity and concluded that appellant sustained an additional one percent permanent impairment of the left lower extremity and four percent permanent impairment of the right lower extremity.¹⁵ Based on the totality of the medical evidence, the Board finds that appellant did not sustain more than four percent permanent impairment of the left lower extremity and four percent permanent impairment of the right lower extremity.

Counsel contends on appeal that Dr. Dyer should not have used *The Guides Newsletter* approach. The Board has held that *The Guides Newsletter* provides the appropriate method of evaluating extremity impairments resulting from a spinal nerve injury such as radiculopathy.¹⁶

¹³ *James Kennedy, Jr.*, 40 ECAB 620, 627 (1989).

¹⁴ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *James Mack*, 43 ECAB 321, 329 (1991).

¹⁵ *Carol A. Smart*, 57 ECAB 340 (2006) (any previous impairment to a member under consideration is included in calculating the percentage of loss except when that impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment). See also 5 U.S.C. § 8108; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(a)(2) (January 2010).

¹⁶ See, e.g., *P.G.*, Docket No. 12-30 (issued May 15, 2012).

Moreover, *The Guides Newsletter* explicitly states that its approach should be used when certain jurisdictions such as FECA permit ratings for the extremities but preclude rating for the spine.¹⁷

Appellant submitted new evidence after issuance of the March 8, 2012 decision. However, the Board lacks jurisdiction to review evidence for the first time on appeal.¹⁸

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

CONCLUSION

The Board finds that appellant did not sustain more than four percent permanent impairment of the left lower extremity and four percent permanent impairment of the right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2012 merit decision of the Office of Workers' Compensation Programs be affirmed.

Issued: March 14, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹⁷ *The Guides Newsletter*, *supra* note 5 at 1, 3.

¹⁸ 20 C.F.R. § 501.2(c).