

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

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C.D., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS HEALTH ADMINISTRATION, )  
Lyons, NJ, Employer )

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**Docket No. 18-0677**  
**Issued: November 4, 2019**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 9, 2018 appellant, through counsel, filed a timely appeal from a November 29, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant met her burden of proof to establish ratable permanent impairment of a scheduled member or function of the body.

## FACTUAL HISTORY

This case was previously before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 19, 2009 appellant, then a 32-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that she sustained a cervical injury on May 18, 2009 when repositioning a patient in bed while in the performance of duty. By decision dated June 10, 2009, OWCP accepted the claim for extruded cervical disc at C6-7 and authorized an anterior cervical decompression and fusion at C6-7, which appellant underwent on July 8, 2009. It paid her wage-loss compensation on the periodic rolls effective August 30, 2009 who then returned to full-time, full-duty work on November 15, 2009.

On August 8, 2013 appellant, through counsel, filed a claim for a schedule award (Form CA-7).

In a May 6, 2013 report, Dr. David Weiss, a Board-certified orthopedic surgeon, diagnosed chronic post-traumatic cervical strain and sprain, herniated cervical discs at C4-5 and C6-7, bulging cervical discs at C3-6, status post cervical discectomy at C6-7, and left-sided cervical radiculopathy. He opined that appellant had reached maximum medical improvement (MMI) on May 6, 2013, the date of the examination. Dr. Weiss opined that she had 16 percent permanent impairment to the left upper extremity based on the class of diagnosis (CDX) of 1 of mild motor strength deficit of the left bicep, severe sensory deficit of the left C7 nerve root, and severe sensory deficit of the left C8 nerve root pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>4</sup>

On August 23, 2013 Dr. Morley Slutsky, a Board-certified occupational medicine specialist serving as a district medical adviser (DMA), reviewed the medical evidence and recommended a second opinion examination to determine the nature and extent of appellant's employment-related conditions and provide a permanent impairment rating according to *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*).

OWCP referred appellant to Dr. Lawrence G. Splitter, a Board-certified occupational medicine specialist, for a second opinion examination to determine the nature and extent of her permanent impairment. In his February 16, 2015 report, Dr. Splitter reviewed a statement of accepted facts, appellant's medical history and the medical evidence of record. He conducted a physical examination and provided his findings, diagnosing status post anterior cervical surgery

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<sup>3</sup> Docket No. 16-1489 (issued April 12, 2017).

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

and nonverifiable left upper extremity radicular complaints. Dr. Splitter advised that “[b]efore assigning an impairment, [he] would recommend an updated electrodiagnostic study to verify any nerve root involvement.”

OWCP subsequently obtained the recommended electrodiagnostic testing. In a report dated June 29, 2015, Dr. Donald A. Stone, a Board-certified neurologist, found that electromyogram and nerve conduction velocity (EMG/NCV) studies dated June 29, 2015 were normal and revealed no evidence of left cervical radiculopathy, median or ulnar neuropathy, or generalized polyneuropathy involving the left upper extremity.

In a supplemental report dated August 4, 2015, Dr. Splitter reviewed the June 29, 2015 EMG/NCV studies and found no evidence of radiculopathy or entrapment neuropathy. He concluded that given the results of the diagnostic studies and physical examination there was no permanent impairment of the left upper extremity secondary to the cervical spine.

On October 23, 2015 the DMA reviewed the medical evidence, including Dr. Splitter’s second opinion examination report, and found no basis for a left upper extremity impairment rating utilizing *The Guides Newsletter*. He determined that appellant had reached MMI on February 16, 2015, the date of the impairment examination performed by Dr. Splitter.

By decision dated October 26, 2015, OWCP denied appellant’s schedule award claim.

On November 4, 2015 appellant, through counsel, requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review.

By decision dated March 30, 2016, OWCP’s hearing representative affirmed the October 26, 2015 schedule award denial. Appellant, through counsel, filed an appeal to the Board.

By decision dated April 12, 2017, the Board affirmed OWCP’s March 30, 2016 decision denying appellant’s schedule award claim. The Board found that the medical evidence of record failed to establish a ratable permanent impairment due to her accepted cervical condition.

On September 12, 2017 appellant, through counsel, requested reconsideration and submitted to OWCP an August 28, 2017 report from Dr. Weiss. In the report Dr. Weiss indicated that he had reviewed the DMA’s October 23, 2015 report, reviewed his own report dated May 6, 2013, and opined that the DMA relied upon Dr. Splitter’s report finding of no dermatomal disturbances. He indicated, however, that Dr. Splitter’s second opinion report was not made available for his review and he was uncertain as to how the sensory examination had been performed. Dr. Weiss reiterated the findings and opinions from his May 6, 2013 report and concluded that he stood by his prior impairment rating of 16 percent permanent impairment of the left upper extremity.

By decision dated November 29, 2017, OWCP denied modification of its prior decision.

## LEGAL PRECEDENT

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

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.<sup>9</sup> Furthermore, the back is specifically excluded from the definition of organ under FECA.<sup>10</sup> 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 Guides Newsletter* is to be applied.<sup>11</sup> 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.<sup>12</sup>

The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.<sup>13</sup>

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> *Id.* at § 10.404(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>9</sup> *See L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>10</sup> *See* 5 U.S.C. § 8101(19); *see also G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

<sup>11</sup> *Supra* note 8 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>12</sup> *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

<sup>13</sup> *See G.S.*, *supra* note 10; *Veronica Williams*, 56 ECAB 367 (2005).

## ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a ratable permanent impairment of a scheduled member or function of the body.

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's March 30, 2016 decision because the Board considered that evidence in its April 12, 2017 decision and found that it was insufficient to establish the claim for a schedule award. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>14</sup>

In support of her request for reconsideration, appellant submitted an August 28, 2017 report from Dr. Weiss who merely reiterated the findings and opinions from his May 6, 2013 report and concluded that he stood by his prior impairment rating of 16 percent permanent impairment of the left upper extremity. The Board finds that Dr. Weiss' August 28, 2017 report is cumulative and repetitive of his May 6, 2013 report. The Board has previously found that he based his permanent impairment rating on diagnoses of mild motor strength deficit of the left bicep, severe sensory deficit of the left C7 nerve root, and severe sensory deficit of the left C8 nerve root, none of which have been accepted as compensable by OWCP. Appellant has not submitted new medical evidence from Dr. Weiss, based upon current medical findings, which provides an opinion as to causal relationship not already considered and rejected by the Board.

Appellant has submitted no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides*, or *The Guides Newsletter*, addressing the nature and extent of her permanent impairment of a scheduled member or function of the body. The Board therefore finds that she has not met her burden of proof to establish a ratable permanent impairment of a member or function of the body.

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 a ratable permanent impairment of a scheduled member or function of the body

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<sup>14</sup> See *B.R.*, Docket No. 17-0294 (issued May 11, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 29, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2019  
Washington, DC

Christopher J. Godfrey, 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