

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

M.S., Appellant

and

**DEPARTMENT OF TRANSPORTATION, FEDERAL
AVIATION ADMINISTRATION, Washington, DC,
Employer**

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) **Docket No. 12-1276**
) **Issued: November 9, 2012**
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 24, 2012 appellant filed a timely appeal of the May 2, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her claim for a schedule award. 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 merits of this case.²

ISSUE

The issue is whether appellant has a ratable impairment of her upper and lower extremities.

¹ 5 U.S.C. §§ 8101-8193.

² The record includes evidence received after the May 2, 2012 decision. As this evidence was not part of the record when OWCP issued its May 2, 2012 final decision, the Board is precluded from considering it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

Appellant, a 77-year-old computer specialist, has an accepted claim for aggravation of cervical and lumbosacral radiculopathy which arose on January 30, 2007. She subsequently filed a claim for a schedule award (Form CA-7). However, appellant did not submit an impairment rating with her claim. On June 12, 2009 OWCP contacted her physician and asked that she provide an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008). It did not receive a reply.

On January 17, 2012 OWCP advised appellant of the necessity of submitting an impairment rating under the A.M.A., *Guides* (6th ed. 2008). Appellant forwarded OWCP's January 17, 2012 correspondence to several physicians but none submitted an impairment rating on her behalf.

In a February 6, 2012 form report, appellant's chiropractor, Dr. Anthony Holvick, stated that he had treated appellant for injuries sustained on January 30, 2007 which included cervical disc herniation at C5-6, lumbar disc herniation at L5-S1, right C6 radiculopathy and bilateral L5-S1 radiculopathy.³

By decision dated May 2, 2012, OWCP denied appellant's claim for a schedule award.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁴ FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁵ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.⁶

³ 5 U.S.C. § 8101(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. The term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulations by the Secretary. *See Paul Foster*, 56 ECAB 208 (2004).

⁴ For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) and for a 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. *Id.* at § 8107(c)(2).

⁵ 20 C.F.R. § 10.404.

⁶ *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or the implementing regulations.⁷ Neither FECA nor the 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.⁸ However, a schedule award is permissible where the employment-related back condition affects the upper and/or lower extremities.⁹

The sixth edition of the A.M.A., *Guides* (2008) provides a specific methodology for rating spinal nerve extremity impairment.¹⁰ It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine.¹¹ The impairment is premised on evidence of radiculopathy affecting the upper and/or lower extremities.¹²

ANALYSIS

Appellant bears the burden of establishing her entitlement to benefits under FECA.¹³ OWCP advised her and her physician of the necessity of submitting an impairment rating in accordance with the A.M.A., *Guides* (6th ed. 2008). The requested medical evidence was not received. Therefore, OWCP properly denied appellant's claim for a schedule award.

In a February 6, 2012 certification, the treating physician, Dr. Holvick, did not provide an impairment rating or identify any specific findings that the district medical adviser (DMA) might otherwise rely upon to determine the existence or extent of impairment. Before a case can be referred to the DMA, the attending physician should describe the impairment in sufficient detail to permit clear visualization of the impairment and the restrictions and limitations which have resulted.¹⁴ The record as of May 2, 2012 did not include a current medical evaluation that would support appellant's claim for a schedule award. Accordingly, OWCP properly denied her claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

⁷ *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

⁸ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); see *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a(3).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4.

¹¹ *Id.*

¹² *Id.*

¹³ 20 C.F.R. § 10.115(f).

¹⁴ *Supra* note 10 at Chapter 3.700.3a(2).

CONCLUSION

Appellant has not established that she has a ratable impairment of the upper and lower extremities.

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2012 decision of the Office of Workers' Compensation Programs is affirmed.¹⁵

Issued: November 9, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

¹⁵ Appellant may request a schedule award or increased schedule award based on evidence of new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.