

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

R.D., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Las Vegas, NV, Employer**

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**Docket No. 16-0761
Issued: January 24, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 3, 2016 appellant filed a timely appeal from a February 9, 2016 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.²

ISSUE

The issue is whether appellant met her burden of proof to establish a ratable impairment due to her accepted conditions, for which a schedule award is warranted.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that the record includes evidence received after OWCP issued its February 9, 2016 decision. On appeal, the Board is limited to reviewing the evidence that was before OWCP when it issued its final decision. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's September 19, 2011 decision are incorporated herein by reference. The relevant facts follow.

Appellant, a 56-year-old transportation security officer, was injured in the performance of duty on December 5, 2009 when she fell from a 20-inch high platform. Her current accepted conditions include cervical, thoracic, and lumbar sprains, chest wall contusion, permanent aggravation of cervical intervertebral disc disorder with myelopathy, and permanent aggravation of lumbar intervertebral disc degeneration. When the case was last on appeal, OWCP had terminated appellant's wage-loss compensation and medical benefits effective May 12, 2010. By decision dated September 19, 2011, the Board reversed OWCP's termination of compensation benefits because it had not met its burden of proof to justify the termination. On October 4, 2011 OWCP advised appellant that her claim was reopened for medical treatment. Appellant subsequently received wage-loss compensation retroactive to February 11, 2010, and OWCP placed her on the periodic compensation rolls effective April 8, 2012.⁴

In a February 13, 2014 report, appellant's then-treating physician, Dr. John B. Siegler, a Board-certified physiatrist, diagnosed cervical and lumbar radiculopathy and advised that appellant was "incapable of even 'low stress' work."

OWCP referred appellant to Dr. Mouchir Harb, a Board-certified neurologist, for a second opinion evaluation to determine the nature and extent of her employment-related conditions. He examined appellant on June 10, 2014 and provided a June 12, 2014 narrative report. Dr. Harb reviewed appellant's medical history, a statement of accepted facts, and provided findings based upon his physical examination. Appellant's paraspinal, cervical neck muscles were tender to pressure and passive movements of the neck were painful for any minor level of range of motion. He found lumbar paraspinal muscles were also exclusively tender and her right hip was tender to pressure. Dr. Harb indicated that appellant appeared to be having chronic pain syndrome caused by the work injury involving post-traumatic headache, lumbago, and sciatica. He also noted that appellant was incapable of resuming work at the time.

In a September 3, 2014 report, Dr. Christopher A. Fisher, appellant's new treating physiatrist, diagnosed chronic neck pain, likely musculoligamentous and myofascial pain etiology, as well as possible radicular symptoms.⁵ He also diagnosed lumbar musculoligamentous and myofascial pain.

In an October 8, 2014 report, Dr. Fisher diagnosed mechanical low back pain, cervical and lumbar muscular and myofascial pain, and ongoing cervical and lumbar pain likely due to discogenic etiology at C4-5, C5-6, and L5-S1. He determined that appellant had reached

³ Docket No. 10-1998 (issued September 19, 2011).

⁴ The employing establishment removed appellant from service effective September 20, 2010 because it was unable to accommodate her injury-related work restrictions.

⁵ Dr. Fisher assumed appellant's care following Dr. Siegler's death in 2014.

maximum medical improvement (MMI) and advised that she should be referred for a functional capacity evaluation (FCE). Dr. Fisher also indicated that appellant could work in a light-duty status pending the FCE results.

OWCP requested clarification from its referral physician, and in a November 12, 2014 supplemental report, Dr. Harb opined that appellant had reached MMI and her accepted conditions had ceased without residuals. Dr. Harb asserted that appellant had an exaggerated pain response to any minor mobilization or pressure to any part in the lumbar, thoracic, or cervical spine area upon examination. Dr. Harb noted that appellant had degenerative changes in her cervical spine, which were chronic and unrelated to her work injury, as well as scoliosis, which was also unrelated to her work injury. He found that appellant's diagnostic studies were normal and demonstrated no findings to explain any injury-related conditions.

On January 7, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a February 5, 2015 letter, OWCP advised appellant of the need to submit an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*). It also provided information regarding FECA methodology for rating spinal nerve extremity impairment.

In response, appellant submitted follow-up reports from Dr. Fisher dated January 7, January 28, and February 25, 2015. Dr. Fisher reiterated that appellant had reached MMI and opined that she needed ongoing pain management for her moderate-to-severe pain, which limited activities of daily living, work duties, and recreational activities. However, he did not provide an impairment rating in accordance with the A.M.A., *Guides* (6th ed. 2009).

On March 2, 2015 appellant underwent an FCE conducted by Doug Ellis, a physical therapist. However, Mr. Ellis concluded that the FCE results were unreliable and invalid. He noted there were inconsistencies in appellant's performance and there was evidence of symptom magnification. Mr. Ellis also indicated her observed self-limiting pain behavior.

In a report dated March 25, 2015, Dr. Fisher noted that appellant continued to have a significant degree of muscular and myofascial pain, as well as discogenic pain symptoms. He reiterated that appellant had reached MMI and recommended a repeat FCE given that the first was invalid.

On March 30, 2015 Mr. Ellis conducted a repeat FCE. Once again, he found the results unreliable and invalid due to continuing signs of symptom magnification and self-limiting pain behavior.⁶

OWCP referred the case to its district medical adviser (DMA) to determine if appellant had any impairment to her upper and/or lower extremities. On April 15, 2015 Dr. Ellen Pichey,

⁶ OWCP referred appellant for an FCE as part of its vocational rehabilitation process, which commenced in early February 2015. Appellant also participated in vocational testing conducted on April 3, 2015. Because of the two invalid March 2015 FCEs, OWCP issued an April 15, 2015 decision that reduced appellant's wage-loss compensation to zero under 5 U.S.C. § 8113(b). In a February 4, 2016 decision, an OWCP hearing representative affirmed the April 15, 2015 decision.

a Board-certified occupational medicine specialist and DMA, reviewed the evidence of record and Dr. Harb's second opinion reports. She found that Dr. Harb's physical examination revealed normal symmetric muscle strength and tone, no atrophy or abnormal movements, and intact sensation in the upper and lower extremities. Dr. Pichey also noted that there appeared to be no positive electrodiagnostic nerve conduction velocity/electromyogram (NCV/EMG) testing, and that appellant's symptoms appeared to be pain related. OWCP's medical adviser concluded that appellant had no ratable impairment to the upper or lower extremities. She also indicated that appellant reached MMI as of November 12, 2014, the date of Dr. Harb's second opinion examination.

By decision dated April 22, 2015, OWCP denied appellant's schedule award claim as the medical evidence did not establish a ratable impairment of a scheduled member.

On May 3, 2015 appellant requested an oral hearing before the Branch of Hearings and Review, which was held before an OWCP hearing representative on December 15, 2015. OWCP received additional follow-up treatment records from Dr. Fisher dated April 22, May 20, June 17, July 29, September 2, October 7, November 4, December 2, 2015, and January 20, 2016. In his latest report, Dr. Fisher continued to diagnose work-related mechanical low back pain, cervical and lumbar muscular and myofascial pain, and ongoing cervical and lumbar pain likely due to discogenic etiology at C4-5, C5-6, and L5-S1. He noted that appellant was at MMI and she was not interested in surgery.

By decision dated February 9, 2016, the hearing representative affirmed OWCP's April 22, 2015 decision denying appellant's claim for a schedule award.

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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* 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* (2009).⁹

⁷ 5 U.S.C. § 8107(c). For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. *Id.* at § 8107(c)(1). For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. *Id.* at § 8107(c)(1).

⁸ 20 C.F.R. § 10.404.

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *id.*, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

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.¹⁰ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹¹ The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment.¹² It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the procedure manual.¹³

When determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.¹⁴ Impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function.¹⁵ If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.¹⁶ There are no provisions for apportionment under FECA,¹⁷ but when the prior impairment is due to a previous work-related injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.¹⁸

ANALYSIS

The Board finds that the medical evidence of record fails to establish that appellant sustained any permanent impairment to a scheduled member causally related to the December 5, 2009 employment injury. OWCP accepted appellant's claim for cervical, thoracic, and lumbar sprains, chest wall contusion, permanent aggravation of cervical intervertebral disc disorder with myelopathy, and permanent aggravation of lumbar intervertebral disc degeneration. However, the medical evidence of record does not establish that she sustained a permanent impairment due to the accepted conditions.

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

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.5c(3) (February 2013).

¹² The methodology and applicable tables were initially published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009). *Id.*

¹³ *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4.

¹⁴ *Carol A. Smart*, 57 ECAB 340, 343 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.5d. (February 2013).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at Chapter 2.808.7a(1); 20 C.F.R. § 10.404(c).

The Board finds that OWCP's medical adviser, Dr. Pichey, properly reviewed the medical record and found there was no evidence of impairment to the extremities in the file.¹⁹ Dr. Pichey found that Dr. Harb's second opinion examination revealed normal symmetric muscle strength and tone, no atrophy or abnormal movements, and intact sensation in the upper and lower extremities. She also noted that there appeared to be no NCV/EMG testing. OWCP's medical adviser concluded that appellant had no ratable impairment to the upper or lower extremities based on her accepted conditions and had reached MMI as of November 12, 2014, the date of Dr. Harb's second opinion examination. The Board finds that the medical adviser properly concluded that there was no medical evidence of impairment to the upper or lower extremities resulting from the accepted conditions and that, therefore, there was no ratable impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

FECA does not authorize schedule awards for loss of use of the spine.²⁰ A claimant may still be entitled to an award for loss of use of a limb where the cause of the impairment originated in the spine. Because the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities, OWCP has adopted the standard set forth in *The Guides Newsletter*.²¹ In his reports, Dr. Fisher determined that appellant had reached MMI, but he failed to provide an impairment rating based on the A.M.A., *Guides*. Consequently, the Board finds that appellant failed to establish that she has a ratable impairment resulting from the accepted employment injuries.²²

Appellant has submitted no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides*, or *The Guides Newsletter*, establishing permanent impairment of a scheduled member. Accordingly, Dr. Pichey's April 15, 2015 report represents the weight of the medical opinion evidence.

Appellant may request, at any time, 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 any ratable impairment related to her accepted conditions for which a schedule award is warranted.

¹⁹ The Board notes that it is appropriate for an OWCP medical adviser to review the medical evidence to determine the percentage of permanent impairment. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Functions of the Medical Unit*, Chapter 3.200.4a (October 1990); *Tommy R. Martin*, 56 ECAB 273 (2005).

²⁰ See *M.R.*, Docket No. 14-833 (issued September 9, 2014).

²¹ See *supra* note 14.

²² *Id.* See *J.Q.*, 59 ECAB 366 (2008) (when the examining physician does not provide an estimate of impairment that conforms to the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by an OWCP medical adviser).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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