

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case as presented in the prior Board decision are incorporated herein by reference. The relevant facts are set forth below.

On April 15, 2013 appellant, then a 35-year-old laborer/custodian, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured her lower back while lifting a bag from a recycling hamper. She stopped work on the date of injury. By decision dated June 6, 2013, OWCP accepted appellant's claim for displacement of the lumbar vertebral disc without myelopathy at L4-5 and L5-S1. It paid her compensation on the periodic rolls commencing June 2, 2013 and on the supplemental rolls for intermittent disability commencing May 4, 2014.

On June 9, 2015 appellant filed a claim for a schedule award (Form CA-7).

By letter dated June 11, 2015, addressed to Dr. Claudio E. Vincenty, Board-certified in anesthesiology and pain medicine, OWCP noted that schedule awards for the spine were not payable under FECA. However, it also noted that such awards could be paid for impairment of the upper or lower extremities caused by injury to a spinal nerve. OWCP requested that Dr. Vincenty submit a report containing an impairment rating rendered in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ and with reference to *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009).

By letter dated June 25, 2015, Dr. Vincenty noted that appellant was at maximum medical improvement (MMI) as of June 9, 2015 and had 12 percent permanent impairment from an interventional pain management point of view. He noted that the rating of impairment was made according to the A.M.A., *Guides*, of a moderate problem in the lumbar spine with a range of 10 percent to 15 percent. Dr. Vincenty indicated that appellant's work-related injury was a disc herniation at L4-5 and a bulge at L5-S1. He concluded that appellant was neurologically grossly intact.

On July 30, 2015 OWCP referred the case to a district medical adviser (DMA). The DMA was asked to review the medical evidence and provide a calculation of appellant's permanent impairment for loss of use of the bilateral lower extremities along with a date of MMI, in accordance with the sixth edition of the A.M.A., *Guides*.

On August 4, 2015 Dr. James Dyer, a Board-certified orthopedic surgeon acting as the DMA, reviewed the medical evidence of record and responded to OWCP's inquiries. He noted appellant's date of MMI as June 9, 2015. Dr. Dyer observed that Dr. Vincenty had found 12 percent whole person impairment rating for a schedule award based on a spinal impairment rating. He noted that FECA did not provide schedule awards for spinal impairment, nor did it consider extent of whole person impairment. Dr. Dyer advised that appellant did not have any deficits of the lower extremities on physical examination, and that, as such, she had zero percent

² Docket No. 16-30 (issued March 4, 2016).

³ A.M.A., *Guides* (6th ed. 2009).

permanent impairment of the right lower extremity and zero percent permanent impairment of the left lower extremity.

In a report dated August 6, 2015, Dr. Vincenty noted that appellant's pain had improved and that she was able to walk for extended periods, but that there remained numbness in her left toes. He noted normal gait and posture, with normal muscle strength of all muscles.

By decision dated August 18, 2015, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record failed to establish ratable permanent impairment of a scheduled member or function of the body.

On October 7, 2015 appellant filed a timely appeal to the Board.

By decision dated March 4, 2016, the Board affirmed the August 18, 2015 decision. The Board found that OWCP properly relied on the August 4, 2015 report of Dr. Dyer, which noted that FECA did not provide for schedule awards for spinal impairment, or for whole person impairment. The Board also found that the evidence of record did not establish objective deficits of the lower extremities on physical examination by Dr. Vincenty.

In a report dated November 11, 2016, Dr. Ali Chahlavi, a Board-certified neurosurgeon, diagnosed an L4-L5 herniated disc with stenosis. He performed a decompressive laminectomy with partial facetectomy and foraminotomy at L4 and L5, decompressing the L4 and L5 nerve roots. The procedure was completed with no complications.

In a diagnostic report dated December 28, 2016, Dr. Elizabeth Bathala, a Board-certified diagnostic radiologist, examined the results of a magnetic resonance imaging (MRI) scan of appellant's lumbar spine. She noted impressions of stable degenerative change in the lower lumbar spine at L4-L5 with no new disc pathology and a diffuse low signal throughout marrow structures, likely related to incomplete fatty marrow replacement, red marrow conversion, or, less likely, a diffuse infiltrative process.

On March 3, 2017 appellant again filed a claim for a schedule award.

By letter dated March 7, 2017, OWCP requested additional information from Dr. Vincenty in support of a schedule award. It requested that Dr. Vincenty submit a report containing an impairment rating rendered according to the A.M.A., *Guides* and with reference to *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009).

By letter dated March 26, 2017, Dr. Vincenty responded to OWCP's inquiry. He noted a date of MMI of June 9, 2015, with a permanent impairment rating of 12 percent. Dr. Vincenty noted that appellant underwent a decompressive laminectomy procedure on November 9, 2016. With this letter, he enclosed his previously submitted June 25, 2015 letter.

On March 28, 2017 OWCP forwarded appellant's claim to a DMA to review appellant's request for a schedule award based on the additional medical evidence.

In a report dated April 9, 2017, the DMA reviewed appellant's medical history and Dr. Vincenty's letter dated March 26, 2017. He noted that in this letter, which enclosed Dr. Vincenty's previously-reviewed June 25, 2015 letter containing an impairment rating and date of MMI, it was noted that appellant was neurologically intact, meaning that there was no evidence of lower extremity sensory or motor deficits related to spinal nerve roots. Based on the information provided, the DMA opined that there was no basis for a payment of a schedule award for lower extremity permanent impairment. He further noted that the date of MMI was November 2, 2016, the date of the impairment examination by Dr. Vincenty.⁴

By decision dated June 15, 2017, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record failed to establish that she had sustained ratable permanent impairment of a scheduled member or function of the body.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing federal regulations⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions and organs of the body. 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁷ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸ For decisions issued after May 1, 2009, the sixth edition is used to calculate schedule awards.⁹ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.¹⁰

⁴ The Board notes that the case record does not contain an impairment examination and rating from Dr. Vincenty dated November 2, 2016.

⁵ *Id.* at § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

⁸ *Id.*

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

¹⁰ See *Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.a.3 (January 2010). This portion of OWCP's procedure provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

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.¹¹ 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.¹² 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.¹³

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.¹⁴

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.¹⁵ 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.¹⁶ 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.¹⁷

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.¹⁸

¹¹ *Pamela J. Darling*, 49 ECAB 286 (1998).

¹² *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹³ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

¹⁴ *Supra* note 9.

¹⁵ 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.

¹⁶ *D.S.*, Docket No. 14-12 (issued March 18, 2014).

¹⁷ See *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

¹⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

ANALYSIS

On March 3, 2017 appellant filed a claim for a schedule award due to her accepted work injury of April 15, 2013. The Board finds that the medical evidence of record does not establish permanent impairment of a scheduled member, warranting a schedule award.

OWCP received a report from Dr. Chahlavi dated November 11, 2016 and a report from Dr. Bathala dated December 28, 2016. However neither of these reports provided an assessment of appellant's permanent impairment, pursuant to *The Guides Newsletter*, establishing ratable permanent impairment of a scheduled body member.¹⁹ As such these reports are of limited probative value in establishing appellant's entitlement to a schedule award.

Following the Board's March 4, 2016 decision OWCP received further evidence in support of appellant's March 3, 2017 schedule award claim. By letter dated March 26, 2017, Dr. Vincenty responded to OWCP's inquiry of March 7, 2017. He noted a date of MMI of June 9, 2015, with an impairment rating of 12 percent. Dr. Vincenty noted that appellant underwent a decompressive laminectomy procedure on November 9, 2016 and enclosed his previously-reviewed June 25, 2015 letter.

The Board notes that Dr. Vincenty's March 26, 2017 letter did not actually contain a new impairment rating, date of MMI, or description of the extent of her impairment. The March 26, 2017 letter merely reiterated the same conclusions found in Dr. Vincenty's June 25, 2015 letter, which was already reviewed by the Board on prior appeal. The March 26, 2017 letter enclosed the June 25, 2015 letter in addition to referencing it as the basis for Dr. Vincenty's March 26, 2017 impairment rating and date of MMI.

The Board's findings in its March 4, 2016 decision with regard to Dr. Vincenty's June 25, 2015 letter also apply to Dr. Vincenty's March 26, 2017 letter, because the latter merely repeated, referenced, and contained the former as an enclosure.²⁰ As previously determined by the Board, Dr. Vincenty rated appellant's permanent impairment of the spine and provided a whole person impairment rating, which are not allowable under FECA. However, he did not provide a rating of any permanent impairment of appellant's lower extremities, due to injury to a spinal nerve, with reference to *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the Sixth Edition (July/August 2009). Dr. Vincenty did not actually render a new impairment rating in his letter of March 26, 2017. Rather, he simply wrote a cover letter for his prior June 25, 2015 impairment rating.

The record also contains the April 9, 2017 report of the DMA who reviewed appellant's medical history and Dr. Vincenty's letter dated March 26, 2017. The DMA did not support a finding of a permanent impairment as he noted Dr. Vincenty's observation that there was no evidence of lower extremity sensory or motor deficits related to spinal nerve roots.

¹⁹ See *C.D.*, Docket No. 16-1489 (issued April 12, 2017).

²⁰ Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA. See *H.G.*, Docket No. 16-1191 (issued November 25, 2016).

Therefore, the evidence of record before the Board contains no probative evidence of a permanent impairment for schedule award purposes.

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 permanent impairment of a scheduled member due to her work-related injuries, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 15, 2017 is affirmed.

Issued: January 4, 2018
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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