

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

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| T.C., Appellant |) | |
| |) | |
| and |) | Docket No. 12-1319 |
| |) | Issued: November 5, 2012 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Washington, MI, Employer |) | |
| _____ |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 4, 2012 appellant filed a timely appeal of a May 21, 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 a ratable impairment entitling her to a schedule award.

FACTUAL HISTORY

On February 25, 2000 appellant, then a 42-year-old rural carrier associate, was lifting mail trays and tubs at work when she injured her lower back. By decision dated March 29, 2000, OWCP accepted her traumatic injury claim for resolved back strain. On January 12, 2002 appellant pulled her lower back while carrying a bundle of catalogs. By decisions dated

¹ 5 U.S.C. § 8101 *et seq.*

February 26 and September 16, 2002, OWCP accepted her traumatic injury claim for lumbar strain, sacroiliac sprain, aggravated L5-S1 degenerative disc disease and L5-S1 radiculopathy and paid disability compensation accordingly.

Appellant filed multiple claims for a schedule award from September 10, 2010 to January 24, 2011 and submitted medical evidence. Dr. Martha A. Frankowski, a Board-certified neurologist, related in a June 20, 2011 report that appellant experienced lumbosacral myalgia and various symptoms affecting the left lower extremity and was unable to sit for more than three to five minutes, stand for more than 10 minutes, or lift items weighing above 20 pounds. Physical examination findings were unremarkable.

In a July 28, 2011 functional capacity evaluation report, Marwan Francess, a licensed occupational therapist, administered a battery of tests spanning four hours to assess appellant's functional capacity and physical tolerances. He concluded that she was able to perform modified work on a full-time basis effective immediately. An August 24, 2011 duty status report from Dr. Frankowski cited Mr. Francess' July 28, 2011 report and diagnosed lumbosacral radiculitis.²

OWCP informed appellant in a February 23, 2012 letter that additional evidence was needed from her attending physician to establish her claim. It pointed out that a schedule award cannot be issued for a spinal impairment but may be paid for an impairment of an extremity resulting from a spinal nerve injury. OWCP gave appellant 30 days to submit a report with an impairment rating based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ (hereinafter A.M.A., *Guides*), specifically the supplemental publication "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (hereinafter *The Guides Newsletter*).⁴

Appellant provided a March 19, 2012 permanent impairment worksheet from Dr. Frankowski citing Mr. Francess' July 28, 2011 report. Dr. Frankowski did not rate any impairment on the worksheet.

By decision dated May 21, 2012, OWCP denied appellant's claim, finding the medical evidence insufficient to demonstrate a permanent impairment of a scheduled member.

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 or loss of use of scheduled members or functions of the body.⁵ However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results

² The case record also contains an October 10, 2011 duty status report diagnosing lumbar radiculitis and releasing appellant to full-time duty. The physician's signature was illegible.

³ A.M.A., *Guides* (6th ed. 2008).

⁴ Christopher R. Brigham, M.D., "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition," *The Guides Newsletter* (July/August 2009).

⁵ 5 U.S.C. § 8107; 20 C.F.R. § 10.404. No schedule award is payable for a member, function or organ of the body not specified under FECA or the implementing regulations. *J.Q.*, 59 ECAB 366 (2008).

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

Although the A.M.A., *Guides* presents methods for estimating impairment to the spine and to the whole person,⁷ FECA does not authorize schedule awards for loss of use of the back or the body as a whole.⁸ 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.⁹

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.¹⁰ OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.¹¹

ANALYSIS

The Board finds that appellant did not sustain a ratable impairment.

OWCP accepted that appellant sustained lumbar strain, sacroiliac sprain, aggravated L5-S1 degenerative disc disease and L5-S1 radiculopathy while in the performance of duty. Appellant thereafter filed multiple claims for a schedule award. Neither Dr. Frankowski's June 20 and August 24, 2011 reports nor the July 28, 2011 functional capacity evaluation report, that he referenced, furnished an impairment rating for a scheduled member. In a February 23, 2012 letter, OWCP advised appellant to submit a report with an impairment rating based on *The Guides Newsletter*. Appellant subsequently provided Dr. Frankowski's March 19, 2012 permanent impairment worksheet, which merely referred to Mr. Frances's July 28, 2011 report. The Board has held that an opinion that is not based upon standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of limited probative value

⁶ *K.H.*, Docket No. 09-341 (issued December 30, 2011).

⁷ See *B.M.*, Docket No. 09-2231 (issued May 14, 2010); *Janae J. Triplette*, 54 ECAB 792 (2003).

⁸ *J.Q.*, *supra* note 5. 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). Also, a description of impairment in terms of "whole person" or "whole body" is not probative as to the extent of loss of use of a specific scheduled member of the body under section 8107 of FECA. *R.I.*, Docket No. 09-1559 (issued August 23, 2010).

⁹ *W.D.*, Docket No. 10-274 (issued September 3, 2010); *Rozella L. Skinner*, 37 ECAB 398 (1986).

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

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

in determining the extent of permanent impairment.¹² Since Dr. Frankowski did not present an impairment rating in accordance with A.M.A., *Guides* or *The Guides Newsletter*, the Board finds that OWCP properly denied appellant's claim. Appellant did not otherwise submit a current impairment rating pursuant to OWCP's standards.

The Board notes that appellant submitted new evidence after issuance of the May 21, 2012 decision and on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal.¹³ Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment.

CONCLUSION

The Board finds that appellant did not sustain a ratable impairment.

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: November 5, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹² *James Kennedy, Jr.*, 40 ECAB 620, 627 (1989).

¹³ 20 C.F.R. § 501.2(c).