

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

M.P., Appellant

and

**DEPARTMENT OF THE NAVY, NAVY
INSTALLATIONS COMMAND, San Diego, CA,
Employer**

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**Docket No. 14-777
Issued: July 18, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 13, 2014 appellant, through his attorney, filed a timely appeal from the December 16, 2013 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 merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's claim for a schedule award.

FACTUAL HISTORY

OWCP accepted that on May 13, 2009 appellant, then a 53-year-old police officer, sustained a lumbar sprain and brachial neuritis or radiculopathy when he was participating in a demonstration of takedown techniques at work and the instructor twice slammed him down to

¹ 5 U.S.C. §§ 8101-8193.

the mat. He stopped work on May 13, 2009 but returned to work shortly thereafter in a limited-duty position.

On August 29, 2012 appellant filed a claim for a schedule award (Form CA-7) due to his accepted work injuries.

In a December 24, 2012 report, Dr. Neil Allen, an attending Board-certified neurologist, reported the findings of his physical examination of appellant on November 2, 2012. He noted that appellant complained of neck and low back soreness but stated, “[Appellant] denies radicular symptoms in the upper and lower extremity.” Dr. Allen indicated that, upon palpation of the neck and low back, appellant exhibited bilateral tenderness of his cervical paraspinal, upper trapezius and lumbar paraspinal muscles. He reported that sharp, dull, soft touch and 2-point touch were intact bilaterally in the C5 through T1 nerve distributions of the arms and that muscle strength was 5/5 in the C5 through C8 spinal levels bilaterally. Sharp, dull, soft touch and 2-point touch were intact bilaterally in the L2 through S1 nerve distributions of the legs, muscle strength was 5/5 in the L4 through S1 spinal levels bilaterally and straight leg raise testing was negative for radicular pain bilaterally. Dr. Allen referenced Table 17-2, Table 17-4, Table 17-6, Table 17-7 and Table 17-9 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).² He concluded that appellant’s “final whole person impairment is [two percent] ... [c]ervical spine [disability-based impairment] whole person impairment is [one percent] ... [l]umbar spine [disability-based impairment] whole person impairment is [one percent].”

In a March 19, 2013 report, Dr. Christopher Gross, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, stated that appellant’s record was reviewed to determine whether he had any permanent impairment due to his accepted work injuries. He noted that, in making this determination, he referenced the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” (July/August 2009). Dr. Gross stated:

“Currently, [appellant] does not have any radicular symptoms in the upper and lower extremities. He has a baseline low level of neck and back pain. On examination, [appellant] has full strength of the bilateral upper and lower extremities. He has sensation intact in all nerve root distributions in the upper and lower extremities. FECA does not award whole body impairment; therefore, Dr. Allen’s rating will not be used. When rating the neck or back, only injuries affecting the limbs can be rated. Therefore, since there are no motor or sensory issues in the limbs, the cervical and lumbar radiculopathy represent a [c]lass 0 diagnosis. This represents a [zero percent] impairment rating. The date of [maximum medical improvement] is November 2, 2012, the date of the last examination by Dr. Allen. [Permanent partial impairment] right lower extremity: [zero percent]. [Permanent partial impairment] left lower extremity: [zero percent]....”

² A.M.A., *Guides* 564-81.

By decision dated June 10, 2013, OWCP denied appellant's claim for a schedule award based on the evaluation of Dr. Gross. It indicated that Dr. Gross reviewed the medical evidence on file and "concluded that the evidence does not demonstrate a permanent, measurable, scheduled impairment."

Appellant requested a hearing with an OWCP hearing representative. During the hearing held on October 21, 2013, he indicated that he felt that he had an impairment because his back would "never heal."

In a December 16, 2013 decision, an OWCP hearing representative affirmed OWCP's June 10, 2013 denial of appellant's claim for a schedule award. She indicated that Dr. Gross properly evaluated appellant's claimed impairment and that Dr. Allen impermissibly provided an impairment rating of the whole person.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing 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 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.⁵ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁶

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.⁷ A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under FECA. Moreover, neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.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

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *Id.*

⁶ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁷ *Pamela J. Darling*, 49 ECAB 286 (1998).

⁸ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990). See 5 U.S.C. § 8101(19).

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 The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.¹¹ In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.¹²

ANALYSIS

OWCP accepted that on May 13, 2009 appellant sustained a lumbar sprain and brachial neuritis or radiculopathy when he was participating in a demonstration of takedown techniques at work. Appellant filed a claim for a schedule award due to his accepted work injuries. OWCP denied his claim based on a March 19, 2013 report of Dr. Gross, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. In making his impairment determination, Dr. Gross had evaluated the evidence of record, including a December 24, 2012 report of Dr. Allen, an attending Board-certified neurologist. He indicated that he applied the standards of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) to find that appellant did not have a ratable permanent impairment.

The Board finds that Dr. Gross properly applied the relevant standards to determine that appellant did not have permanent impairment entitling him to a schedule award under FECA. Dr. Gross indicated that the medical evidence of record showed that appellant did not have any permanent impairment in his arms and legs that stemmed from the areas affected by his accepted work injuries, *i.e.*, his neck and low back areas. He properly noted, "Currently, [appellant] does not have any radicular symptoms in the upper and lower extremities.... When rating the neck or back, only injuries affecting the limbs can be rated. Therefore, since there are no motor or sensory issues in the limbs, the cervical and lumbar radiculopathy represent a class 0 diagnosis.

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 *D.S.*, Docket No. 14-12 (issued March 18, 2014).

¹² See *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

This represents a zero percent impairment rating.”¹³ Dr. Gross detailed Dr. Allen’s findings on physical examination which did not show any radicular symptoms in appellant’s arms or legs.¹⁴

On appeal, counsel asserts that OWCP’s rating methodology for extremity impairment originating in the spine amounts to junk science. However, as set forth above, OWCP’s reliance on *The Guides Newsletter*, “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” (July/August 2009) as incorporated into the Federal (FECA) Procedure Manual is a proper exercise of OWCP’s discretion.¹⁵

In his December 24, 2012 report, Dr. Allen reported findings of his physical examination of appellant on November 2, 2012. He referenced Table 17-2, Table 17-4, Table 17-6, Table 17-7 and Table 17-9 of the sixth edition of the A.M.A., *Guides* and concluded that appellant’s “final whole person impairment is [two percent] ... [c]ervical spine [disability-based impairment] whole person impairment is [one percent] ... [l]umbar spine [disability-based impairment] whole person impairment is [one percent].” However, this impairment calculation is of limited probative value on the issue of the present case because neither FECA nor its implementing regulations provide for a schedule award for impairment to the body as a whole.¹⁶

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 OWCP properly denied appellant’s claim for a schedule award.

¹³ See *The Guides Newsletter*, “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” (July/August 2009), pages 4 to 6.

¹⁴ Dr. Allen noted that appellant complained of neck and low back soreness but stated, “[Appellant] denies radicular symptoms in the upper and lower extremity.” He indicated that the physical examination of appellant showed no sensory or motor loss in the arms and legs.

¹⁵ See *supra* notes 10 through 12.

¹⁶ See *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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