

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

L.T., Appellant)	
)	
and)	Docket No. 15-423
)	Issued: March 26, 2015
DEPARTMENT OF HEALTH & HUMAN)	
SERVICES, NATIONAL INSTITUTES OF)	
HEALTH, Bethesda, MD, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Alan J. Shapiro, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 16, 2014 appellant, through counsel, timely appealed a November 6, 2014 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 the claim.

ISSUE

The issue is whether appellant has a ratable impairment of the left upper extremity.

FACTUAL HISTORY

Appellant, a 50-year-old former housekeeping aide, injured her neck and left arm/shoulder while lifting a cleaning cart at work on May 14, 2008. OWCP initially accepted left shoulder strain, but later expanded appellant's claim to include C5-6 disc herniation. Surgical intervention was recommended; however, appellant had an acute myocardial infarction

¹ 5 U.S.C. §§ 8101-8193 (2006).

on June 25, 2008. Because of her ongoing cardiac-related treatment, surgery to address the cervical condition was contraindicated. Although eligible to receive FECA wage-loss compensation, appellant opted instead to receive Federal Employees' Retirement System benefits.

On January 31, 2014 appellant filed a claim for a schedule award (Form CA-7). She did not submit any medical evidence of permanent impairment at the time.

On February 4, 2014 OWCP sent appellant a schedule award development letter explaining the need to submit medical evidence in support of her claim for permanent impairment. It advised appellant to obtain an impairment rating from her physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2008). OWCP further explained that, although FECA did not authorize schedule awards for permanent impairment of the spine, the A.M.A., *Guides* (6th ed. 2008) included a FECA-approved methodology for rating spinal nerve extremity impairment. Appellant was afforded at least 30 days to submit the required medical evidence in support of her schedule award claim.

In a March 7, 2014 decision, OWCP denied appellant's claim for a schedule award. It noted that it had not received any additional medical evidence in response to its February 4, 2014 development letter.

OWCP subsequently received a February 25, 2014 impairment rating from Dr. Stuart J. Goodman, a Board-certified neurologist,² who indicated that appellant suffered from a cervical disc herniation at C5-6, which was causally related to her May 14, 2008 work injury.³ Dr. Goodman noted that appellant was a surgical candidate, but due to cardiac-related issues she did not undergo cervical surgery. He stated that appellant had residual weakness in the left upper extremity, as well as associated pain and discomfort, and decreased range of motion. Dr. Goodman found that appellant reached maximum medical improvement (MMI), assuming surgery was otherwise contraindicated. He rated her under Table 17-2, Cervical Spine Regional Grid, A.M.A., *Guides* 564 (6th ed. 2008). Dr. Goodman found class 2 impairment based on the diagnosis of single level intervertebral disc herniation with medically-documented findings (with or without surgery). The default rating (c) for the diagnosed condition is 11 percent whole person impairment.⁴ Based on physical examination findings, Dr. Goodman assigned a grade modifier of one pursuant to Table 17-7, A.M.A., *Guides* 576 (6th ed. 2008).⁵ He then found appellant had 12 percent impairment of the "left upper extremity."⁶

² Counsel submitted Dr. Goodman's report under cover letter dated March 10, 2014.

³ Dr. Goodman noted that OWCP also accepted appellant's claim for left shoulder sprain (ICD-9 840.9).

⁴ See Table 17-2, A.M.A., *Guides* 564 (6th ed. 2008).

⁵ Dr. Goodman did not discuss adjustments for other nonkey factors such as clinical studies and/or functional history. See Table 17-5, A.M.A., *Guides* 575 (6th ed. 2008).

⁶ Dr. Goodman recommended that appellant follow up with her treating spinal surgeon. He also suggested an electromyography and nerve conduction velocity study to determine if this process was just chronic or if it was still active. Dr. Goodman stated that this information would be relevant for purposes of reevaluation for possible surgery.

On June 24, 2014 counsel timely requested reconsideration and referenced Dr. Goodman's February 25, 2014 impairment rating, which OWCP had not previously considered.

By decision dated November 6, 2014, OWCP reviewed the merits of appellant's claim, but denied modification. It found Dr. Goodman's report speculative on the issue of whether appellant had reached MMI.

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.⁷ 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.⁸ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).⁹

No schedule award is payable for a member, function, or organ of the body that is not specified in FECA or the implementing regulations.¹⁰ 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.¹¹ However, a schedule award is permissible where the employment-related back condition affects the upper and/or lower extremities.¹² The A.M.A., *Guides* (6th ed. 2008) provides a specific methodology for rating spinal nerve extremity impairment.¹³ It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine.¹⁴ The rating methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.¹⁵

⁷ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁸ 20 C.F.R. § 10.404 (2014).

⁹ 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 (February 2013).

¹⁰ *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

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

¹² *Supra* note 9 at Part 2, Chapter 2.808.6a(3) (February 2013).

¹³ *Id.* at Part 3, Chapter 3.700, Exhibit 4 (January 2010).

¹⁴ *Id.*

¹⁵ *Id.*

ANALYSIS

OWCP initially denied appellant's claim because she had not submitted any medical evidence demonstrating a ratable impairment. It subsequently received Dr. Goodman's February 25, 2014 impairment rating. Dr. Goodman did not specifically rate appellant for her accepted left shoulder strain. Instead, he rated her under Table 17-2, Cervical Spine Regional Grid, A.M.A., *Guides* 564 (6th ed. 2008). Dr. Goodman found class 2 impairment based on single level intervertebral disc herniation. This diagnosis corresponds to a default rating (c) of 11 percent whole person impairment under Table 17-2. OWCP previously advised appellant that schedule awards were not available for whole person impairment and/or impairment of the spine.

Having cited Table 17-2, Dr. Goodman concluded, with no explanation, that appellant had 12 percent impairment of the "left upper extremity." As noted, Table 17-2 addresses whole person impairment of the spine, not upper extremity impairment. In its February 4, 2014 schedule award development letter, OWCP provided appellant clear instructions regarding the FECA-approved methodology for rating spinal nerve extremity impairment. The Board finds that Dr. Goodman's February 25, 2014 impairment rating is inconsistent with FECA and the A.M.A., *Guides* (6th ed. 2008). Accordingly, appellant failed to establish that she has a ratable impairment of the left upper extremity impairment.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

Appellant failed to establish that she has a ratable impairment of the left upper extremity.

¹⁶ Regarding the issue of maximum medical improvement, before a schedule award may be made, it must be medically determined that no further improvement can be anticipated and the impairment must reach a fixed and permanent state, which is known as maximum medical improvement. While additional medical treatment such as surgery may be recommended in order to improve the claimant's condition, the claimant is not required to undergo such treatment. Under the circumstances, OWCP must calculate the percentage of a schedule award as if no further improvement were possible if the claimant declined such intervention. *See P.L.*, Docket No. 13-1340 (issued October 28, 2013). *See also supra* note 9 at Part 3, Chapter 3.700.3a(1). (January 2010)

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 26, 2015
Washington, DC

Patricia Howard Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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