

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

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| _____                                    | ) |                                 |
| <b>W.C., Appellant</b>                   | ) |                                 |
|  | ) |                                 |
| <b>and</b>                               | ) | <b>Docket No. 19-1117</b>       |
|  | ) | <b>Issued: October 21, 2019</b> |
| <b>U.S. POSTAL SERVICE, POST OFFICE,</b> | ) |                                 |
| <b>Hinesburg, VT, Employer</b>           | ) |                                 |
| _____                                    | ) |                                 |

*Appearances:* *Case Submitted on the Record*  
*Alan J. Shapiro, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

**DECISION AND ORDER**

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

**JURISDICTION**

On April 22, 2019 appellant, through counsel, filed a timely appeal from a March 26, 2019 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 has met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

## FACTUAL HISTORY

On June 17, 2010 appellant, then a 66-year-old part-time flexible sales and service associate, filed an occupational disease claim (Form CA-2) alleging a right shoulder injury due to factors of his federal employment including sorting mail for four to six hours per day. OWCP accepted the claim for rotator cuff tear of the right shoulder. Appellant had stopped work on June 12, 2010 and OWCP paid him wage-loss compensation on the daily rolls effective June 17, 2010, and on the periodic rolls effective December 19, 2010.<sup>3</sup>

In December 2013 appellant returned to work as a part-time flexible sales and service associate and, by decision dated February 28, 2014, OWCP determined that his actual wages in this position fairly and reasonably reflected his wage-earning capacity.<sup>4</sup>

On February 23, 2016 appellant filed a claim for a schedule award (Form CA-7) due to his accepted employment injury.

In a March 9, 2016 development letter, OWCP requested that appellant submit a rating report from an attending physician addressing whether he had permanent impairment of his right upper extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup> It afforded him 30 days to submit the requested evidence. Appellant did not submit a rating report within the allotted period.

By decision dated June 6, 2017, OWCP denied appellant's schedule award claim. It noted that he had not submitted a rating report as requested and found that the medical evidence of file failed to demonstrate a measurable permanent impairment. OWCP indicated that appellant's claim was "denied because the requirements have not been met for entitlement to a schedule award."<sup>6</sup>

On January 2, 2018 appellant filed another claim for a schedule award (Form CA-7) due to his accepted employment injury.

In a January 11, 2018 development letter, OWCP requested that appellant submit an impairment rating report from an attending physician addressing whether he had permanent impairment of his right upper extremity under the standards of the sixth edition of the A.M.A.,

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<sup>3</sup> On July 30, 2010 appellant underwent OWCP-authorized arthroscopic debridement of his right rotator cuff.

<sup>4</sup> The Board notes that the case record does not contain medical evidence produced after late-2013.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>6</sup> On June 15, 2017 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. Counsel later withdrew the hearing request on behalf of appellant.

*Guides*. It afforded him 30 days to submit the requested evidence. Appellant did not submit a rating report within the allotted period.

By decision dated August 10, 2018, 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.

On August 16, 2018 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing, held on January 14, 2019, OWCP's hearing representative granted counsel's request to keep the record open for 30 days in order to provide appellant an opportunity to obtain and submit a permanent impairment rating report. Appellant did not submit such a report after the hearing.

By decision dated March 26, 2019, OWCP's hearing representative denied modification of the August 10, 2018 decision.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>7</sup> and its implementing regulation<sup>8</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 to all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>9</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>10</sup>

### **ANALYSIS**

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

OWCP afforded appellant the opportunity to submit a rating report evaluating permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.<sup>11</sup> However, appellant did not submit such medical evidence. The Board finds that that the evidence in the case file does not support granting appellant a schedule award for permanent impairment. Appellant has not met his burden of proof.

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<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> *Id.* See also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

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

<sup>11</sup> See *supra* notes 9 and 10.

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 his 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 March 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 21, 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