

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

G.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Silver Spring, MD, Employer**

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**Docket No. 12-532
Issued: August 13, 2012**

Appearances:
Stephen D. Scavuzzo, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 4, 2012 appellant, through her attorney, filed a timely appeal from a July 21, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her schedule award claim. 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 decision.

ISSUE

The issue is whether appellant is entitled to a schedule award for a permanent impairment of the right upper extremity.

FACTUAL HISTORY

On May 23, 2001 appellant, then a 44-year-old letter carrier, filed an occupational disease claim alleging that she sustained carpal tunnel syndrome, a pinched nerve in her neck and

¹ 5 U.S.C. § 8101 *et seq.*

myofascial pain due to carrying her mailbag. OWCP accepted the claim for a disc herniation with right cervical radiculopathy.

On October 2, 2006 appellant filed a claim for a schedule award. In a report dated February 16, 2005, Dr. Fredric L. Salter, a Board-certified orthopedic surgeon, measured cervical range of motion and found “diffuse tenderness in the upper trapezius, greater on the right than the left.” On examination, he found no loss of reflex or deficits in motor strength or sensation. In a report dated May 9, 2007, Dr. Salter discussed appellant’s complaints of neck pain radiating from the right shoulder to middle back. He diagnosed continued pain following an anterior cervical discectomy, corpectomy and fusion at C5-7. Using the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (A.M.A., *Guides*), Dr. Salter found that appellant had a 12 percent impairment due to loss of range of motion of the spine.

By letter dated June 1, 2009, OWCP advised appellant that it required an impairment evaluation from a physician utilizing the sixth edition of the A.M.A., *Guides*. On June 30, 2009 Dr. Salter considered her symptoms of neck pain radiating into the right shoulder. He used Table 17.2 on page 564 of the sixth edition of the A.M.A., *Guides*, relevant to determining impairments of the cervical spine, to find a 28 percent whole person impairment.

On August 12, 2009 OWCP’s medical adviser reviewed Dr. Salter’s finding in his February 16, 2005 report that appellant had “no reflex, motor or sensory deficits about the upper extremities.” He thus concluded that there was no evidence of an upper extremity impairment. The medical adviser also found that Dr. Salter’s whole person impairment rating was inappropriate under FECA.

By decision dated November 5, 2009, OWCP denied appellant’s claim for a schedule award on the grounds that the medical evidence was insufficient to show that she had an impairment of the upper extremities. On December 2, 2009 appellant’s attorney requested an oral hearing. On April 23, 2010 counsel asked for a review of the written record in lieu of an oral hearing.

In a report dated May 6, 2010, Dr. Salter discussed appellant’s complaints of “sticking pains down her right arm and a numb feeling; when it is painful it is weak.” He stated:

“On examination today, cervical motions are essentially unchanged from my initial evaluation of February 16, 2005. There is no reflex, motor or sensory deficits about the upper extremity. With full shoulder abduction and lateral cervical flexions [appellant] complains of radiating right arm pain. Positive Spurling towards the right.”

Using the fifth edition of the A.M.A., *Guides*, Dr. Salter found that appellant had a 4 percent impairment at C5, C6 and C7 due to “subjective evidence of pain and tingling in the C5-6 and C6-7 distributions,” for a total right upper extremity impairment of 12 percent.

By decision dated July 19, 2010, OWCP’s hearing representative set aside the November 5, 2009 decision. She found the May 6, 2010 report from Dr. Salter was sufficient to warrant further development. The hearing representative remanded the case for an OWCP

medical adviser to review Dr. Salter's report and provide a rationalized finding regarding whether appellant had a permanent impairment of the right upper extremity.

In a report dated December 27, 2010, OWCP's medical adviser found that the medical evidence was insufficient to establish a right upper extremity impairment. He noted that an impairment of a spinal nerve affecting the extremity was evaluated in accordance with the July/August issue of *The Guides Newsletter*.² The medical adviser found that the proposed tables set forth in *The Guides Newsletter* required identification of the involved nerve and the degree of sensory and/or motor deficit. He concluded, "In this case, Dr. Salter clearly documents that there is 'no reflex, motor or sensory deficits about the upper extremity.' Therefore, there is no objective basis upon which to rate impairment."

By decision dated January 6, 2011, OWCP denied appellant's schedule award claim. It indicated in its decision that she had previously received an award for a 12 percent impairment of the right upper extremity. On February 3, 2011 counsel requested an oral hearing, which he subsequently changed to a request for a review of the written record. On June 13, 2011 he contended that OWCP erred when it found that appellant had previously received a 12 percent impairment.

In a decision dated July 21, 2011, OWCP's hearing representative affirmed the January 6, 2011 decision as modified to reflect that appellant had not previously received an award for a 12 percent impairment. She noted that the sentence was a typographical error.

On appeal, counsel argues that under Table 16-13 of the fifth edition of the A.M.A., *Guides*, pain can be the basis for an impairment rating.

LEGAL PRECEDENT

The schedule award provision of FECA,³ and its implementing federal regulations⁴ 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.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

² Christopher R. Brigham, MD, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition, *The Guides Newsletter* (July/August 2009).

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁷ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

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.⁸ OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury.⁹

ANALYSIS

OWCP accepted that appellant sustained a herniated disc with right cervical radiculopathy due to factors of her federal employment. On October 2, 2006 she filed a claim for a schedule award. In support of her claim, appellant submitted a May 9, 2007 report from Dr. Salter, who opined that she had a 12 percent permanent impairment due to loss of range of motion of the spine. FECA, however, does not provide for payment of a schedule award for the permanent loss of use of the back or spine.¹⁰

In a report dated June 30, 2009, Dr. Salter used the sixth edition of the A.M.A., *Guides* to find that appellant had a 28 percent impairment of the whole person using Table 17.2, the Cervical Regional Grid. FECA, however, does not authorize the payment of schedule awards for a whole person impairment.¹¹ Further, as discussed, a claimant is not entitled to a schedule award for an impairment of the spine or back.¹²

On May 6, 2010 Dr. Salter reviewed appellant's complaints of pain radiating down the right arm with numbness and weakness with pain. On examination, he found no "reflex, motor or sensory deficits about the upper extremity," full shoulder abduction and a positive Spurling's test on the right. Dr. Salter applied the fifth edition of the A.M.A., *Guides* to find a 12 percent impairment due to loss of sensation at C5, C6 and C7. Physicians, however, must use the sixth edition of the A.M.A., *Guides* for all ratings on or after May 1, 2009. A medical opinion not

⁷ A.M.A., *Guides* 494-531.

⁸ *Supra* note 8.

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹⁰ FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19); *see also Jay K. Tomokiyo*, 51 ECAB 361 (2000). A schedule award is payable for a permanent impairment of the extremities that is due to a work-related back condition; *see Denise D. Cason*, 48 ECAB 530 (1997).

¹¹ *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹² *See supra* note 10.

based on the appropriate edition of the A.M.A., *Guides* is of diminished probative value in determining the extent of a claimant's permanent impairment.¹³

Further, OWCP's medical adviser reviewed Dr. Salter's report and found that there was no basis for an impairment rating of the upper extremity. He found that OWCP had adopted the approach set forth in *The Guides Newsletter* for rating spinal nerve injuries as impairments of the extremities. The medical adviser noted that *The Guides Newsletter* required identification of the affected nerve and the extent of any sensory or motor loss. He concluded that, as Dr. Salter found no sensory or motor deficit, there was no ratable impairment. Appellant has submitted no medical evidence in conformance with the A.M.A., *Guides* supporting a ratable impairment of the upper extremity. Consequently, she did not meet her burden of proof.

On appeal, counsel argues that under the fifth edition pain can be the basis for an impairment rating. As noted, however, effective May 1, 2009 the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁴

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.

CONCLUSION

The Board finds that appellant is not entitled to a schedule award for a permanent impairment of the right upper extremity.

¹³ See *Shalanya Ellison*, 56 ECAB 150 (2004).

¹⁴ See *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 13, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board