

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

W.R., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Coleman, FL, Employer**

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**Docket No. 13-492
Issued: June 26, 2013**

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 December 27, 2012 appellant filed a timely appeal from an October 1, 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 the case.

ISSUE

The issue is whether appellant has established permanent impairment due to her work-related injuries.

FACTUAL HISTORY

On June 24, 2008 appellant, then a 47-year-old correctional officer, filed a traumatic injury claim. On June 17, 2008 while escorting a trash truck, she had to climb up a cement platform, which had no ladder or steps available, to remove padlocks from top of dumpster and then jumped down from the platform. Appellant claimed injury to her right ankle and knee, back

¹ 5 U.S.C. § 8101 *et seq.*

and neck. OWCP accepted the conditions of cervical strain, lumbar strain, right knee strain/sprain and right foot strain/sprain, displacement of cervical intervertebral disc without myelopathy, spinal stenosis in cervical region and tear of medial meniscus of right knee. Appellant received compensation for disability including an October 12, 2009 anterior cervical discectomy and interbody fusion at levels C4-7. She underwent a partial right lateral meniscectomy on February 9, 2010. Appellant stopped work on May 10, 2009 and did not return.

On November 5, 2010 appellant requested a schedule award. By decision dated December 21, 2011, OWCP granted a schedule award for two percent permanent impairment of the right leg. The period of the award ran 5.76 weeks from September 26 to November 5, 2011.²

On February 14, 2012 appellant again requested a schedule award for her cervical and lumbar condition. In a February 1, 2012 report, Dr. Robert L. Masson, a Board-certified neurologist, opined that she was at maximum medical improvement for her spinal conditions. Based on a 1996 Florida Uniform Permanent Impairment Rating Schedule, he opined that appellant had a total spinal impairment of 28 percent.

In a March 1, 2012 letter, OWCP informed Dr. Masson that FECA does not provide for schedule awards for permanent impairment of the spine, but that such awards could be paid for impairment of the upper or lower extremities caused by injury to a spinal nerve. Dr. Masson was asked to rate impairment of the extremities due to any spinal nerve injury under the appropriate sections of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a March 7, 2012 report, Dr. Masson stated that, when appellant was last seen on February 1, 2012, he was unaware that she had an electromyogram (EMG), which showed mild-to-moderate right carpal tunnel subsequent to her injury of falling on outstretched arms and hands and her knee. He noted that she could have had double crush syndrome. Dr. Masson stated that appellant complained of right upper extremity paresthesias and of her hands falling asleep, which was characteristic of peripheral nerve entrapment. Based on a 1996 Florida Uniform Permanent Impairment Rating Schedule, he opined that she had 15 percent impairment or a total impairment of up to 43 percent.

In an April 23, 2012 report, an OWCP medical adviser noted that Dr. Masson's March 7, 2012 report referenced carpal tunnel syndrome on the right side, which was not an accepted condition.

In a May 2, 2012 report, Dr. James W. Dyer, a medical adviser, reviewed the evidence. He found that appellant reached maximum medical improvement as of February 1, 2012. Dr. Dyer noted that she had cervical surgery on October 12, 2009 and was given 28 percent whole percent impairment for axial spine impairment under a 1996 Impairment Guides for Florida. He advised, however, that no motor or sensory deficit in the upper or lower extremity was identified by Dr. Masson and that the rating was given for spinal impairment. Dr. Dyer recommended a second opinion examination.

² The December 21, 2011 OWCP decision erroneously states that the schedule award was for the left leg.

OWCP referred appellant for a second opinion examination to Dr. Raymond D. Crosby, an osteopath specializing in orthopedics. In a September 4, 2012 report, Dr. Crosby reviewed the history of injury, her medical treatment and provided findings on examination. He found that appellant was at maximum medical impairment for the cervical spine surgery and that the nerve conduction studies (NCS) and EMGs noted some cervical degeneration of the C4-7 level disc above her previous fusion. Dr. Crosby noted that the diagnostic studies did not reveal any peripheral entrapment neuropathy of the left side and a mild-to-moderate carpal tunnel on the right side. While appellant subsequently complained of peri-cervical tenderness and swelling, no spasm or abnormal swelling was observed on examination. Under Table 17-2 of the A.M.A., *Guides* for the cervical spine, Dr. Crosby opined that she was a class 3 with a 0 modifier, giving her a 15 percent impairment rating. He stated that, if awards were only for impairment of the affected spinal nerve extremity, no impairment was applicable in this case. In a September 18, 2012 addendum, Dr. Crosby advised that, under the sixth edition guidelines rating for peripheral nerve injuries, appellant had no focal peripheral nerve injury and he was assigned a zero percent impairment.

On September 26, 2012 Dr. H.P. Hogshead, a medical adviser, stated that Dr. Crosby correctly applied the sixth edition guidelines for rating peripheral nerve injuries. He stated that the second opinion examination and report was thorough and objective. In the September 18, 2012 supplemental report, Dr. Crosby had found no evidence of impairment to the extremities based on the peripheral nerve guidelines. Dr. Hogshead stated that he was certain that Dr. Crosby intended to include evidence of a radiculopathy which would be the concern in this situation.

By decision dated October 1, 2012, OWCP denied appellant's claim for a schedule award as the evidence was not sufficient to establish permanent impairment to a scheduled member due to her accepted cervical and lumbar work injuries.

LEGAL PRECEDENT

FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.³ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁴ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.⁵

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.⁶

³ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁴ A. *George Lampo*, 45 ECAB 441 (1994).

⁵ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁶ *Tammy L. Meehan*, 53 ECAB 229 (2001).

OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.⁷

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.⁸ In 1960, amendments to FECA modified the schedule award provisions to provide 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. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.⁹

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter Rating Spinal Nerve Extremity Impairment* using the sixth edition (July/August 2009) is to be applied.¹⁰

ANALYSIS

OWCP accepted that on June 17, 2008 appellant sustained a cervical strain, lumbar strain, right knee strain/sprain and right foot strain/sprain, displacement of cervical intervertebral disc without myelopathy, cervical spinal stenosis and a tear of the medial meniscus of the right knee. It authorized an anterior cervical discectomy and interbody fusion at levels C4-7 and a partial right lateral meniscectomy. Appellant received a schedule award on December 21, 2011 for a two percent permanent impairment of the right lower extremity.

On February 14, 2012 appellant filed a claim for a schedule award and submitted the reports of Dr. Masson.

In his February 14 and March 7, 2012 reports, Dr. Masson found that appellant had a spinal impairment of 43 percent under the 1996 Florida Uniform Permanent Rating Schedule. This consisted of 28 percent impairment for her spinal conditions and 15 percent impairment for a right carpal tunnel condition. The Board notes that a schedule award is not payable under FECA for injury to the back or spine.¹¹ Further, an impairment rating based on state workers'

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(b) (August 2002).

⁸ *Pamela J. Darling*, 49 ECAB 286 (1998).

⁹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁰ See *G.N.*, Docket No. 10-850 (issued November 12, 2010); see also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹¹ *Supra* note 8 at n.10. See 5 U.S.C. § 8101(20).

compensation standards are not determinative as to the relevant standards of the A.M.A., *Guides* and are of limited probative value. OWCP has not accepted a right carpal tunnel condition. Appellant must establish impairment to a scheduled member caused by the accepted injury before any impairment due to her right wrist condition can be assessed.¹² She did not submit any additional medical evidence regarding impairment to her right knee.

OWCP referred appellant to Dr. Crosby for a second opinion examination to determine the extent of any permanent impairment due to the accepted injury. In a September 4, 2012 report, Dr. Crosby found that she was at maximum medical improvement with regard to her cervical spine surgery. He reported that the diagnostic NCS and EMGs showed no peripheral entrapment neuropathy on the left side and a mild-to-moderate carpal tunnel on the right side. Dr. Crosby provided findings on examination and no evidence of peri-cervical spasm or abnormal swelling. He referred to Table 17-2 of the A.M.A., *Guides*, relevant to determining impairments of the spine, but noted that there was no impairment of the extremities related to a spinal nerve. In his September 18, 2012 addendum, Dr. Crosby clarified that appellant had no focal peripheral nerve injury and he would assign a zero percent impairment. On September 26, 2012 Dr. Hogshead reviewed the medical record. He stated that Dr. Crosby properly applied the sixth edition guidelines rating for peripheral nerve injuries.

The Board finds that Dr. Crosby's opinion is thorough and well rationalized. Dr. Crosby reviewed appellant's history of injury, the medical record and the statement of accepted facts. Based on the history of injury, physical examination and review of the diagnostic testing, he found no impairment to either upper extremity or a peripheral nerve injury. While Dr. Crosby referred to Table 17-2 of the A.M.A., *Guides* and provided 15 percent impairment for the cervical spine, OWCP's procedures provided that *The Guides Newsletter* July/August 2009 regarding spinal nerve extremity impairments would be the appropriate method for determining an upper extremity impairment.¹³ He found no evidence of radiculopathy and explained that appellant's cervical condition and surgery did not result in any peripheral nerve impairment. The Board notes, however, that his failure to cite *The Guides Newsletter* does not affect the disposition of the case as there is no probative medical evidence establishing that appellant sustained permanent impairment of either upper extremity resulting from her accepted cervical condition.

On appeal, appellant contends that she is entitled to a schedule award. As noted Dr. Crosby's cervical impairment rating is precluded under FECA as the spine is not a scheduled member under section 8107.¹⁴ Appellant additionally argues that her treating physician's opinion should be given greater weight over that of Dr. Crosby. As noted, Dr. Masson's impairment rating is of diminished probative value as he, too, rated impairment of the spine. There is no probative medical evidence of record establishing that appellant sustained permanent impairment to either an upper extremity resulting from her accepted cervical or lumbar conditions. While appellant has evidence of right carpal tunnel syndrome, which Dr. Crosby noted on examination, this condition has not been accepted as related to her accepted injury. As

¹² See generally *Thomas P. Lavin*, 57 ECAB 353 (2006).

¹³ See also *G.N.*, *supra* note 10.

¹⁴ *Supra* note 8.

previously noted, she must establish impairment to a scheduled member caused by the accepted condition before impairment can be assessed.¹⁵

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

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish entitlement to a schedule award for permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 26, 2013
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

¹⁵ See generally *Thomas P. Lavin*, *supra* note 13.