

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

J.J., Appellant

and

**DEPARTMENT OF JUSTICE, EXECUTIVE
OFFICE FOR IMMIGRATION REVIEW,
Irving, TX, Employer**

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**Docket No. 18-1615
Issued: March 5, 2019**

Appearances:

Debra Hauser, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 22, 2018 appellant, through counsel, filed a timely appeal from an April 19, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

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.

FACTUAL HISTORY

On September 28, 2014 appellant, then a 48-year-old legal assistant, filed an occupational disease claim (Form CA-2) alleging that she developed hip pain, pelvic pain, muscle fatigue, and weakness as a result of performing her daily duties of pushing and pulling volumes of court cases in excess of 150 files for weekly court proceedings and pushing a cart in excess of 50 pounds.

Appellant was treated by Dr. Ho Bing Patrick Oei, a Board-certified rheumatologist, on August 8 and September 18, 2014, who noted that appellant had a history of unspecified connective tissue disease characterized by muscle weakness, positive antinuclear antibodies (ANA), persistently elevated creatine phosphokinase (CPK), osteoarthritis of the left hip, degenerative spine disease of the cervical and lumbar spine, and fibromyalgia. Dr. Oei diagnosed unspecified diffuse connective tissue disease, fibromyalgia, myalgia, paresthesia, and hyperesthesia. He opined that, although appellant had preexisting conditions of unspecified connective tissue disease, osteoarthritis of the spine and hip, and fibromyalgia, her conditions were exacerbated due to the stressful nature of her job. Dr. Oei opined that the impact of performing her duties as a legal assistant caused an aggravation and exacerbation of unspecified connective tissue disease, degenerative spine disease, osteoarthritis of her hip, and fibromyalgia.

By decision dated January 20, 2016, OWCP accepted appellant's claim for the conditions of aggravation of systemic involvement of connective tissue, unspecified.

On March 1, 2017 appellant filed a claim for a schedule award (Form CA-7). She submitted a January 18, 2017 report from Dr. Helsten who noted her history of a work-related condition and reviewed the medical record. Dr. Helsten noted examination findings of severe distress with a pain level of 8 on a scale of 1 to 10, severe tenderness throughout her neck and upper back, severe tenderness to the lumbar spine, normal sensation in the fingers of both hands, weak grip in both hands bilaterally, normal ambulation, and severe tenderness to her right elbow, and bilateral wrists, hips, and knees. He diagnosed aggravation of connective tissue disease. Dr. Helsten noted that appellant reached maximum medical improvement on January 18, 2017. He noted the Pain Disability Questionnaire (PDQ) score was 95. Dr. Helsten rated appellant's condition using the pain-related impairment system referenced in Chapter 3 of the American Medical Association, *Guides to the Evaluation of Permanent* (A.M.A., *Guides*).³ He noted that appellant had diffuse pain throughout her neck, back, and all four extremities. Dr. Helsten noted that appellant's PDQ score of 95 would provide for a one percent whole person impairment pursuant to the A.M.A., *Guides*, however, because multiple areas were involved he assigned three percent whole person impairment based on chronic ongoing severe pain.

³ A.M.A., *Guides* (6th ed. 2009).

In a March 25, 2017 report, an OWCP district medical adviser (DMA) opined that appellant had not sustained an impairment due to the accepted condition. He indicated that Dr. Helsten rated appellant for chronic pain using the pain chapter which was not allowed by OWCP. The DMA noted that appellant had diffuse pain with no objective end organ damage. He indicated that Dr. Oei diagnosed fibromyalgia. The DMA referenced the pain chapter of the A.M.A., *Guides* on page 36, which provides “some conditions are associated with severe pain, but are not amenable to conventional impairment ratings because they are not associated with unequivocal objective factors. In these conditions, it is not possible to make impairment ratings on the basis of objective factors. Common examples include headache disorders and fibromyalgia.” The DMA further noted that page 447 of the A.M.A., *Guides* provides that, although there are real symptoms in fibromyalgia syndrome, these conditions do not typically rise to the level of ratable impairment. Therefore, he noted that there was no impairment for fibromyalgia as it was “not possible to make impairment ratings on the basis of objective factors.” With regard to the unspecified connective tissue disease, Dr. Helsten noted generalized weakness, positive ANA, and persistently elevated CPK, but noted that these were nonspecific findings and there was no specific objective anatomical basis upon which to rate appellant. With regard to the neck and upper back, Dr. Oei’s August 8, 2014 report noted x-rays on May 9, 2014 revealed degenerative cervical spine disease at C5-6 and C6-7, with no evidence of upper extremity sensory or motor deficits related to the cervical spine and upper back. With regard to myositis, he found no objective evidence of myositis on muscle biopsy, as such there would be no basis for an impairment for this condition as there is no objective anatomical deficits related to the condition.

By decision dated May 5, 2017, OWCP denied appellant’s claim for a schedule award.

On February 20, 2018 appellant, through counsel, requested reconsideration. In a report dated May 17, 2017, Dr. Helsten explained that Chapter 3 of the A.M.A., *Guides* provided for a rating of permanent impairment due to chronic pain if there is no specific diagnosis elsewhere in the A.M.A., *Guides*. Specifically, he noted the A.M.A., *Guides* recommend using the PDQ in which appellant scored 95. Dr. Helsten indicated that the statutory provision provided impairment ratings due to pain.

In a March 28, 2018 report, a DMA reviewed Dr. Helsten’s May 17, 2017 report. He noted that Dr. Helsten had failed to provide valid range of motion measurements pursuant to the criteria in the A.M.A., *Guides*. The medical adviser referenced FECA Bulletin No. 09-03 (March 15, 2009), Pain, which provided for a maximum of three percent impairment rating for nonspecific pain that cannot be attributed to a condition addressed elsewhere in the A.M.A., *Guides*. With regard to the diagnosed fibromyalgia, he noted findings of diffuse pain with no objective end organ damage. The DMA advised that there was no impairment for fibromyalgia as it was not possible to make impairment ratings on the basis of objective factors. He further noted that subjective concerns (fatigue, difficulty concentrating, pain) if not accompanied by clinical signs are generally not given separate impairment ratings. The DMA indicated that Dr. Helsten rated appellant for chronic pain related to nonobjective conditions. Dr. Helsten determined a PDQ score of 95, noting that pursuant to Table 3-1, page 40, this would equate to one percent whole person impairment and because multiple areas were involved he assigned three percent whole person impairment. The DMA noted that this rating was inconsistent with the A.M.A., *Guides* and therefore he found no basis upon which to assign a rating of permanent impairment.

By decision dated April 19, 2018, OWCP denied modification of the May 5, 2017 decision.

LEGAL PRECEDENT

The schedule award provisions 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. 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.⁶ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁷

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 impairments of the body are to be included.⁸ A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.⁹ A schedule award is also not payable for a member, function, or organ of the body not specified in FECA or in the implementing regulations.¹⁰

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.¹¹

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, warranting a schedule award.

⁴ *Id.* at § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ *Id.* at Chapter 3.700.3(a)(3) (January 2010). *See also* Raymond E. Gwynn, 35 ECAB 247, 253 (1983).

⁹ *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

¹⁰ *See Tania R. Keka*, 55 ECAB 354 (2004).

¹¹ *See supra* note 7 at Chapter 2.808.6(f) (February 2013); *see also* Tommy R. Martin, 56 ECAB 273 (2005). .

OWCP accepted that appellant developed an aggravation of systemic involvement of connective tissue due to her employment duties. On March 1, 2017 appellant filed a claim for a schedule award.

In support of her claim appellant submitted reports by Dr. Helsten which provided ratings of permanent impairment. The Board has reviewed Dr. Helsten's reports dated January 18 and May 17, 2017, and finds that Dr. Helsten has not adequately explained how his opinion as to the extent of permanent impairment was reached in accordance with the relevant standards of the A.M.A., *Guides*.¹² In his reports, Dr. Helsten rated appellant's condition using the pain-related impairment system referenced in Chapter 3 of the A.M.A., *Guides*. He noted that appellant had diffuse pain throughout her neck, back, and all four extremities. Dr. Helsten noted that appellant's PDQ score of 95 would provide for a one percent whole person impairment pursuant to the A.M.A., *Guides*, however, because multiple areas were involved he assigned three percent whole person impairment based on chronic ongoing severe pain. However, his findings were nonspecific and there was no objective anatomical basis upon which to rate appellant. Therefore, the Board finds that Dr. Helsten did not properly follow the A.M.A., *Guides*. An attending physician's report is of little probative value when the A.M.A., *Guides* were not properly followed.¹³ Therefore the reports of Dr. Helsten are insufficient to establish appellant's claim for a schedule award.

The DMA properly utilized the findings in Dr. Helsten's January 18 and May 17, 2017 reports, and correlated them to specific provisions in the A.M.A., *Guides*. He noted that appellant had diffuse pain with no objective end organ damage. The DMA indicated that appellant had been diagnosed with fibromyalgia, but page 36 of the A.M.A., *Guides*, provides that some conditions, such as fibromyalgia, are associated with severe pain are not amenable to conventional impairment ratings because they are not associated with unequivocal objective factors. In these conditions, it is not possible to make impairment ratings on the basis of objective factors. The DMA further noted that page 447 of the A.M.A., *Guides* provides that, although there are real symptoms in fibromyalgia syndrome, these conditions do not typically rise to the level of ratable impairment. Therefore, he noted that there was no impairment for fibromyalgia absent objective factors.

Appellant has submitted no medical evidence in conformance with the sixth edition of the A.M.A., *Guides*, addressing whether she has employment-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 conditions. Consequently, appellant has not met her burden of proof.

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.

¹² See *Tonya R. Bell*, 43 ECAB 845, 849 (1992).

¹³ See *Paul R. Evans, Jr.*, 44 ECAB 646 (1993); *John Constantin*, 39 ECAB 1090 (1988) (medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value).

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 April 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 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