

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

R.C., Appellant)	
)	
and)	Docket No. 19-1350
)	Issued: December 11, 2019
DEPARTMENT OF HEALTH & HUMAN)	
SERVICES, FOOD & DRUG)	
ADMINISTRATION, Lenexa, KS, 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
JANICE B. ASKIN, Judge

JURISDICTION

On June 4, 2019 appellant filed a timely appeal from December 12, 2018 and May 2, 2019 merit decisions 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.²

ISSUES

The issues are: (1) whether appellant has greater than 1 percent permanent impairment of the left upper extremity and 10 percent permanent impairment of the right upper extremity, for

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the May 2, 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.*

which he previously received schedule award compensation; (2) whether he received an overpayment of compensation in the amount of \$3,135.16 for the period May 1 through July 5, 2014; and (3) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On March 22, 2007 appellant, then a 51-year-old consumer safety investigator, filed a traumatic injury claim (Form CA-1) alleging that on March 15, 2007 he aggravated his herniated cervical disc when the charter bus on which he was a passenger on the way to training abruptly stopped while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that the injury occurred in the performance of duty. Appellant stopped work and returned to limited duty on July 10, 2007. He stopped work again on May 30, 2008. By decision dated November 19, 2007, OWCP accepted appellant's claim for neck sprain. It subsequently expanded acceptance of appellant's claim to include aggravation of degeneration of cervical intervertebral disc at C5-7, and aggravation of cervical spondylosis with myelopathy at C6-7. OWCP paid appellant wage-loss compensation for temporary total disability on the supplemental rolls beginning May 30, 2008 and on the periodic rolls, effective August 3, 2008. Appellant retired from federal employment due to disability on February 28, 2009.

On May 30, 2014 OWCP granted appellant a schedule award for one percent permanent impairment of the left upper extremity and two percent permanent impairment of the right upper extremity. The award ran for 9.37 weeks from May 1 to July 5, 2014. OWCP noted that the schedule award was based on a May 13, 2014 report of Dr. Daniel Zimmerman, a Board-certified family practitioner, serving as an OWCP district medical adviser (DMA). By decision dated January 22, 2015, an OWCP hearing representative affirmed the May 30, 2014 schedule award decision.

Appellant appealed to the Board.

By decision dated March 3, 2016, the Board affirmed the January 22, 2015 decision. The Board found that the weight of the medical evidence rested with Dr. Zimmerman's May 13, 2014 report as he properly based his impairment rating on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*).

In an August 17, 2016 letter, appellant indicated that he was requesting a schedule award for his neck due to the change of condition that has worsened his neck.

OWCP received a July 14, 2016 report by Dr. John W. Ellis, a Board-certified family practitioner, who noted appellant's March 15, 2007 employment injury and the subsequent

³ Docket No. 11-2072 (issued August 28, 2012); Docket No. 15-1612 (issued March 3, 2016).

medical treatment he received. He recounted appellant's continued complaints of severe pain in his neck and upper back. Upon examination of appellant's back, Dr. Ellis observed marked tightness of the posterior cervical muscles and in the upper rhomboid muscles. Range of motion of appellant's cervical spine was decreased. Dr. Ellis indicated that the March 15, 2007 injury caused a severe straining of the muscles and ligaments of his neck and also injured the annular fibers of his discs. He opined that appellant's neck injury caused acute spinal nerve impingement down the left arm and more impingement of the spinal nerves down his right arm. Dr. Ellis calculated that appellant had a combined 17 percent right upper extremity permanent impairment and 13 percent left upper extremity permanent impairment.

On November 30, 2016 appellant filed a claim for an increased schedule award (Form CA-7).

In a development letter dated January 17, 2017, OWCP advised appellant of the type of evidence needed to establish his claim for an increased schedule award utilizing the appropriate portions of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. It afforded him 30 days to submit the necessary evidence.

OWCP routed appellant's schedule award claim to Dr. Herbert White, Jr., Board-certified in physical medicine and rehabilitation serving as a DMA, for review. In a January 7, 2018 report, Dr. White indicated that he was unable to provide an impairment rating based on the information in the record and recommended referral for a second-opinion examination.

OWCP referred appellant to Dr. Kala Danushkodi, Board-certified in physical medicine and rehabilitation, for a second-opinion examination in order to provide an impairment rating in accordance with the A.M.A., *Guides* and *The Guides Newsletter*. In a September 18, 2018 report, Dr. Danushkodi discussed appellant's history of the March 15, 2007 employment injury and noted that appellant's claim was accepted for neck sprain, aggravation of degeneration of cervical intervertebral disc at C5-7, and aggravation of cervical spondylosis with myelopathy at C5-7. She recounted appellant's complaints of pain in his neck radiating to both upper extremities with associated numbness. Upon physical examination, Dr. Danushkodi observed normal cervical range of motion and palpable tenderness of the right C6-7 paraspinals. Spurling's sign was positive with pain radiating to the right upper extremity. Dr. Danushkodi reported shared sensations to pinprick in the right C7 dermatome and normal left upper extremity sensory examination. She diagnosed right C7 cervical radiculopathy.

Utilizing Table 15-20 of the A.M.A., *Guides*, Dr. Danushkodi indicated that appellant had a normal motor sensory examination on the left, which was consistent with zero percent permanent impairment. Regarding appellant's right upper extremity, she assigned class 1 in the C7 category (CDX) for mild sensory deficit, default one percent, and mild motor deficit, default five percent. Dr. Danushkodi reported a grade modifier of 2 for functional history (GMFH) due to constant symptoms and ability to perform self-care unassisted and a grade modifier of 2 for clinical studies (GMCS) due to moderate pathology. She noted that grade modifier for physical examination (GMPE) was not used since physical examination was used to define the class. After applying the net adjustment formula $((2-1) + (2-1) = 2)$, Dr. Danushkodi calculated that appellant had 1 percent right upper extremity impairment for sensory and 9 percent right upper extremity impairment for motor deficit for a combined 10 percent right upper extremity permanent impairment.

In a November 30, 2018 report, the DMA reviewed appellant's case, including Dr. Danushkodi's September 18, 2018 second-opinion report. Referencing the A.M.A., *Guides* and *The Guides Newsletter*, he calculated appellant's right upper extremity impairment for deficits in the C7 nerve root. The DMA found a CDX of 1 for mild sensory impairment (default one percent) and for motor impairment (default five percent). He agreed with Dr. Danushkodi's GMFH of 2, GMCS of 2, and that GMPE was excluded because it was used to determine diagnostic placement. Using the net adjustment formula, the DMA calculated a net adjustment of +2, equaling a grade E impairment, which equaled 1 percent sensory impairment and 9 percent motor impairment for a total of 10 percent right upper extremity impairment. He did not provide an impairment rating for appellant's left upper extremity. The DMA noted a date of maximum medical improvement (MMI) of September 18, 2018, the date of Dr. Danushkodi's second-opinion report.

By decision dated December 12, 2018, OWCP granted appellant an additional schedule award of eight percent permanent impairment of the right upper extremity for a total of 10 percent right upper extremity impairment. The award ran for 24.96 weeks from September 18, 2018 to March 11, 2019. OWCP also noted that the current evidence of record established no permanent impairment of the left upper extremity under the A.M.A., *Guides* and *The Guides Newsletter*. It found that the weight of the medical evidence rested with Dr. Danushkodi's September 18, 2018 second-opinion report and the DMA's November 30, 2018 report.

In a January 14, 2019 memorandum, OWCP identified a potential overpayment of compensation because appellant had previously received a schedule award for one percent permanent impairment of the left upper extremity, but the most recent November 30, 2018 DMA report showed no impairment rating of the left upper extremity. It indicated that according to OWCP's procedure manual, a one percent impairment rating for the arm equaled 3.12 weeks or 21.84 days. OWCP noted that appellant's weekly pay rate at the time of the award was \$1,339.81, which when multiplied by the 75 percent compensation rate equaled \$1,004.86. It multiplied \$1,004.86 by 3.12 weeks and calculated that appellant had received an overpayment of compensation in the amount of \$3,135.16.

On March 6, 2019 OWCP informed appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$3,135.16 for the period May 1 through July 5, 2014 because he was incorrectly paid schedule award benefits to which he was not entitled. It explained that he had previously received a schedule award for one percent left upper extremity impairment in 2014, but the current evidence of record established that appellant had no permanent impairment of the left upper extremity. OWCP found that appellant was not at fault in creating the overpayment. It requested that he complete an overpayment recovery questionnaire and submit supporting financial documentation to assist OWCP in its evaluation of his eligibility for waiver of recovery of the overpayment. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

By decision dated May 2, 2019, OWCP finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$3,135.16 for the period May 1 through September 15, 2014 as he was incorrectly paid schedule award compensation

benefits. It found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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. FECA, however, does not specify the manner in which the percentage of loss of a member 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 and the Board has concurred in such adoption.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.⁷

In addressing upper extremity impairments, the sixth edition requires identification of the impairment CDX condition, which is then adjusted by GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁸ OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of permanent impairment specified.⁹

The A.M.A., *Guides* also provide that the ROM impairment method is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other diagnosis-based sections are applicable.¹⁰ If ROM is used as a stand-alone approach, the total of motion impairment for all units of function must be calculated. All values for the joint are measured and added.¹¹ Adjustments for functional history may be made if the evaluator determines that the resulting impairment does not adequately reflect functional loss and functional reports are determined to be reliable.¹²

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017).

⁸ A.M.A., *Guides* 411.

⁹ *See P.R.*, Docket No. 18-0022 (issued April 9, 2018); Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.808.6f (March 2017).

¹⁰ A.M.A., *Guides* 461.

¹¹ *Id.* at 473.

¹² *Id.* at 474.

Regarding the application of ROM or DBI methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides:

“As the [A.M.A.,] *Guides* caution that if it is clear to the evaluator evaluating loss of ROM that a restricted ROM has an organic basis, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment, the CE [claims examiner] should provide this information (*via* the updated instructions noted above) to the rating physician(s).

“Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify: (1) the methodology used by the rating physician (*i.e.*, DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. *If the [A.M.A.,] Guides allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used.*”¹³ (Emphasis in the original.)

The Bulletin further advises: “If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE.”¹⁴

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.¹⁵ Furthermore, the back is specifically excluded from the definition of organ under FECA.¹⁶ 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* 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 July/August 2009 edition of *The Guides Newsletter* is to be applied.¹⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant’s schedule award claim is not in posture for decision.

¹³ FECA Bulletin No. 17-06 (May 8, 2017); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

¹⁴ *Id.*; *V.L.*, Docket No. 18-0760 (issued November 13, 2018); *A.G.*, *id.*

¹⁵ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁶ *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁷ *Supra* note 7 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

OWCP accepted that appellant sustained neck sprain, aggravation of degeneration of cervical intervertebral disc at C5-7, and aggravation of cervical spondylosis with myelopathy at C6-7 as a result of a March 15, 2007 employment injury. It granted him a schedule award for one percent permanent impairment of the left upper extremity and two percent permanent impairment of the right upper extremity. By decision dated March 3, 2016, the Board affirmed a January 22, 2015 hearing representative's decision which affirmed the May 30, 2014 schedule award decision. The Board's review of the medical evidence submitted prior to January 22, 2015 is *res judicata* absent further review by OWCP under section 8128 of FECA.¹⁸

On November 30, 2016 appellant submitted a claim for an additional schedule award. By decision dated December 12, 2018, OWCP determined that he currently had no permanent impairment of the left upper extremity and an additional eight percent permanent impairment of the right upper extremity. The award was based on the opinions of Dr. Danushkodi, an OWCP second-opinion physician, as reviewed by the DMA, Dr. White.

In a September 18, 2018 second-opinion report, Dr. Danushkodi provided an impairment rating based on spinal nerve impairment to appellant's upper extremities. Utilizing Table 15-20 of the A.M.A., *Guides*, she determined that appellant had 0 percent left upper extremity impairment and 10 percent right upper extremity impairment due to C7 spinal nerve impairment. The Board finds that Dr. Danushkodi's second-opinion report is insufficient to carry the weight of the medical evidence as she did not apply the relevant standards for evaluating conditions originating in the cervical spine.¹⁹ Dr. Danushkodi improperly applied Table 15-20 (Brachial Plexus Impairment: Upper Extremity Impairments), beginning in page 434 of the sixth edition of the A.M.A., *Guides*, rather than *The Guides Newsletter*, to evaluate any permanent impairment originating in the cervical spine.

The Board will, therefore, set aside OWCP's December 12, 2018 decision and remand the case for a qualified physician to conduct a full physical examination and provide a permanent impairment rating in accordance with the A.M.A., *Guides*, *The Guides Newsletter*, and FECA Bulletin No. 17-06 in order to determine the extent of appellant's bilateral upper extremity impairment due to his accepted cervical injury.²⁰ After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an additional upper extremity schedule award.

CONCLUSION

The Board finds that this case is not in posture for decision.²¹

¹⁸ See *B.W.*, Docket No. 18-1415 (issued March 8, 2019).

¹⁹ See *supra* notes 8 through 10.

²⁰ See *B.B.*, Docket No. 17-1949 (issued October 16, 2018).

²¹ In light of the disposition of issue 1 regarding appellant's schedule award claim, the second and third issues regarding the overpayment of compensation based on appellant's schedule award are moot and will not be addressed.

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2019 and December 12, 2018 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: December 11, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board