

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

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A.C., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,  
Santa Clarita, CA, Employer

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**Docket No. 16-0810  
Issued: September 22, 2016**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 10, 2016 appellant, through counsel, filed a timely appeal of a February 2, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUE**

The issue is whether appellant has met her burden of proof to establish a ratable impairment of a scheduled member.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On January 16, 2011 appellant, then a 35-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she developed right-sided lower back pain on December 29, 2010. She attributed her condition to working parcels. OWCP accepted appellant's claim on April 13, 2011 for lumbar sprain.

On January 14, 2015 appellant filed a claim for compensation (Form CA-7) and requested a schedule award. In a report dated November 9, 2014, Dr. John J. Kayvanfar, an orthopedic surgeon, found that appellant had 14 percent impairment of the whole person due to intervertebral disc herniation. He further opined that 14 percent whole person impairment was equal to 35 percent impairment of the right and left lower extremity.

In a letter dated February 2, 2015, OWCP requested that appellant's physician provide an opinion as to whether her condition had reached maximum medical improvement (MMI). Dr. Kayvanfar completed a report on January 11, 2014 and described appellant's history of injury and medical treatment history. He reported her low back pain, upper back pain, radiation to the groin, and pain that traveled to her buttock area and the front of her legs. Dr. Kayvanfar described numbness and tingling in appellant's posterior thighs to her knees. He diagnosed status post lumbosacral strain and sprain, lumbosacral L5-S1 spondylosis, annular tear, and posterior paracentral focal disc herniation. Dr. Kayvanfar opined that appellant had reached MMI on November 18, 2013. He concluded that appellant had 11 percent impairment of the whole person based on the fifth edition of the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (2001). In a note dated April 2, 2014, Dr. Kayvanfar found that appellant had 14 percent impairment of the whole person due to intervertebral disc herniation based on the sixth edition of the A.M.A., *Guides*.<sup>3</sup> He reviewed appellant's MRI scan and found that she had a class II lumbar spine impairment. In a supplemental report dated November 9, 2014, Dr. Kayvanfar reiterated his conclusion and noted that the impairment rating was based on page 570 of the A.M.A., *Guides* at Table 17-4 class II. He added that Table 16-10 on page 530 reveals that 14 percent whole person impairment is the equivalent of 35 percent impairment of the right and left lower extremity.

On March 19, 2015 OWCP's medical adviser reviewed appellant's claim for a schedule award and found that she had no ratable impairment of either the right or left lower extremities. He noted that Dr. Kayvanfar did not provide any findings or citations to the A.M.A., *Guides* in support of impairments of the lower extremities and relied on sections of the A.M.A., *Guides* pertaining to spinal pathology.

By decision dated April 21, 2015, OWCP denied appellant's claim for a schedule award as she failed to submit medical evidence in accordance with the A.M.A., *Guides* establishing impairment of a scheduled member.

Counsel requested an oral hearing from OWCP's Branch of Hearings and Review on April 27, 2015. He and appellant appeared at the oral hearing in front of an OWCP hearing representative on November 18, 2015. Counsel argued that OWCP's medical adviser failed to adequately review Dr. Kayvanfar's November 9, 2014 report.

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<sup>3</sup> A.M.A., *Guides*, 6<sup>th</sup> ed. (2009).

By decision dated February 2, 2016, the hearing representative denied appellant's claim for a schedule award finding that she did not have a ratable impairment of a scheduled member. OWCP's hearing representative found that appellant had an accepted low back condition due to her employment duties, but that the medical evidence failed to establish impairment to her lower extremities due to the accepted conditions. She found that appellant's physician did not provide his findings and conclusions in accordance with the A.M.A., *Guides* and that OWCP's medical adviser reviewed the medical evidence and found that appellant had no impairment of her lower extremities due to the accepted back injuries.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>4</sup> and its implementing regulations<sup>5</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.<sup>6</sup> No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the regulations.<sup>7</sup> Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of whole person or the back or spine,<sup>8</sup> no claimant is entitled to such an award.<sup>9</sup>

Amendments to FECA, however, 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. 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.<sup>10</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6<sup>th</sup> ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>7</sup> *W.D.*, Docket No. 10-274 (issued September 3, 2010); *William Edwin Muir*, 27 ECAB 579 (1976).

<sup>8</sup> FECA itself specifically excludes the back from the definition of organ. 5 USC § 8101(19).

<sup>9</sup> *W.D.*, *supra* note 7. *Timothy J. McGuire*, 34 ECAB 189 (1982).

<sup>10</sup> *W.D.*, *supra* note 7. *Rozella L. Skinner*, 37 ECAB 398 (1986).

federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.<sup>11</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 a July/August 2009, *The Guides Newsletter*.<sup>12</sup>

### ANALYSIS

The Board finds that appellant has not submitted the necessary medical evidence to meet her burden of proof to establish permanent impairment of a scheduled member.

OWCP accepted appellant's occupational disease claim for sprain of the lumbar spine and displacement lumbar intervertebral disc without myelopathy. In support of her claim for permanent impairment of the lower extremities due to her accepted spine conditions, appellant submitted three reports from Dr. Kayvanfar. Dr. Kayvanfar opined that she had reached MMI on November 18, 2013. In his January 2014 report, he listed findings of low back pain, upper back pain, radiation to the groin, and pain that traveled to her buttock area and the front of her legs. Dr. Kayvanfar described numbness and tingling in appellant's posterior thighs to her knees. He diagnosed status post lumbosacral strain and sprain, lumbosacral L5-S1 spondylosis, annular tear, and posterior paracentral focal disc herniation. Dr. Kayvanfar initially provided an impairment rating of 11 percent impairment of the whole person based on the fifth edition of the A.M.A., *Guides*. As noted above, FECA does not provide for impairment ratings based on the whole person and OWCP has adopted the sixth edition of the A.M.A., *Guides* for evaluation of schedule awards. Due to these deficiencies, this report fails to establish appellant's claim for a schedule award.

In his April 2, 2014 report, Dr. Kayvanfar found based on the sixth edition of the A.M.A., *Guides* that appellant had 14 percent impairment of the whole person due to intervertebral disc herniation and a class II lumbar spine impairment. On November 9, 2014 he found that appellant had 14 percent impairment of the whole person due to intervertebral disc herniation. Dr. Kayvanfar further opined that 14 percent whole person impairment was equal to 35 percent impairment of the right and left lower extremity.

While the sixth edition of the A.M.A., *Guides*, lists impairments to the lumbar spine<sup>13</sup> these are not the applicable provisions as adopted by OWCP for evaluation of injuries to the spine resulting in lower extremity impairments. As noted above, in order to establish impairment to the lower extremities due to a spinal injury, the physician must provide findings and citations as set forth in the July/August 2009 *The Guides Newsletter*.<sup>14</sup> Dr. Kayvanfar did not rate

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<sup>11</sup> Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.808.5c(3) (February 2013); Federal (FECA) Procedure Manual, *supra* note 6 at Exhibit 4 (January 2010).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010) (Exhibits 1, 4).

<sup>13</sup> A.M.A., *Guides*, 570, Table 17-4.

<sup>14</sup> *J.C.*, Docket No. 15-1780 (issued March 17, 2016).

appellant's impairment based on these standards and his rating is therefore insufficient to establish that appellant is entitled to a schedule award of the lower extremities due to the accepted conditions of sprain of the lumbar spine and displacement lumbar intervertebral disc without myelopathy. OWCP's medical adviser reviewed Dr. Kayvanfar's physical findings and found that appellant had no ratable impairment of either lower extremity.

Appellant failed to submit sufficient medical evidence to establish permanent impairment to a specific member, organ, or function of the body listed in FECA or its implementing regulations.

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 appellant has not met her burden of proof to establish a ratable impairment of a scheduled member.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 2, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board