

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

K.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Gastonia, NC, Employer**

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**Docket No. 19-0165
Issued: June 25, 2019**

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 31, 2018 appellant filed a timely appeal from a July 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.²

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.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the July 23, 2018 merit 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.*

FACTUAL HISTORY

On October 19, 2016 appellant, then a 35-year-old mail clerk, filed a notice of traumatic injury (Form CA-1) alleging that, on that date, she injured her right hip, leg, and lower back when she slipped on a puddle on the floor while in the performance of duty. OWCP accepted the claim for lumbar inflammatory spondylopathy, lumbar spondylosis without myelopathy or radiculopathy, right hip muscle strain, and right leg strain. Appellant did not initially stop work. OWCP subsequently paid her intermittent wage-loss compensations on the supplemental rolls for the period December 3, 2016 to July 21, 2017.

In an August 25, 2017 report, Dr. Tejas Parikh, Board-certified in physical medicine and rehabilitation, released appellant to return to work without restrictions and indicated that she had reached maximum medical improvement (MMI). He opined that appellant had zero percent permanent impairment under the North Carolina Commission Industrial Rating Guide.

On October 19, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated October 24, 2017, OWCP requested that appellant obtain a report from her treating physician which provided a permanent impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ addressing whether appellant had reached MMI and the extent of her permanent impairment, if any. It explained that awards for permanent impairment may not be paid for the spine, but such awards could be paid for impairment of the upper or lower extremities caused by an injury to a spinal nerve. OWCP explained that the physician should refer to *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (*The Guides Newsletter*) (July/August 2009).⁴

In a report dated December 13, 2017, Dr. Arthur Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), noted that he had reviewed the medical record, including Dr. Parikh's August 25, 2017 evaluation, which found that appellant had reached MMI. The DMA opined that appellant had no lower extremity permanent impairment

³ A.M.A., *Guides* (6th ed. 2009).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

because she had no neurologic deficit consistent with radiculopathy in the lower extremities in accordance with the *The Guides Newsletter* and the A.M.A., *Guides*.

By decision dated January 16, 2018, OWCP denied appellant's schedule award claim. It found that she had not submitted medical evidence establishing permanent impairment of a scheduled member or function of the body warranting a schedule award.

On February 12, 2018 OWCP received appellant's request for a telephonic hearing, which was held before an OWCP hearing representative on June 21, 2018.

In a May 25, 2018 report, Dr. Parikh opined that appellant had two percent permanent impairment of the lumbar spine. He noted that she had some intermittent pain and paresthesia in her right lower extremity and referenced the North Carolina Commission Rating Guide.

By decision dated July 23, 2018, OWCP's hearing representative affirmed the January 16, 2018 decision. She explained that Dr. Parikh had not utilized the A.M.A., *Guides*, nor had he described the dermatomal distribution of pain, numbness, or paresthesia which was required to confirm a diagnosis of radiculopathy. OWCP found that his report was insufficient to establish appellant's claim for permanent impairment of a lower extremity due to the accepted spinal conditions.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁵ and its implementing federal regulations,⁶ 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.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.⁹ 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

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ *See B.W.*, Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *Pamela J. Darling*, 49 ECAB 286 (1998).

schedule award for permanent impairment to an extremity, even though the cause of the impairment originated in the spine.¹⁰

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.¹¹ OWCP has adopted this approach for rating permanent impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in *The Guides Newsletter* (July/August 2009).¹² Specifically, OWCP will address upper extremity impairment originating in the spine through Table 15-14.¹³

A claimant has the burden of proof under FECA to establish permanent impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.¹⁴ Before the A.M.A., *Guides* can be utilized, a description of the impairment must be obtained from his or her physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decrease in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.¹⁵

OWCP's procedures provide that, if a claimant has not submitted an impairment evaluation, it should request a detailed report that "includes history of clinical presentation, physical findings, functional history, clinical studies or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment rating was calculated."¹⁶ If the claimant does not provide an impairment evaluation, "and there is no indication of permanent impairment in the medical evidence of file, the CE [claims examiner] may proceed with a formal denial of the award."¹⁷

¹⁰ *J.M., id*; *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹¹ *R.B.*, Docket No. 17-1995 (issued August 13, 2018); *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹² *Supra* note 8 at Chapter 3.700, Exhibit 1 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

¹³ *Supra* note 3 at 425.

¹⁴ *See I.T.*, Docket No. 18-1049 (issued December 31, 2018).

¹⁵ *A.T.*, Docket No. 18-0864 (issued October 9, 2018).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (March 2017).

¹⁷ *Id.* at Chapter 2.808.6(c).

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 entitling her to a schedule award.

OWCP accepted that appellant sustained lumbar inflammatory spondylopathy, lumbar spondylosis without myelopathy or radiculopathy, right hip muscle strain, and right leg strain due to her employment injury.

On October 19, 2017 appellant filed a schedule award claim and on October 24, 2017, OWCP requested that she submit an impairment evaluation from her physician addressing the extent of any employment-related permanent impairment using the A.M.A., *Guides*. OWCP specifically informed appellant that a schedule award could not be granted for permanent impairment of the lumbar spine, but could be paid for permanent impairment of an extremity caused by injury to a spinal nerve.

The Board notes that Dr. Parikh, the treating physician, did not utilize *The Guides Newsletter* in his August 25, 2017 or his May 25, 2018 report.¹⁸ Dr. Parikh relied upon the North Carolina Industrial Commission Rating Guide, as opposed to the A.M.A., *Guides*. He indicated in his August 25, 2017 report that appellant had zero percent permanent impairment and later indicated in his May 25, 2018 report that she had two percent permanent impairment of the lumbar spine. While he noted that appellant had some pain and paresthesia of the right lower extremity, Dr. Parikh did not provide a permanent impairment rating for the right lower extremity. Moreover, he did not find permanent impairment of a lower extremity in sufficient detail so that the claims examiner and others reviewing the file would be able to clearly visualize the impairment with its resulting restrictions and limitations.¹⁹ As Dr. Parikh's reports do not comport with the A.M.A., *Guides* or *The Guides Newsletter*, appellant has not submitted medical evidence supporting that she sustained permanent impairment due to her accepted employment injury, and thus has not met her burden of proof.²⁰

In light of the deficiencies in Dr. Parikh's reports, OWCP properly routed his findings to the DMA, Dr. Harris.²¹ Dr. Harris properly applied *The Guides Newsletter* to Dr. Parikh's findings in concluding that appellant had no permanent impairment of the lower extremities. He explained that appellant had no neurologic deficit consistent with radiculopathy in accordance with *The Guides Newsletter*. Appellant has submitted no medical evidence in conformance with the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter*, addressing whether she has employment-

¹⁸ *Supra* note 10.

¹⁹ *See B.V.*, Docket No. 17-0656 (issued March 13, 2018).

²⁰ *See P.L.*, Docket No. 13-1592 (issued January 7, 2014).

²¹ OWCP's 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 impairment specified. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017). *See J.J.*, Docket 18-1615 (issued March 5, 2019).

related permanent impairment of a scheduled member or function of the body. Thus, the Board finds that the medical evidence of record is insufficient to establish permanent impairment of a scheduled member or function of the body causally related to the accepted employment conditions. Consequently, appellant has not met her burden of proof.

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 July 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 25, 2019
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