

**United States Department of Labor  
Employee's Compensation Appeals Board**

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**E.T., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Livonia, MI, Employer**

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**Docket No. 14-1501  
Issued: December 11, 2014**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 18, 2014 appellant, through counsel, filed a timely appeal from an April 30, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 met her burden of proof to establish that she has an impairment of either lower extremity due to the accepted lumbar sprain/strain.

On appeal, appellant's attorney asserts that the April 30, 2014 decision is contrary to law and fact.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On October 22, 2005 appellant, then a 34-year-old letter carrier, filed a traumatic injury claim alleging that she injured her back on October 4, 2005 while carrying a heavy mailbag. OWCP accepted the claim for sprain/strain lumbar region, and she began modified duty. Appellant stopped work on December 17, 2007 and was terminated by the employing establishment effective October 24, 2008 for failure to adhere to attendance regulations. In a May 25, 2011 decision, OWCP denied her claim for wage-loss compensation from December 23, 2007, and continuing. In correspondence dated September 13, 2011, it granted appellant application to withdraw her request for a hearing.

On October 18, 2011 appellant, through her attorney, requested a schedule award and submitted a September 2, 2011 report in which Dr. William N. Grant, a Board-certified internist, noted her complaint of lumbosacral pain and paresthesias that radiated down both lower extremities following an injury at work that affected her activities of daily living. Dr. Grant performed physical examination, noting a positive straight leg test bilaterally and diagnosed sprain, lumbar region. He found that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>2</sup> under Table 16-12, Peripheral Nerve Impairment, appellant had a class 2 motor impairment of the sciatic nerve for a 25 percent impairment of each lower extremity.

On March 12, 2013 OWCP asked that appellant submit a medical report that comported with the July/August 2009 *The Guides Newsletter*. In an April 4, 2013 report, Dr. John L. Dunne, an osteopath, noted that her complaint of radiating moderate low back pain and her report that a magnetic resonance imaging (MRI) scan study demonstrated a herniated nucleus pulposus at L5-S1 and that electrodiagnostic studies showed nerve damage to the lower extremities. He indicated that appellant had limited active lumbar range of motion and that sensory examination was normal although she reported subjective paresthesias. Dr. Dunne found no evidence of lumbar radiculopathy on clinical examination and that straight-leg raising was normal. He advised that maximum medical improvement had been reached and that, under Table 17-4, Lumbar Regional Grid, appellant had a class 1 impairment for one percent sensory deficit of the lower extremity, as described in the April 2009 addendum to the A.M.A., *Guides* newsletter.

In an October 8, 2013 report, Dr. Morley Slutsky, an OWCP medical adviser Board-certified in occupational medicine, noted his review of the record including Dr. Dunne's report. He indicated that maximum medical improvement was reached on April 4, 2013, the date of Dr. Dunne's evaluation. Dr. Slutsky noted that the MRI scan and electrodiagnostic studies reported by appellant were not found in the case record and that Dr. Dunne, who analyzed appellant's findings under Chapter 17, found that sensory examination was normal and that there was no evidence of lumbar radiculopathy on examination. He indicated that lumbar sprains/strains do not cause permanent sensory/motor deficits in the lower extremities and, as Dr. Dunne found no objective evidence of lumbar radiculopathy in the lower extremities, there

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008).

was no basis for an impairment in either extremity using the July/August 2009 *The Guides Newsletter*.

By decision dated October 10, 2013, OWCP denied appellant's claim for a schedule award. Appellant, through her attorney, timely requested a hearing that was held on March 12, 2014. At the hearing, she described her symptoms and counsel asserted that her complaints were sufficient to establish radiculopathy, as supported by Dr. Dunne's report which conformed an "April 2009 *The Guides Newsletter*." The hearing representative questioned whether Dr. Dunne's conclusion of a one percent impairment was for each lower extremity, and left the record open for 30 days for appellant to obtain a supplementary report from the physician.

In a March 19, 2014 report, Dr. Dunne indicated that appellant had a one percent impairment of each lower extremity.

By decision dated April 30, 2014, the hearing representative affirmed the October 10, 2013 decision. He found that OWCP had adopted the July/August 2009 *The Guides Newsletter*, not an "April 2009" newsletter. He also found that Dr. Dunne failed to provide a reasoned explanation as to why appellant had one percent bilateral impairments when her sensory examination was normal and there was no evidence of lumbar radiculopathy on examination.

### **LEGAL PRECEDENT**

The schedule award provision of FECA,<sup>3</sup> and its implementing federal regulations<sup>4</sup> 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.<sup>5</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is to be used to calculate schedule awards.<sup>6</sup>

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.<sup>7</sup> 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

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> *Id.* at § 10.404(a).

<sup>6</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>7</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.<sup>8</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.<sup>9</sup> OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in the July to August 2009 *The Guides Newsletter*.<sup>10</sup>

### ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that she has a ratable impairment of either lower extremity. OWCP accepted that she sustained a lumbar sprain/strain and appellant requested a schedule award. The Board finds that the weight of the medical evidence rests with the opinion of Dr. Slutsky, the medical adviser, who explained why Dr. Dunne's impairment evaluation was insufficient to establish entitlement.

In his October 8, 2013 report, Dr. Slutsky described the April 4, 2013 report in which Dr. Dunne, an attending osteopath, advised that appellant had a normal lower extremity sensory examination and no evidence of lumbar radiculopathy. The medical adviser further noted that, although appellant reported positive MRI scan and electrodiagnostic study findings, these reports were not found in the case record. He also indicated that Dr. Dunne utilized Chapter 17 in describing appellant's impairment, and correctly advised that, therefore, his evaluation did not comport with the July to August 2009 *The Guides Newsletter*, used to evaluate lower extremity impairment caused by a spinal injury. Moreover, Dr. Dunne referenced an "April 2009" A.M.A., *Guides* newsletter and not the July to August 2009 edition that has been adopted by OWCP.<sup>11</sup> His opinion is therefore insufficient to establish entitlement to a schedule award. Likewise, as Dr. Grant did not reference the July to August 2009 *The Guides Newsletter* and procedures described therein, his opinion also did not comport with the A.M.A., *Guides* and OWCP procedures and is insufficient to establish entitlement to a schedule award.

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.

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<sup>8</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>9</sup> *Rozella L. Skinner*, 37 ECAB 398 (1986).

<sup>10</sup> FECA Transmittal No. 10-04 (issued January 9, 2010); 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.

<sup>11</sup> *Id.*

**CONCLUSION**

The Board finds that appellant did not establish that she has an impairment of either lower extremity due to the accepted lumbar sprain/strain.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 30, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2014  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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