

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

_____)	
S.D., Appellant)	
)	
and)	Docket No. 18-0855
)	Issued: November 28, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
New Philadelphia, OH, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 15, 2018 appellant, through counsel, filed a timely appeal from a December 11, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On October 9, 2010 appellant, then a 46-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, while delivering mail on October 6, 2010, she slipped while backing away from a dog and struck her face on a gas meter, causing a fracture of the left orbital socket, left cheek, and her nose. She stopped work on the date of injury.

By decision dated November 18, 2010, OWCP accepted the claim for closed left orbital fracture, cracked tooth, and cervical spine sprain. It paid appellant wage-loss compensation and medical benefits on the periodic rolls commencing November 24, 2010. On November 7, 2011 OWCP expanded its acceptance of the claim to include adjustment disorder with anxiety and cognitive communication deficit.

Following a vocational rehabilitation program, appellant returned to work on April 1, 2013 under an assisted reemployment contract for 30 hours a week. OWCP paid appellant wage-loss compensation for the remaining hours.

On July 27, 2016 appellant filed a claim for a schedule award (Form CA-7). In support thereof, she submitted an October 10, 2016 report from Dr. Paul Scheatzle, an attending osteopathic physician Board-certified in physiatry. Dr. Scheatzle related appellant's symptoms of intermittent cephalgia, vertigo, short-term memory difficulties, left oral dysesthesias, left facial weakness, tooth sensitivity, emotional lability, and poor attention span. On examination, he found that she had decreased sensation on the left side of her face, a slight decrease in balance, increased lateral sway with heel and toe walking, limited cervical spine motion, left paraspinal muscle spasms, and increased thoracic kyphosis. Dr. Scheatzle diagnosed post-concussion syndrome. He opined that appellant had attained maximum medical improvement (MMI). Referring to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*),³ he found 24 percent whole person impairment due to combined impairments for cognitive communication deficit, cracked tooth, orbital floor fracture, and a class 2 cervical spine sprain.

In a letter dated November 18, 2016, OWCP notified Dr. Scheatzle that OWCP did not utilize whole person impairment ratings. It advised that schedule award ratings should be expressed in terms of upper extremity impairment, and not the cervical spine itself. OWCP also advised that impairments must be calculated according to the sixth edition of the A.M.A., *Guides*.⁴

In response, Dr. Scheatzle submitted a report dated November 30, 2016 in which he found five percent whole person impairment due to impairment of the cervical spine. He noted that

³ A.M.A., *Guides* (5th ed. 2001).

⁴ A.M.A., *Guides* (6th ed. 2009).

appellant had attained MMI as of October 19, 2016. On examination, Dr. Scheatzle found “guarding and spasm of the cervical paraspinal muscles, flattening of the cervical lordosis, tenderness to palpation,” and lateral flexion limited to 30 degrees. Referring to Table 17-2, page 564 of the sixth edition of the A.M.A., *Guides*, he assessed a class 1 impairment for cervical sprain/strain with continued complaints of axial pain, equal to five percent impairment of the whole person.

Dr. Martin Fritzhand, a Board-certified urologist, submitted a January 10, 2017 permanent impairment evaluation. He summarized appellant’s history of injury and treatment. On examination, Dr. Fritzhand noted diminished pinprick and light-touch sensation on the left side of appellant’s face, at MMI by January 2012. He opined that after reviewing section 13.11.b of the sixth edition of the A.M.A., *Guides*, Table 13-9 found a class 1 impairment of the trigeminal nerve due to pain and diminished sensation, equal to two percent whole person impairment.

As appellant’s physicians had not provided an impairment rating in accordance with the A.M.A., *Guides*, OWCP referred her for a second opinion report from Dr. Victoria Langa, a Board-certified orthopedic surgeon. In a report dated February 6, 2017, Dr. Langa reviewed the medical record and a statement of accepted facts. She related appellant’s complaints of occasional aching and stiffness in her neck, and “crunching” with movement. Appellant’s discomfort sometimes radiated to the upper back, but never to the upper extremities. On examination, Dr. Langa found mild paravertebral tenderness to palpation, rotation of the cervical spine at 60 degrees left and 80 degrees right, and a normal neurologic examination of both upper extremities. She diagnosed status post cervical sprain/strain. Dr. Langa found that the accepted cervical spine sprain had resolved without residuals. She opined that according to *The Guides Newsletter*, “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” (July/August 2009) (*The Guides Newsletter*), appellant had no permanent impairment of a scheduled member as she had no radicular symptoms in either upper extremity attributable to the cervical spine. Dr. Langa noted that appellant had no work limitations due to the resolved cervical spine sprain.

On March 19, 2017 Dr. Morley Slutsky, a Board-certified occupational medicine specialist serving as an OWCP district medical adviser, reviewed Dr. Langa’s report and concurred with her rating. He noted that as Dr. Langa found no evidence of sensory or motor deficits of the upper extremities related to the cervical spine, there was no basis for an upper extremity impairment rating using the A.M.A., *The Guides Newsletter*. Dr. Slutsky also explained that cervical spine sprains did not result in permanent sensory or motor deficits of the upper extremities. He found that appellant had attained MMI as of February 6, 2017, the date of Dr. Langa’s examination.

By decision dated March 29, 2017, OWCP denied appellant’s schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body attributable to the accepted October 6, 2010 employment injury. It accorded the weight of the medical evidence to Dr. Langa’s February 6, 2017 opinion as reviewed by Dr. Slutsky.

On April 4, 2017 appellant, through counsel, requested a telephonic oral hearing before an OWCP hearing representative. During the hearing, held on October 5, 2017, appellant testified that she had not sustained cervical spine injury either prior or subsequent to the October 6, 2010 employment injury. She noted that she had been working part time in a private sector clerical

position. Counsel requested that the record be left open for 30 days to obtain clarification from Dr. Fritzhand regarding his January 10, 2017 opinion that appellant had sustained two percent permanent impairment of the whole person based on Table 13-19.

Following the hearing, counsel submitted a November 1, 2017 report from Dr. Scheatzle diagnosing postconcussion syndrome. Dr. Scheatzle did not address the issue of permanent impairment.

By decision dated December 11, 2017, OWCP's hearing representative affirmed the prior decision. He accorded the weight of the medical evidence to Dr. Langa's opinion as reviewed by Dr. Slutsky. The hearing representative found that Dr. Fritzhand's report of record was insufficient to establish permanent impairment of a scheduled member or function of the body as there was no provision under FECA for whole person impairment.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. It, 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 sound 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.

No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the regulations.⁷ Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,⁸ no claimant is entitled to such an award.⁹ However, in 1966, amendments to FECA modified the schedule award provision 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 provision of FECA includes 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.¹⁰

⁵ *Supra* note 2 at § 8107.

⁶ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁷ *Henry B. Floyd, III*, 52 ECAB 220 (2001).

⁸ FECA specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

⁹ *Thomas Martinez*, 54 ECAB 623 (2003).

¹⁰ *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

OWCP's procedures provide that, to support a schedule award, the record 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 for the claims examiner to visualize the character and degree of disability, and gives a percentage of impairment, based on a specific diagnosis, not the body as a whole, except for impairment to the lungs.¹¹ When the examining physician does not provide an estimate of impairment confirming to the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by its medical adviser.¹²

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* is to be applied.¹³ 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.¹⁴ 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.¹⁵

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

In support of her claim, appellant submitted a report dated October 10, 2016 from Dr. Scheatzle who found that she had 24 percent whole person permanent impairment under the fifth edition of the A.M.A., *Guides*. After OWCP notified Dr. Scheatzle of the necessity to utilize the sixth edition of the A.M.A., *Guides* and to address permanent impairment of the upper extremities related to the cervical spine, he submitted a November 30, 2016 report finding five percent permanent impairment of the whole person due to a class 1 cervical sprain. However, a schedule award is only payable for permanent impairment originating in the spine if permanent impairment of an extremity is established.¹⁶ Dr. Scheatzle did not indicate that appellant had sustained any permanent impairment of the upper extremities due to the accepted cervical sprain.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.c.1 (March 2017). See also *R.F.*, Docket No. 16-0192 (issued November 8, 2016).

¹² *J.Q.*, 59 ECAB 366 (2008).

¹³ See *G.N.*, Docket No. 10-0850 (issued November 12, 2010); see also *supra* note 11 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁴ *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

¹⁵ See *A.R.*, Docket No. 17-1504 (issued May 25, 2018); *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

¹⁶ *Supra* note 8.

Thereafter, OWCP referred the case for a second opinion on the appropriate percentage of permanent impairment to Dr. Langa, a Board-certified orthopedic surgeon. Dr. Langa submitted a February 6, 2017 report finding no sensory or motor impairment of either upper extremity. She therefore opined that appellant had no permanent impairment attributable to the accepted cervical sprain.

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP 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.¹⁷ Dr. Slutsky, an OWCP district medical adviser, reviewed Dr. Langa's report on March 19, 2017 and concurred with her findings. He explained that a cervical spine sprain was not competent to cause permanent sensory or motor deficits of the upper extremities.

The Board finds that Dr. Langa properly determined that appellant had no permanent impairment of her upper extremities under the standards of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. In her February 6, 2017 report, Dr. Langa properly indicated that no schedule award was warranted according to *The Guides Newsletter* as appellant had no sensory or motor impairment of either arm. She found no basis under *The Guides Newsletter* to rate impairment of either upper extremity as there were no neurologic deficits in either arm.

Because Dr. Scheatzle's impairment evaluation was not conducted in accordance with the standards of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*, it is of limited probative value and insufficient to establish that appellant has upper extremity impairment attributable to her accepted conditions.¹⁸

Dr. Fritzhand, a Board-certified urologist, opined on January 10, 2017 that she had two percent permanent impairment of the whole person due to trigeminal nerve impairment caused by the accepted left orbital fracture. However, there is no provision under FECA for whole person impairments other than those involving the lungs.¹⁹ Dr. Fritzhand's opinion is therefore of limited probative value and insufficient to establish permanent impairment of a scheduled member or function of the body.²⁰

On appeal, counsel contends that the A.M.A., *Guides* "require[s] whole person rating for the body parts recognized in the claim." However, as noted above, there is no provision under FECA which provides for a whole person impairment rating other than for impairment of the

¹⁷ See *supra* note 11 at Chapter 2.808.6(f) (February 2013).

¹⁸ *A.R.*, *supra* note 15. See also *Carl J. Cleary*, 57 ECAB 563, 568 at note 14 (2006) (an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment).

¹⁹ *Supra* note 11 at Chapter 2.808.5.c.1. See also *R.F.*, *supra* note 11.

²⁰ *Supra* note 16.

lungs.²¹ The Board notes that in the case at bar, appellant did not claim, nor did OWCP accept, pulmonary condition of any kind.

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 met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the December 11, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 28, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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

²¹ *Supra* note 17.