

ISSUE

The issue is whether appellant has met his burden of proof to establish a permanent impairment of his left lower extremity causally related to his accepted employment injury, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances of this case as presented in the prior appeal are incorporated herein by reference.³ The relevant facts are as follows.

On October 10, 2010 appellant, then a 57-year-old transportation security officer (screener), filed a traumatic injury claim (Form CA-1) alleging that he injured his lower back when lifting a bag while in the performance of duty. He stopped work on October 19, 2010 and returned to limited-duty work on October 24, 2010. OWCP assigned OWCP File No. xxxxxx049 and accepted the claim for a lumbar sprain.⁴

On December 20, 2016 Dr. Polly Fraga, a Board-certified internist, indicated that appellant had reached maximum medical improvement (MMI) as of that day.

In a report dated January 12, 2017, Dr. Joseph B. Fitzgerald, a Board-certified orthopedic surgeon, based upon a review of medical evidence and physical examination, diagnosed L4 lumbar radiculopathy, L4 herniated disc, and lumbar spondylosis. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ he determined that appellant had 11 percent left lower extremity permanent impairment for motor and sensory deficits. In reaching this determination, Dr. Fitzgerald assigned a class 1 for L4 with a default impairment of three percent for mild sensory deficits and five percent for mild motor deficits. Next, he applied grade modifiers of two for functional history and one for physical examination, resulting in a net adjustment to grade D or four percent left lower extremity permanent impairment for L4 mild sensory loss and seven percent left lower extremity permanent impairment for L4 mild motor deficit or 11 percent left lower extremity permanent impairment.

On January 22, 2017 appellant filed a claim for a schedule award (Form CA-7).

By development letter dated April 13, 2017, OWCP informed appellant that additional evidence was necessary to establish his schedule award claim. Specifically it advised him that Dr. Fitzgerald's impairment rating was insufficient to support his claim as the impairment rating was based on medical conditions not accepted by OWCP. OWCP afforded appellant 30 days to

³ Docket No. 14-1450 (issued September 11, 2015).

⁴ Appellant subsequently filed another claim for traumatic injury on August 14, 2012, alleging back, neck and hernia conditions. OWCP assigned that claim File No. xxxxxx985, which it denied. It remains in closed status. OWCP combined OWCP File Nos. xxxxxx049 and xxxxxx985 on December 23, 2013, with OWCP File No. xxxxxx049 listed as the master file.

⁵ A.M.A., *Guides* (6th ed. 2009).

submit evidence of a permanent impairment causally related to the accepted condition of lumbar sprain.

In response to OWCP's request, appellant submitted an October 19, 2010 progress note signed by Gail Spellman, a nurse practitioner, and magnetic resonance imaging (MRI) scans dated March 5, 2011 and November 4, 2012. He also submitted an April 28, 2017 letter from Dr. Fraga, in which she noted that appellant had experienced back pain and symptoms since October 19, 2010.

By decision dated September 19, 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 due to the accepted employment injury.

On September 26, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The hearing was held on March 7, 2018. Counsel noted during the hearing that appellant's lumbar conditions were either preexisting or aggravated by the employment injury.

By decision dated April 16, 2018, OWCP's hearing representative affirmed the denial of appellant's schedule award claim.

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ and its implementing regulations⁷ 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 to all claimants, good administrative practice necessitates 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 the implementing regulations as the appropriate standard for evaluating schedule losses.⁸ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁹ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

impairments of the body are to be included.¹⁰ A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.¹¹

A schedule award is not payable for a member, function, or organ of the body not specified in FECA or in the implementing regulations.¹² As neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.¹³ However, as FECA makes provision for the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.¹⁴

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.¹⁵ 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.¹⁶ 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.¹⁷

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his left lower extremity causally related to his accepted employment injury, warranting a schedule award.

In his January 12, 2017 report, Dr. Fitzgerald rated appellant's left lower extremity based the diagnoses of L4 lumbar radiculopathy, L4 herniated disc, and lumbar spondylosis. A schedule

¹⁰ *J.H.*, Docket No. 17-1916 (issued January 19, 2019); see *Raymond E. Gwynn*, 25 ECAB 247 (1983); Federal (FECA) Procedure Manual, *supra* note 9 at *Schedule Awards*, Chapter 3.700.3(a)(3) (January 2010). This portion of OWCP's procedures provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

¹¹ See *A.L.*, Docket No. 08-1730 (issued March 16, 2009); *Marilyn S. Freeland*, 57 ECAB 607 (2006); *Gordon G. McNeill*, 42 ECAB 140 (1990).

¹² See *Tania R. Keka*, 55 ECAB 354 (2004).

¹³ See *id.*; FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

¹⁴ See *J.H.*, *supra* note 10; *George E. Williams*, 44 ECAB 530 (1993).

¹⁵ See *G.N.*, Docket No. 10-0850 (issued November 12, 2010); see also *supra* note 9 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁶ *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

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

award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.¹⁸ Dr. Fitzgerald did not offer rationalized medical opinion which established that these diagnoses were causally related to the accepted employment injury, appellant is not entitled to a schedule award for permanent impairment of the left lower extremity arising from these diagnoses.¹⁹ The Board also finds that Dr. Fitzgerald did not specifically identify any lower extremity impairment due to appellant's accepted lumbar sprain. Dr. Fitzgerald did not indicate that the work-related injury had affected any residual usefulness, in whole or in part, of the left lower extremity.²⁰

While counsel has also contended that OWCP should have considered Dr. Fitzgerald's diagnosed conditions to be preexisting and therefore included in a permanent impairment evaluation, the Board has explained that a preexisting, underlying condition should be considered when determining entitlement to a schedule award, but only to the extent that the work-related injury has affected any residual usefulness in whole or in part of the scheduled member.²¹ Since appellant has not established that the accepted condition of lumbar sprain caused a permanent impairment of a scheduled member, appellant is not entitled to a schedule award based solely on any preexisting conditions.

The remaining medical evidence is insufficient to support appellant's claim. Dr. Fraga's December 20, 2016 note and April 28, 2017 letter do not address whether appellant had any permanent impairment of his left lower extremity. Evidence which does not address the issue of permanent impairment is irrelevant in a schedule award claim.²² Ms. Spellman's October 19, 2010 progress notes are not relevant as they do not constitute competent medical evidence as a nurse practitioner is not a physician under FECA.²³

Appellant has submitted no medical evidence in conformance with the sixth edition of the A.M.A., *Guides*, or *The Guides Newsletter* establishing that he has permanent impairment of a scheduled member or function of the body due to his accepted lumbar sprain condition. Consequently, appellant has not established entitlement to a schedule award.

¹⁸ *Veronica Williams*, 56 ECAB 367 (2005).

¹⁹ *See G.F.*, Docket No. 16-0997 (issued November 15, 2016).

²⁰ *Supra* note 9 at Chapter 2.808.7(a)(1); 20 C.F.R. § 10.404(c).

²¹ *See G.R.*, Docket No. 18-0735 (issued November 15, 2018).

²² *See P.D.*, Docket No. 17-1565 (issued February 21, 2018); *J.D.*, Docket No. 17-0767 (issued November 28, 2017).

²³ *See J.M.*, Docket No. 17-1603 (issued April 10, 2018); *G.A.*, Docket No. 09-2153 (issued June 10, 2010). Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2).

Appellant may request a schedule award or an increased schedule award at any time based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his left lower extremity causally related to his accepted employment injury, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 2019
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