

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

R.T., Appellant)

and)

DEPARTMENT OF DEFENSE, EDUCATION)
ACTIVITY -- SECTION IV, Arlington, VA,)
Employer)

**Docket No. 09-2034
Issued: June 3, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 4, 2009 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated May 14, 2009 denying her schedule award claim. Pursuant to 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 employment-related permanent impairment, thereby entitling her to a schedule award.

FACTUAL HISTORY

On July 13, 2005 appellant, then a 58-year-old custodial worker, injured her low back and right elbow when she slipped on a waxed floor while buffing it. The Office accepted the claim for lumbar strain/sprain, right elbow contusion and lumbar intervertebral disc disorder with myelopathy and authorized lumbar spine fusion. On May 31, 2007 it accepted appellant's claim for a recurrence of disability beginning March 13, 2007 and subsequently placed her on the periodic rolls in receipt of wage loss for total disability. Appellant accepted a light-duty job

offer as a modified custodial worker working four hours per day and returned to work on November 15, 2007.¹

On March 4, 2009 appellant filed a claim for a schedule award.

On March 23, 2009 Dr. James E. Rice, an attending Board-certified orthopedic surgeon, diagnosed lumbar degenerative disc disease with residual lumbar radiculopathy and status post fusion. He concluded that appellant had reached maximum medical improvement and had impairment peripheral nerve involvement based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). On physical examination, Dr. Rice found persistent left leg numbness in the L5-S1 distribution, absent knee and ankle jerk reflexes and other leg and back symptoms.

By letter dated April 7, 2009, the Office informed appellant that Dr. Rice's report did not provide any percentage of permanent impairment. It requested that she ask him to use the sixth edition of the A.M.A., *Guides* to determine her permanent impairment. The Office also advised appellant of what information the report should include. Appellant was given 30 days to provide the requested information. No medical evidence was received.

By decision dated May 14, 2009, the Office denied appellant's claim for a schedule award.² It found that it had not received medical evidence to establish she had sustained permanent impairment of a scheduled body member.³

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulations⁵ 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, the Act 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.⁶ Effective

¹ Appellant resigned from her position and elected to receive retirement benefits under the Civil Service Retirement Act in lieu of compensation benefits under the Federal Employees' Compensation Act.

² The Board notes that the Office issued a decision on the schedule award on February 22, 2010, which was during the pendency of appellant's appeal with the Board. It is well established that the Board and the Office may not exercise concurrent jurisdiction over the same issue in the same case. *D.S.*, 58 ECAB 392 (2007); *Cathy B. Millin*, 51 ECAB 331 (2000); *Douglas E. Billings*, 41 ECAB 880 (1990). Therefore the Office's February 22, 2010 decision is null and void.

³ The Board notes that, following the May 14, 2009 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. § 501.2(c); *M.B.*, 60 ECAB ___ (Docket No. 09-176, issued September 23, 2009); *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*

May 1, 2009, the Office adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁷

No schedule award is payable for a member, function or organ of the body not specified in the Federal Employees' Compensation Act or in the implementing regulations.⁸ As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.⁹ The Board notes that section 8101(19) specifically excludes the back from the definition of organ.¹⁰ However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.¹¹

ANALYSIS

The Office accepted appellant's claim for lumbar strain/sprain and right elbow contusion and a lumbar intervertebral disc disorder with myelopathy. As noted, the Federal Employees' Compensation Act does not permit a schedule award based on impairment to the back or spine. Appellant may only receive a schedule award for impairment to lower extremities if such impairment is established as being due to her accepted lumbar spine conditions.

Appellant did not submit sufficient medical evidence to establish that her accepted lumbar conditions resulted in permanent impairment. A March 23, 2009 report from Dr. Rice found that she had reached maximum medical improvement following lumbar spinal fusion. He noted only that she had peripheral nerve impairment under the fifth edition of the A.M.A., *Guides*. Dr. Rice did not provide any impairment rating or reference any tables. He did not explain how appellant's lumbar condition caused impairment to either lower extremity or an adequate description of appellant's physical condition so that an impairment rating could be determined by an Office medical adviser.

In order to determine entitlement to a schedule award, appellant's physician must provide a sufficiently detailed description of her condition so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions

⁷ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

⁸ *S.K.*, 60 ECAB ____ (Docket No. 08-848, issued January 26, 2009); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁹ *See D.N.*, 59 ECAB ____ (Docket No. 07-1940, issued June 17, 2008); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹⁰ 5 U.S.C. § 8101(19).

¹¹ *J.Q.*, 59 ECAB ____ (Docket No. 06-2152, issued March 5, 2008); *Thomas J. Engelhart*, *supra* note 8.

and limitations.¹² As Dr. Rice did not adequately describe appellant's condition or correlate his findings to the A.M.A., *Guides*, his report is insufficient to establish permanent impairment. On April 7, 2009 the Office requested that appellant provide a report from her treating physician addressing permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*; however, no additional evidence was submitted. There is no reasoned medical opinion evidence to establish the nature or extent of any impairment correlated to the A.M.A., *Guides* or explaining the causal relationship between these findings and her accepted employment injury. Appellant has failed to establish that she sustained a permanent impairment as a result of her accepted conditions.¹³

CONCLUSION

The Board finds that appellant failed to establish that she is entitled to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 14, 2009 is affirmed.

Issued: June 3, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹² A.A., 59 ECAB ___ (Docket No. 08-951, issued September 22, 2008); *Renee M. Straubinger*, 51 ECAB 667 (2000) (where the Board found that before the A.M.A., *Guides* can be utilized, a description of the claimant's impairment must be obtained from his or her physician with the description in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations).

¹³ *D.H.*, 58 ECAB 358 (2007); *Tammy L. Meehan*, 53 ECAB 229 (2001) (the burden is upon the employee to establish by evidence that he or she is entitled to compensation).