

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

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| K.F., Appellant |) | |
| |) | |
| and |) | Docket No. 18-1517 |
| |) | Issued: October 9, 2019 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Swansea, MA, Employer |) | |
| |) | |

Appearances: *Case Submitted on the Record*
Edwin T. Scanlon, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 23, 2018 appellant, through counsel, filed a timely appeal from a January 30, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated August 9, 2019, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 18-1517 (issued August 8, 2019).

Federal Employee' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

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

This case has previously been before the Board.⁵ 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 June 28, 1995 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her right shoulder and back when exiting her vehicle while in the performance of duty. She stopped work on June 28, 1995 and returned to regular duty on July 3, 1995. OWCP accepted the claim for right shoulder strain and muscle strain of the neck on September 10, 1999.

On June 20, 2007 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated May 4, 2009, OWCP requested that appellant provide an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶ It afforded her 30 days to submit the requested information.

In response, appellant submitted a June 2, 2009 report from Dr. Tejaswini Shah, Board-certified in physical medicine and rehabilitation. Dr. Shah diagnosed cervical radiculopathy, left carpal tunnel syndrome, ulnar nerve dysfunction at the left elbow, and headache. She opined that these conditions were a direct result of the June 28, 1995 injury, and that appellant no longer could perform her duties as a letter carrier.

In a September 2, 2009 letter, OWCP requested that Dr. Shah provide a permanent impairment rating of appellant's right upper extremity due to appellant's accepted employment-related conditions, using the sixth edition of the A.M.A., *Guides*.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence on appeal. 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.*

⁵ Docket No. 08-2389 (issued April 8, 2009).

⁶ A.M.A., *Guides* (6th ed. 2009).

In response, Dr. Shah submitted a September 16, 2009 report repeating the findings from her June 2, 2009 report.

On March 2, 2010 OWCP again asked Dr. Shah to provide an impairment rating using the sixth edition of the A.M.A., *Guides*. No response was received.

By letter dated January 31, 2014, OWCP advised appellant that current medical evidence was needed to establish her schedule award claim. It again requested that she obtain an impairment rating from a treating physician which addressed the date of maximum medical improvement and provided a detailed description of permanent impairment due to the accepted conditions utilizing the sixth edition of the A.M.A., *Guides*.

In a February 20, 2014 memorandum of telephone call, counsel explained that appellant was unable to obtain an impairment rating from a physician. Subsequently, OWCP was informed that appellant would obtain an impairment rating and therefore an extension of time was granted.

In an April 23, 2014 memorandum of telephone call, counsel indicated that appellant could not find a provider who would accept workers' compensation claimants. OWCP explained that it could not provide guidance in selecting a physician, but a second opinion examination could be scheduled.

A May 7, 2014 memorandum of telephone call indicated that appellant was unable to find a physician and requested that OWCP schedule a second opinion examination. OWCP indicated that it would notify her when the second opinion was scheduled.

By decision dated June 28, 2017, OWCP denied appellant's schedule award claim, finding that appellant had not submitted medical evidence to establish a permanent impairment of a scheduled member or function of the body, due to her accepted employment injury, which supported a schedule award. It indicated that she requested that OWCP arrange a second opinion examination to obtain a rating, however, they did not receive any reports containing medical information requested.

OWCP thereafter received an April 27, 2011 report from Dr. Randall Updegrove, Board-certified in occupational medicine, who opined that appellant could not perform the full duties of a postal worker due to cervical herniated discs, carpal tunnel syndrome, and ulnar dysfunction.

In a letter dated July 14, 2017, counsel submitted arguments related to appellant's accepted conditions. He noted that the Office of Personnel Management found that she was disabled due to herniated discs, carpal tunnel syndrome, and ulnar dysfunction. Counsel explained that Dr. Shah declined to provide an impairment rating, despite being furnished with a copy of the A.M.A., *Guides*. He also noted that Dr. Updegrove declined to provide an impairment rating. Counsel argued that appellant was unable to locate a physician to render an impairment rating and requested OWCP's assistance.

On July 21, 2017 appellant requested an oral hearing before an OWCP hearing representative, which was held on November 20, 2017. She testified that she was unable to obtain a permanent impairment rating and requested OWCP's assistance to schedule a permanent impairment evaluation.

Following the hearing, appellant submitted a report dated November 10, 2017 from Dr. Joseph Russo, a Board-certified plastic surgeon. Dr. Russo diagnosed left ulnar nerve dysfunction; cervical disc herniation; cervical disc degeneration at C4-5, C5-6, and C6-7; osteophyte of vertebrae; and right shoulder impingement syndrome. He opined that appellant's ulnar nerve dysfunction, right shoulder pain, cervical spine degeneration, and bulging and herniated cervical discs were caused by her job as a mail carrier.

By decision dated January 30, 2018, OWCP's hearing representative affirmed the June 28, 2017 decision. She found that appellant had not submitted medical evidence from a physician as to permanent impairment, if any.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁷ and its implementing federal regulations,⁸ 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.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰

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.¹¹ Before the A.M.A., *Guides* can be utilized a description of 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.¹²

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

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at § 10.404(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹¹ *See I.T.*, Docket No. 18-1049 (issued December 31, 2018).

¹² *A.T.*, Docket No. 18-0864 (issued October 9, 2018).

the impairment rating was calculated.”¹³ 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.”¹⁴

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.

OWCP accepted appellant’s claim for right shoulder strain and muscle strain of the neck as a result of her June 28, 1995 employment injury. On June 20, 2007 appellant filed a claim for a schedule award.

On multiple occasions OWCP requested that appellant submit a report from her treating physician, which provided a rating of her permanent impairment, resulting from her accepted employment-related conditions, utilizing the sixth edition of the A.M.A., *Guides*.

In response, appellant submitted a June 2, 2009 report from Dr. Shah, an April 27, 2011 report from Dr. Updegrave, and a November 10, 2017 report from Dr. Russo. However, these physicians did not address the issue of whether appellant had a permanent impairment due to the accepted conditions.

As noted, appellant must submit an evaluation from a physician that includes a description of impairment 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 She has failed to submit medical evidence supporting permanent impairment due to her accepted employment injury and thus, she has not met her burden of proof.¹⁶

Although counsel continues to assert that OWCP should have developed the medical evidence and scheduled a second opinion examination, the decision to refer a case for a second opinion examination rests wholly with an OWCP claims examiner.¹⁷

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.

¹³ *Supra* note 10 at Chapter 2.808.6(a) (March 2017).

¹⁴ *Id.* at Chapter 2.808.6(c).

¹⁵ *See B.V.*, Docket No. 17-0656 (issued March 13, 2018).

¹⁶ *See P.L.*, Docket No. 13-1592 (issued January 7, 2014).

¹⁷ *See supra* note 10 at Chapter 3.500.3(a) (June 2015).

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 January 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board