

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

M.B., Appellant	)	
	)	
and	)	<b>Docket No. 19-0540</b>
	)	<b>Issued: August 8, 2019</b>
U.S. POSTAL SERVICE, POST OFFICE, Clearwater, FL, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On January 11, 2019 appellant filed a timely appeal from a January 8, 2019 merit decision<sup>1</sup> 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 over the merits of this case.<sup>3</sup>

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<sup>1</sup> Appellant's AB-1 form notes that he is appealing from a December 18, 2018 purported decision. The only document of record dated December 18, 2018 was a recurrence development letter. As this correspondence is not a final adverse decision of OWCP, the Board does not have jurisdiction to consider the merits of appellant's recurrence claim. See 20 C.F.R. § 501.2(c). The only OWCP decision over which the Board may take jurisdiction is the January 8, 2019 schedule award decision.

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

<sup>3</sup> The Board notes that, following the January 8, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## ISSUE

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

## FACTUAL HISTORY

On October 11, 2017 appellant, then a 41-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 10, 2017 he injured his lower back as a result of an automobile accident while in the performance of duty. After an initial denial, OWCP accepted the claim by decision dated March 6, 2018 for lumbar and cervical strains, lumbar and cervical bulging discs, and left foot strain and sprain. It also paid wage-loss compensation retroactive to November 25, 2017 because the employing establishment had been unable to accommodate appellant's limited-duty work restrictions.

In a work capacity evaluation dated April 6, 2018, Dr. Jonathan Yousef, a Board-certified family practitioner, recommended temporary sedentary work restrictions. The employing establishment informed OWCP on April 30, 2018 that it could not accommodate limited-duty work within appellant's restrictions. OWCP paid appellant wage-loss compensation on the periodic compensation rolls beginning April 29, 2018.

On June 8, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a work capacity evaluation dated June 8, 2018, Dr. Yousef recommended permanent work restrictions of no sitting more than 30 minutes per day, no walking, pushing, pulling, or squatting more than 4 hours per day, no twisting more than 5 hours per day, and no lifting more than 6 hours per day. In a report of the same date, he followed up with appellant for his injury resulting from the motor vehicle accident of October 10, 2017. Dr. Yousef noted that the sudden impact created forces that damaged soft tissue structures in the lumbar and cervical spine, as demonstrated by magnetic resonance imaging (MRI) scan results revealing bulging discs in his lumbar and cervical spine. He diagnosed cervical disc displacement, segmental and somatic dysfunction of the lumbar region, intervertebral disc displacement of the lumbar region, contracture of muscle, low back pain, sprain of the ligaments of the lumbar spine, and left foot pain. Dr. Yousef stated that, in regards to the medical care he provided, appellant had reached maximum medical improvement (MMI). He also noted that he would defer to appellant's neurosurgeon regarding an impairment rating.

On July 25, 2018 appellant returned to full-time modified-duty work at the employing establishment.

Appellant resubmitted his schedule award claim on August 28, 2018.

In a development letter dated September 7, 2018, OWCP requested that appellant provide an impairment rating in accordance with the sixth edition of the American Medical Association,

*Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>4</sup> It afforded him 30 days to submit the requested information.

In a report dated September 19, 2018, Dr. Yousef again stated that appellant was at maximum medical improvement, further recommending that appellant revisit his neurosurgeon to see if he would like to reconsider surgical options. Appellant stated that he would like to consider neck surgery.

In a work capacity evaluation dated December 19, 2018, Dr. Jorge Inga, a Board-certified neurosurgeon, checked a box indicating that appellant had not reached MMI.

By decision dated January 8, 2019, OWCP denied appellant's schedule award claim, finding that he had not reached MMI.

### **LEGAL PRECEDENT**

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>8</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.<sup>9</sup>

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.<sup>10</sup> 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 schedule or nonscheduled member. Therefore, as the

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<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>5</sup> *L.C.*, Docket No. 15-1671 (issued May 24, 2016); *Veronica Williams*, 56 ECAB 367 (2005).

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> *L.C.*, *supra* note 5; *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

<sup>10</sup> *L.C.*, *supra* note 5; *Pamela J. Darling*, 49 ECAB 286 (1998).

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.<sup>11</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairment of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*) offers an approach to rating spinal nerve impairments consistent with sixth edition methodology.<sup>12</sup> OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.<sup>13</sup>

### **ANALYSIS**

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award. OWCP accepted his claim for lumbar and cervical strain, lumbar and cervical bulging discs, left foot strain and left foot sprain. On June 8, 2018 appellant filed a claim for a schedule award. In a work capacity evaluation dated December 19, 2018, Dr. Inga checked a box indicating that appellant had not reached MMI. By letter dated December 21, 2018, Dr. Yousef stated that appellant was scheduled for surgery on January 14, 2019 with Dr. Inga. On December 26, 2018 appellant requested authorization for cervical spinal fusion.

It is well established that a schedule award cannot be determined and paid until a claimant has reached MMI.<sup>14</sup> The medical record indicates that appellant was still actively treating with Dr. Inga, as of December 21, 2018, who also noted that appellant had not yet reached MMI in a work capacity evaluation dated December 19, 2018. The Board finds that, as appellant did not submit medical evidence indicating that he had reached MMI, he has not met his burden of proof to establish a claim for a schedule award.<sup>15</sup>

### **CONCLUSION**

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

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<sup>11</sup> *L.C., supra* note 5; *Thomas J. Englehart*, 50 ECAB 319 (1999).

<sup>12</sup> *L.C., supra* note 5; *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

<sup>14</sup> *L.C., supra* note 5; *D.H.*, Docket No. 13-1642 (issued January 7, 2014).

<sup>15</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 8, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 8, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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