

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Corpus Christi, TX, Employer**

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**Docket No. 17-1128
Issued: November 22, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 21, 2017 appellant filed a timely appeal from a March 1, 2017 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 appellant has established permanent impairment of a scheduled member entitling her to a schedule award.

FACTUAL HISTORY

On May 5, 2014 appellant, then a 35-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 2, 2014 she sustained a back injury while she was training an employee when she leaned forward from the backseat of a vehicle while wearing a lap belt. She

¹ 5 U.S.C. § 8101 *et seq.*

stopped work on the date of injury and was released to full-time work with restrictions on June 20, 2014.

By decision dated June 25, 2014, OWCP accepted the claim for sprain of back lumbar region and sprain of neck. By decision dated November 19, 2014, it accepted the additional conditions of displacement of cervical intervertebral disc without myelopathy, displacement of lumbar intervertebral disc without myelopathy, and thoracic or lumbosacral neuritis or radiculitis.

Following her injury, appellant sought treatment with Dr. Syed Hussain, a Board-certified neurological surgeon. In a June 22, 2015 medical report, Dr. Hussain reported that neuromuscular examination revealed normal findings despite complaints of lower back pain radiating into the legs. He diagnosed cervicalgia, cervical radiculopathy, lumbar radiculopathy, and lumbago.

On August 14, 2015 appellant filed a claim for a schedule award (Form CA-7).

In support of her claim, appellant submitted a July 29, 2015 impairment rating report from Dr. Louise Lamarre, Board-certified in anatomic pathology. Dr. Lamarre reported that electromyography (EMG) testing revealed sensory deficit over the lower extremity L5-S1 radiculopathy and opined that maximum medical improvement (MMI) had been reached. In accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*),² she calculated four percent permanent impairment of the lower extremity for sciatic nerve mild-to-moderate sensory deficit.³

OWCP routed Dr. Lamarre's report, a statement of accepted facts (SOAF), and the case file to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and a determination on whether appellant sustained a permanent impairment and date of MMI.

In a September 3, 2015 report, Dr. Katz reported that Dr. Lamarre failed to specify whether the four percent permanent impairment rating applied to the left or right lower extremity. He further noted that use of the Lower Extremity Peripheral Nerve Impairment Grid, Table 16-12, was not the preferred method for rating spinal nerve impairment.⁴ Dr. Katz reported that a June 22, 2015 report from Dr. Hussain revealed normal physical examination findings. As such, he found a conflict in medical opinion between Dr. Hussain and Dr. Lamarre.

On October 22, 2015 OWCP referred appellant, a series of questions, a SOAF, and the medical record to Dr. James E. Butler, a Board-certified orthopedic surgeon, for a second opinion examination and determination as to whether she sustained a permanent impairment of a scheduled member and the date of MMI.

² A.M.A., *Guides* (2009).

³ *Id.* at 535, Table 16-12.

⁴ *Id.* at 534.

In an October 22, 2015 report, Dr. Butler reported that appellant reached MMI on July 29, 2015. He explained that *The Guides Newsletter* should be applied for rating spinal nerve impairment. Dr. Butler noted that diagnostic testing did not correlate with appellant's clinical examination as EMG testing showed left-sided radiculopathy while she was reporting symptoms on the right side. He further noted examination of the upper and lower extremities revealed normal sensory findings, as well as normal lower extremity motor examination findings. Therefore, Dr. Butler opined that appellant had zero percent permanent impairment of the upper extremities and zero percent permanent impairment of the lower extremities due to the accepted cervical and lumbar spine conditions.

On March 31, 2016 Dr. Katz, serving as OWCP's DMA, reviewed Dr. Butler's second opinion evaluation and agreed with the physician, finding that appellant had zero percent permanent impairment of the right and left upper extremities and zero percent permanent impairment of the right and left lower extremities.

By decision dated April 4, 2016, OWCP denied appellant's claim for a schedule award as the evidence was insufficient to establish any permanent impairment to a scheduled member or function of the body.

Following OWCP's denial of her schedule award claim, appellant underwent new diagnostic testing on June 23, 2016. In a June 23, 2016 diagnostic report, Dr. Rafath Quraishi, a practicing radiologist, reported that a magnetic resonance imaging (MRI) scan of the lumbar spine revealed interval improvement with decreased L4-5 and L5-S1 disc sizes. A cervical spine MRI scan revealed minimal C4-5 disc bulge with otherwise normal findings.

On January 19, 2017 appellant filed a new Form CA-7 for a schedule award.

In support of her claim, appellant submitted a January 5, 2017 impairment rating from Dr. Charles Kennedy, a Board-certified orthopedic surgeon. Dr. Kennedy reported that physical examination of the cervical spine revealed full range of motion and negative compression, while examination of the back revealed some mild tenderness with negative straight leg testing. He diagnosed cervicgia without radiculopathy and lumbago without radiculopathy. Dr. Kennedy noted prior MRI scan testing of the lumbar and cervical spine on October 12, 2015 with repeat testing performed on June 23, 2015. In accordance with Table 17-2 of the A.M.A., *Guides*, Cervical Spine Regional Grid, he noted use of a diagnosis-based impairment (DBI) of intervertebral herniation with no radiculopathy under class zero. However, as appellant's symptoms were more than moderate and moderately severe, Dr. Kennedy determined that this resulted in class 1 seven percent whole person impairment of the cervical spine.⁵ With respect to the lumbosacral spine, he noted no radiculopathy and no long tract signs or straight leg abnormalities, moderate range. Utilizing Table 17-4, Lumbar Spine Regional Grid, Dr. Kennedy determined a class 1 seven percent permanent impairment of the lumbosacral spine.⁶ He added the cervical and lumbar spine impairment ratings (7 + 7), for a total 14 percent whole person

⁵ *Id.* at 564.

⁶ *Id.* at 570.

permanent impairment. Dr. Kennedy concluded that MMI was reached on June 23, 2016, the date of the last diagnostic testing.

OWCP routed Dr. Kennedy's report, the SOAF, and case file to Dr. Katz, serving as OWCP's DMA, for review and a determination on whether appellant sustained a permanent partial impairment and date of MMI.

In a February 27, 2017 report, Dr. Katz reviewed Dr. Kennedy's report and disagreed with the physician's rating of seven percent permanent impairment of the cervical spine and seven percent permanent impairment of the lumbar spine. He explained that FECA did not allow a schedule award for the spine and therefore a diagnosed injury originating in the spine could only be considered to the extent that it resulted in permanent impairment of the extremities, generally reflected as spinal nerve impairment. Therefore, Dr. Kennedy's impairment under Table 17-2 and Table 17-4 could not be considered as spinal nerve injuries, which were best determined by the method described in *The Guides Newsletter*. Dr. Katz further reported that Dr. Kennedy found no motor/sensory deficits in any extremity which established no ratable impairment of the accepted spinal conditions per FECA guidelines. He concluded that the date of MMI was January 5, 2017 and found that appellant had zero percent permanent impairment of the right and left upper extremities and zero percent permanent impairment of the right and left lower extremities.

By decision dated March 1, 2017, OWCP denied appellant's claim for a schedule award as the evidence of record was insufficient to establish any permanent impairment to a scheduled member or function of the body.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations 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.⁷ 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.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

⁷ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

⁸ *K.H.*, Docket No. 09-0341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

It is the claimant's burden of proof to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.¹⁰ OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.¹¹

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.¹² 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 schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.¹³

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.¹⁴ For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009) is to be applied.¹⁵ FECA approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities.¹⁶

ANALYSIS

OWCP accepted appellant's claim for sprain of back lumbar region, sprain of neck and later expanded the claim to include, displacement of cervical intervertebral disc without myelopathy, displacement of lumbar intervertebral disc without myelopathy, and thoracic or lumbosacral neuritis or radiculitis. The Board notes that a schedule award is not payable under FECA for injury to the spine¹⁷ or based on whole person impairment.¹⁸ However, a claimant

¹⁰ *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹¹ *Supra* note 9 at Chapter 2.808.5 (February 2013).

¹² *Pamela J. Darling*, 49 ECAB 286 (1998).

¹³ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁴ *Supra* note 9 at Chapter 3.700, Exhibit 4 (January 2010).

¹⁵ *See G.N.*, Docket No. 10-0850 (issued November 12, 2010); *see also* FECA Procedure Manual at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 9 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁶ *Supra* note 9 at Chapter at 2.808.5c(3) (February 2013).

¹⁷ *Supra* note 12.

¹⁸ *N.M.*, 58 ECAB 273 (2007).

may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.¹⁹

The Board finds that appellant failed to submit sufficient evidence to establish that, as a result of her employment injury, she sustained any permanent impairment to a scheduled member such that she would be entitled to a schedule award.²⁰

In support of her claim, appellant submitted a January 5, 2017 impairment rating from Dr. Kennedy who diagnosed cervicgia without radiculopathy and lumbago without radiculopathy. Dr. Kennedy found that she reached MMI as of June 23, 2016. However, he determined that appellant sustained 7 percent permanent impairment of the cervical spine and 7 percent permanent impairment of the lumbar spine, for a total 14 percent whole percent permanent impairment. The Board notes that Dr. Kennedy's report did not provide support for a ratable impairment warranting her a schedule award. There is no statutory basis for the payment of a schedule award for whole body impairment under FECA.²¹

Moreover, the sixth edition of the A.M.A., *Guides* does not provide for a schedule award for injury to the spine.²² However, impairment of a scheduled member of the upper or lower extremities is payable under FECA, if it originates from the spine.²³ The approach of rating impairment of the upper or lower extremities caused by a spinal injury is provided in section 3.700 of OWCP procedures, which memorializes proposed tables as outlined in a July/August 2009, *The Guides Newsletter*.²⁴ The Board notes that Dr. Kennedy did not reference or provide an evaluation in accordance with the July/August 2009, *The Guides Newsletter*.²⁵ Dr. Kennedy did not rate appellant's impairment pursuant to *The Guides Newsletter*, and his rating is therefore insufficient to establish that she is entitled to a schedule award of the lower or upper extremities due to the accepted lumbar and cervical injuries.²⁶

OWCP appropriately forwarded the medical evidence and record to Dr. Katz, an OWCP DMA, for review and a determination on whether appellant sustained a permanent impairment and date of MMI. Dr. Katz reviewed Dr. Kennedy's report and properly concluded that she had no permanent impairment of the upper or lower extremities. The DMA explained that Dr. Kennedy failed to use *The Guides Newsletter* for impairment of a spinal nerve injury. Moreover, the findings of Dr. Kennedy's January 5, 2017 evaluation failed to provide support for a schedule award as his examination revealed no significant problems to the lower or upper

¹⁹ *Supra* note 13.

²⁰ *W.R.*, Docket No. 13-0492 (issued June 26, 2013).

²¹ *K.S.*, Docket No. 15-1082 (issued April 18, 2017).

²² *W.D.*, Docket No. 10-0274 (issued September 3, 2010).

²³ *K.H.*, *supra* note 8.

²⁴ *Supra* note 15.

²⁵ *J.C.*, Docket No. 15-1780 (issued March 17, 2016).

²⁶ *E.D.*, Docket No. 10-0967 (issued January 7, 2011).

extremities with normal sensory and motor findings.²⁷ Dr. Katz provided a well-reasoned report based on a proper factual and medical history and included detailed findings and rationale supporting his opinion. As previously noted, FECA does not allow for permanent impairment ratings of the spine without evidence of extremity impairment.²⁸

Regarding the medical evidence of record submitted prior to the January 19, 2017 schedule award claim, the Board finds that Dr. Hussain and Dr. Quraishi offered no rating of appellant's alleged permanent impairment.²⁹ Their reports are therefore of limited probative value regarding appellant's schedule award claim.

While Dr. Lamarre found that appellant had four percent permanent impairment of a lower extremity, he did not specify which lower extremity sustained the permanent impairment. Furthermore, he did not explain that his permanent impairment rating was conducted pursuant to *The Guides Newsletter*.³⁰ As such, Dr. Lamarre's report is of limited probative value.

The other medical reports of record from Dr. Katz and Dr. Butler support the finding that appellant has not established a permanent impairment of a scheduled member causally related to the accepted injury.

Thus, the record does not provide any medical opinion finding that appellant sustained permanent impairment of the upper or lower extremities as a result of her accepted lumbar and cervical injuries.³¹ The Board finds that she failed to meet her burden of proof.³²

Appellant may request a schedule award or increased schedule award at any time 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 established a permanent impairment of a scheduled member entitling her to a schedule award.

²⁷ *L.W.*, Docket No. 12-1613 (issued February 19, 2013).

²⁸ *Supra* note 17.

²⁹ *See F.S.*, Docket No. 15-1884 (issued February 16, 2016) (appellant's physician did not explain that appellant had permanent impairment of a scheduled member as a result of the employment injury).

³⁰ *Supra* note 15.

³¹ *L.F.*, Docket No. 10-0343 (issued November 29, 2010); *V.W.*, Docket No. 09-2026 (issued February 16, 2010).

³² It is appellant's burden of proof to establish that she sustained a permanent impairment of a scheduled member as a result of an employment injury. The medical evidence must include a description of any physical impairment in sufficient detail so that the claims examiner and others reviewing the file would be able to clearly visualize the impairment with its resulting restrictions and limitations. *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated March 1, 2017 is affirmed.

Issued: November 22, 2017
Washington, DC

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

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

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