

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

D.P., Appellant)
and) Docket No. 19-0742
DEPARTMENT OF THE ARMY, MADIGAN) Issued: August 20, 2019
ARMY MEDICAL CENTER, Tacoma, WA,)
Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 11, 2019 appellant filed a timely appeal from an October 23, 2018 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 to consider the merits of this case.

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 April 10, 2017 appellant, then a 55-year-old cook, filed an occupational disease claim (Form CA-2) alleging that he developed sciatica as a result of factors of his federal employment

¹ 5 U.S.C. § 8101 *et seq.*

including bending and twisting with heavy dishes and lifting heavy pans from a warmer to a serving line. He indicated that he first became aware of his claimed condition and its relationship to his federal employment on March 20, 2017. OWCP accepted the claim for intervertebral disc displacement, lumbar region.

OWCP thereafter received a medical report dated April 24, 2018 by Dr. Robert G.R. Lang, an attending Board-certified neurosurgeon. Dr. Lang noted a history of appellant's accepted employment injury and his current back symptoms. He discussed findings on physical examination and reviewed diagnostic test results. Citing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),² Dr. Lang opined that appellant had 10 percent whole person permanent impairment of the lumbar spine due to a single level intervertebral disc herniation with ongoing L5 radicular findings. He determined that appellant had reached maximum medical improvement (MMI) at that time and needed no further treatment.

On September 6, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated September 7, 2018, OWCP advised appellant of the deficiencies in his schedule award claim. It requested that he submit an impairment evaluation from his treating physician addressing whether he had attained MMI with an impairment rating according to the sixth edition of the A.M.A., *Guides*. OWCP explained that the submitted opinion from Dr. Lang was not probative because schedule awards were not payable for permanent impairment of the spine or the whole body. Rather, it noted that such awards could be paid for permanent impairment of limbs caused by the accepted spinal condition. OWCP afforded appellant 30 days to respond.

OWCP received additional reports dated September 26 and October 15, 2018 and an order form dated September 27, 2018 from Dr. Lang who diagnosed lumbar disc prolapse with root compression, lumbar radiculopathy, muscle wasting and atrophy, not elsewhere classifiable, of the left lower leg, focal motor weakness, hypoesthesia of the skin, and gait abnormality. In the September 26 and October 15, 2018 reports, Dr. Lang also provided impressions that appellant had lumbar disc herniation and left L5 radiculopathy. He noted that a magnetic resonance imaging scan demonstrated a focal posterolateral protrusion at left L5 transition. Dr. Lang further noted that appellant had ongoing left leg weakness and pain, and improvement with conservative measures. He reiterated that he had reached MMI. Dr. Lang advised that an electromyogram and nerve conduction velocity (EMG/NCV) study would be performed to evaluate appellant's signs of left foot and great toe weakness. In the September 27, 2018 order, he requested EMG/NCV testing of appellant's bilateral lower extremities.

OWCP also received a report dated October 15, 2018 by Dr. Matthew Irvin, a physiatrist, who indicated that an EMG/NCV evaluation of appellant's bilateral lower extremities was abnormal. Dr. Irvin found electrodiagnostic evidence of a chronic motor radiculopathy at the left L5 level and decreased compound muscle action potential of the left peroneal motor nerve

² A.M.A., *Guides* (6th ed. 2009).

consistent with a chronic lumbar radiculopathy. He also found that bilateral sural sensory nerves showed no response, which may be early signs of a neuropathy.

By decision dated October 23, 2018, OWCP denied appellant's schedule award claim. It found that he had not submitted medical evidence establishing permanent impairment of a scheduled member or function of the body warranting a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA,³ and its implementing federal regulations,⁴ 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. 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.⁷ Furthermore, the back is specifically excluded from the definition of organ under FECA.⁸ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments 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. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.⁹

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.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see also* J.L., Docket No. 18-1380 (issued May 1, 2019). FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

⁸ *Id.* at § 8101(19).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

OWCP accepted that appellant sustained other intervertebral disc displacement, lumbar region, while in the performance of duty. On September 6, 2018 appellant filed a schedule award claim.

In support of his claim, appellant submitted an April 24, 2018 report from his physician, Dr. Lang, who utilized the sixth edition of the A.M.A., *Guides* and opined that appellant sustained 10 percent whole person permanent impairment of the lumbar spine due to a single level intervertebral disc herniation with ongoing L5 radicular findings. As noted, however, neither FECA nor its implementing regulations provide a schedule award for permanent impairment of the back.¹⁰ FECA also specifically excludes the back as an organ and, therefore, the back does not come under the provision for payment of a schedule award.¹¹ Moreover, there is no statutory basis for the payment of a schedule award for whole body impairment under FECA.¹² Payment is authorized only for the permanent impairment of specified members, organs, or functions of the body.¹³ For these reasons, the Board finds that the opinion of Dr. Lang is of diminished probative value and insufficient to establish permanent impairment of a scheduled member or function of the body due to the accepted lumbar condition.

The additional reports and EMG/NCV study by Dr. Lang are also insufficient to establish permanent impairment as he did not provide a rating of permanent impairment in accordance with the A.M.A., *Guides*.¹⁴ Likewise, Dr. Irvin's October 15, 2018 EMG/NCV study report lacks probative value as diagnostic tests do not address permanent impairment.¹⁵

It is appellant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.¹⁶ He did not submit such evidence. Thus, appellant has not met his burden of proof to establish his schedule award claim.¹⁷

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.

¹⁰ See *supra* note 7.

¹¹ 5 U.S.C. § 8101(19).

¹² See *supra* note 7.

¹³ See N.H., Docket No. 17-0696 (issued July 19, 2017); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁴ See D.S., Docket No. 18-0336 (issued May 29, 2019); I.T., Docket No. 18-1049 (issued December 31, 2018).

¹⁵ *Id.*

¹⁶ E.F., Docket No. 18-1723 (issued May 1, 2019); D.F., Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁷ *Id.*

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.

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2019
Washington, DC

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

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

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