

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

_____)
R.P., Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Orlando, FL,)
Employer)
_____)

**Docket No. 19-1118
Issued: October 25, 2019**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 22, 2019 appellant, through counsel, filed a timely appeal from a March 27, 2019 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.³

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.*

³ The Board notes that following the March 27, 2019 decision, OWCP received additional evidence. 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.*

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 23, 2017 appellant, then a 55-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured both her right knee and middle to lower back that same date while in the performance of duty. She explained that she had adjusted the height of her stool and when she went to sit on it, the stool fell down. OWCP accepted appellant's claim for cervical sprain, lower back strain, and right knee sprain.

On August 8, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a July 12, 2018 report Dr. Matthew D. Imfield, a Board-certified physiatrist, performed an examination of appellant's lower extremities noting symmetric manual muscle testing, symmetric sensation, symmetric reflexes, and a negative straight leg raising test. An electromyogram (EMG) demonstrated results consistent with bilateral S1 radiculopathy with no acute changes. Dr. Imfield noted that the findings were consistent with an old injury or stenosis. The EMG also demonstrated no evidence for peripheral neuropathy; findings consistent with compression of the lateral popliteal neuropathy at the left fibular head; or findings consistent with bilateral compression of the medial plantar, lateral plantar, and Baxter's nerve.

On July 19, 2018 Dr. David P. Kalin, a Board-certified family practitioner, indicated that he had utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ and determined that appellant's bilateral lumbar radiculopathy had resulted in five percent whole-body permanent impairment. He opined that appellant had reached maximum medical improvement (MMI) on July 19, 2018. Dr. Kalin noted that appellant had multiple preexisting morbidities, which had caused impairment. On examination he noted "full range of motion with minimal guarding" of the bilateral shoulders and all other extremities were within normal limits; a vertical postsurgical incision over the right knee; and diminished sensation circumferentially around the right knee, which was otherwise normal. Dr. Kalin diagnosed chronic cervical musculoskeletal ligamentous strain with multilevel mild degenerative spondylosis with facet arthropathy and postoperative changes following anterior cervical discectomy and fusion of C5-6 without evidence of hardware complication; mild right-sided neural foraminal stenosis; a history of post-traumatic bilateral lumbar radiculopathy; chronic cervicothoracic musculoskeletal ligamentous strain; a history of post-traumatic pain and "limited range of motion" with the bilateral shoulders; status post right knee replacement on April 14, 2016; history of cervicothoracic and thoracolumbar levoscoliosis; and status post left foot surgery for flat feet.

On September 10, 2018 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed Dr. Kalin's July 19, 2018 report, the medical evidence of record, and a statement of accepted facts (SOAF). He found that Dr. Kalin's impairment evaluation could not be considered probative for schedule award purposes under FECA, because he referenced no tables and provided no worksheets, narrative, or calculations to

⁴ A.M.A., *Guides* (6th ed. 2009).

explain the method by which he arrived at his determination. The DMA further noted that FECA did not allow a schedule award for the spine, nor did it recognize whole person impairment. Referring to Dr. Kalin's findings on physical examination on July 19, 2018, as well as Dr. Imfield's findings on July 12, 2018, he rendered impairment evaluations of the right and left lower extremities utilizing *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*). The DMA noted that Dr. Kalin had described strength within normal limits and diminished sensation around the right knee that was otherwise normal, which was consistent with a total knee replacement, but not spinal nerve dermatomal loss. Using Proposed Table Two for spinal nerve impairment resulting in lower extremity impairment, he noted no motor deficit for spinal nerves L3-5 and S1, resulting in a class 0 impairment for both lower extremities with a default value of zero and no net adjustment. As such, the DMA calculated zero percent impairment of the right and left lower extremities.

By decision dated October 1, 2018, OWCP denied appellant's schedule award claim finding that she had not met her burden of proof to establish, through the medical evidence of record, permanent impairment of a scheduled member or function of the body.

On October 9, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

In a follow-up report dated November 28, 2018, Dr. Kalin requested a diagnosis update for lumbosacral strain and lumbar radiculopathy, noting that Dr. Imfield had confirmed lumbar radiculopathy by EMG. On examination, he observed minimal swelling, full range of motion, and normal neurovascular status of the bilateral hands.

The hearing took place on January 25, 2019. During the hearing, counsel noted that Dr. Imfield's July 12, 2018 electrodiagnostic testing report had been submitted to the record. OWCP's hearing representative held the case record open for at least 30 days for the submission of additional evidence. No evidence was received.

By decision dated March 27, 2019, OWCP's hearing representative affirmed the October 1, 2018 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁵ and its implementing federal regulations,⁶ 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

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.⁹ Furthermore, the back is specifically excluded from the definition of organ under FECA.¹⁰ 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 impairment consistent with the 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.¹¹ The Board has recognized the adoption of this methodology for rating extremity impairment as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.¹²

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.¹³

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.

On July 12, 2018 Dr. Imfield conducted an electrodiagnostic consultation with regard to appellant's lower extremities. On examination he noted symmetric manual muscle testing, symmetric sensation, symmetric reflexes, and a negative straight leg raising test. An EMG demonstrated results consistent with bilateral S1 radiculopathy with no acute changes. Dr. Imfield noted that the findings were consistent with an old injury or stenosis.

In a report dated July 19, 2018, Dr. Kalin indicated that he had utilized the sixth edition of the A.M.A., *Guides* to determine that appellant's bilateral lumbar radiculopathy had resulted in five percent whole-body permanent impairment. He opined that appellant had reached MMI on July 19, 2018. In accordance with its procedures, OWCP properly referred the evidence of record to its DMA, Dr. Katz. Dr. Katz found, in a September 10, 2018 report, that the impairment

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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

¹⁰ *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).

¹¹ *Supra* note 9 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

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

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

evaluation of Dr. Kalin could not be considered probative for the purpose of recommending a schedule award under FECA because he referenced no tables and provided no worksheets, narrative, or calculations to explain the method by which he arrived at his determination. The DMA also correctly noted that FECA does not allow a schedule award for the spine, nor does it recognize whole person permanent impairment. Referring to Dr. Kalin's physical examination findings from the July 19, 2018 examination, as well as Dr. Imfield's findings from July 12, 2018, the DMA rendered impairment evaluations of the right and left lower extremities utilizing the A.M.A., *Guides* and *The Guides Newsletter*. Dr. Imfield noted that Dr. Kalin had described strength within normal limits and diminished sensation around the right knee that was otherwise normal, which was consistent with a total knee replacement, but not spinal nerve dermatomal loss. Using Proposed Table Two for spinal nerve impairment resulting in lower extremity impairment, he noted no motor deficit for spinal nerves L3-5 and S1, resulting in a class 0 impairment for both lower extremities with a default value of zero and no net adjustment. As such, the DMA calculated zero percent impairment of the right and left lower extremities.

The Board finds that the DMA applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* to the clinical findings of Drs. Kalin and Imfield. The DMA's calculations were mathematically accurate and there is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* demonstrating a percentage of permanent impairment. The Board finds that he explained that Dr. Kalin's rating was improperly based on whole person impairment and that he had not explained the method by which he arrived at his percentage of impairment, and that FECA does not allow a schedule award for the spine. The DMA further noted that clinical findings for the lower extremities had been normal, with diminished sensation around the right knee attributable to prior right knee replacement. The Board finds that the DMA properly determined that appellant had zero percent permanent impairment of the lower extremities.¹⁴

Appellant has submitted no other medical evidence in conformance with the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter*, establishing 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 her claim for a schedule award.

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 permanent impairment of a scheduled member or function of the body, warranting a schedule award.

¹⁴ *See id.*

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2019
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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