

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.⁴ 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 February 8, 2016 appellant, then a 56-year-old social insurance specialist, filed a traumatic injury claim (Form CA-1) alleging that on February 3, 2016 she was injured when she fell while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that appellant stopped work on February 4, 2016 and returned to work on February 10, 2016.⁵ OWCP accepted her claim for a lower back contusion, a lower back and pelvis contusion, and sacroiliac joint dysfunction. It paid appellant wage-loss compensation on the supplemental rolls for intermittent wage loss as of April 4, 2016.

On January 30, 2018 appellant underwent sacroiliac joint stabilization surgery. She resumed work in a full-time, limited-duty capacity on April 3, 2018.

A May 18, 2018 medical report by Dr. Mark Dumonski, a Board-certified orthopedic surgeon, indicated that appellant presented with improved left-side low back pain. Dr. Dumonski noted that appellant was 3.5 months postsurgery and was doing well. He noted that an x-ray of appellant's pelvis showed that her left sacroiliac joints were well positioned and adequately fused. Dr. Dumonski further noted that appellant still had pain with heavy lifting, and he listed work restrictions for appellant. He opined that appellant had reached maximum medical improvement (MMI) and that she had 10 percent permanent impairment due to her sacroiliac joint fusion.

On July 12, 2018 OWCP received various forms wherein Dr. Dumonski reiterated that appellant had reached MMI and that she had 10 percent permanent impairment of her sacroiliac joint.

On August 16, 2018 appellant filed a claim for a schedule award (Form CA-7). An August 16, 2018 letter from counsel indicated that Dr. Dumonski found that appellant reached MMI and had conducted an evaluation in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶

In a September 4, 2018 development letter addressed to Dr. Dumonski, OWCP noted appellant's accepted conditions and explained that schedule awards for the spine were not payable under FECA. However, it also noted that such awards could be paid for impairment of the upper or lower extremities caused by injury to a spinal nerve. OWCP requested that Dr. Dumonski submit a report containing an impairment rating rendered in accordance with the A.M.A., *Guides*,

⁴ Docket No. 19-1225 (issued December 17, 2019).

⁵ Appellant returned to work on a part-time (four hours), modified-duty basis.

⁶ A.M.A., *Guides* (6th ed. 2009).

and with reference to *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*).

An August 31, 2018 report by Dr. Dumonski indicated that appellant was seven months status post a sacroiliac joint fusion. Appellant presented with low back pain radiating into her left groin and medial thigh and noted that her pain was intermittent. A physical examination revealed tenderness to palpation in her lower lumbar paraspinal musculature and bilateral gluteal regions. Appellant had negative straight leg raise testing bilaterally and walked with a normal gait. Dr. Dumonski assessed appellant as having low back pain and ongoing improvement in the pain she experienced prior to her left sacroiliac joint fusion. He noted that she continued to be at MMI.

A September 17, 2018 letter from Dr. Dumonski indicated that appellant's most relevant diagnosis for rating permanent impairment was sacroiliac joint dysfunction, status post left sacroiliac joint fusion. He noted that appellant's left sacroiliac joint was impaired due to her surgery, as prior to her surgery she did not. Dr. Dumonski indicated that his pertinent objective findings at his most recent evaluation of appellant included that she had tenderness to palpation in her lower back and that she was neurovascularly intact. He explained that his 10 percent permanent impairment rating was based on his previous patients who had the same condition and surgery. Dr. Dumonski noted that there was no table in the A.M.A., *Guides* that corresponded to a left sacroiliac dysfunction status post a left sacroiliac joint fusion procedure.

In an October 16, 2018 memorandum, Dr. Michael Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), was provided appellant's medical records and a statement of accepted facts (SOAF) for review and OWCP requested an impairment rating of appellant's lower extremities according to the A.M.A., *Guides* and *The Guides Newsletter*.

In an October 17, 2018 report, the DMA indicated that he reviewed appellant's provided medical records and SOAF. He noted appellant's accepted conditions and reviewed her medical history and history of injury, including her January 30, 2018 sacroiliac joint surgery. The DMA indicated that Dr. Dumonski incorrectly determined appellant's permanent impairment rating in his September 17, 2018 medical report because impairments of the sacroiliac joint were not eligible for a schedule award pursuant to the sixth edition of the A.M.A., *Guides*. He also noted that appellant's accepted conditions were not eligible for an alternative range of motion impairment calculation pursuant to the A.M.A., *Guides*.

By decision dated January 23, 2019, 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 as a result of her accepted February 3, 2016 employment injury.

On January 30, 2019 appellant, through counsel, requested an oral hearing before a representative of the Branch of Hearings and Review.

Appellant submitted a May 10, 2019 workers' compensation medical status form signed by Dr. Dumonski wherein he diagnosed lumbago and noted that appellant had work restrictions due to her injury.

An OWCP hearing was held on May 17, 2019. Appellant additionally submitted a May 10, 2019 medical report by Dr. Dumonski indicating that she complained of experiencing low back pain, left leg pain, and diminished function for the prior month. Dr. Dumonski noted her history

of injury and conducted a physical examination which revealed tenderness to palpation to a mild degree in the lumbar paraspinal musculature, in particular on her left, a positive straight leg test on the left and a negative straight leg test on the right, and antalgic gait favoring the left leg. The examination additionally revealed that appellant had no substantial pain with the internal or external rotation of her hips. Dr. Dumonski reviewed an x-ray of appellant's pelvis and opined that it displayed appropriate positioning of her implants with good alignment. He further opined that her sacroiliac joint did not appear to be causing her current pain or her swelling in her lower extremity, and that her symptomology indicated that she potentially had lumbar radiculopathy.

By decision dated July 2, 2019, an OWCP hearing representative affirmed the January 23, 2019 OWCP decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁷ and its implementing regulations⁸ 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. FECA, however, does not specify the manner in which the percentage of loss of a member 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 and the Board has concurred in such adoption.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.¹⁰

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.¹¹ Furthermore, the back is specifically excluded from the definition of organ under FECA.¹² 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's procedures indicate that *The Guides Newsletter* is to be applied.¹³

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at § 10.404(a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹⁰ 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).

¹¹ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹² *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹³ *Supra* note 10 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

It is the claimant's burden of proof to establish permanent impairment of the scheduled member or function of the body as a result of an employment injury.¹⁴ OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.¹⁵ Its procedures further provide that, if a claimant has not submitted a permanent impairment evaluation, it should request a detailed report that includes a discussion of how the impairment rating was calculated.¹⁶ If the claimant does not provide an impairment evaluation and there is no indication of permanent impairment in the medical evidence of file, the claims examiner may proceed with a formal denial of the award.¹⁷

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.

Dr. Dumonski's reports indicated that appellant was post-status a sacroiliac joint fusion and that she had reached MMI on May 18, 2018. He opined that appellant's left sacroiliac joint was impaired due to her surgery, as prior to her surgery she did not. Dr. Dumonski noted that her most relevant diagnosis for rating purposes was sacroiliac joint dysfunction, status post left sacroiliac joint fusion. He explained that his 10 percent permanent impairment rating of appellant's sacroiliac joint was based on his previous patients who had the same condition and surgery. Dr. Dumonski further explained that there was no table in the A.M.A., *Guides* that corresponded to a diagnosis of sacroiliac dysfunction status post sacroiliac joint fusion. Although OWCP advised Dr. Dumonski that he should provide a lower extremity permanent impairment rating pursuant to *The Guides Newsletter*, he did not provide a rating of permanent impairment of appellant's lower extremities, due to injury to a spinal nerve, with reference to *The Guides Newsletter*.¹⁸ Furthermore, Dr. Dumonski did not document a permanent impairment rating for the lower extremities that could be visualized and rated.¹⁹

In accordance with its procedures, OWCP properly routed the case record to its DMA who opined that Dr. Dumonski incorrectly determined appellant's permanent impairment rating in his reports because impairments of the sacroiliac joint were not eligible for a schedule award under FECA. The Board finds that the DMA properly applied the standards of the A.M.A., *Guides* and *The Guides Newsletter*.

¹⁴ *T.K.*, Docket No. 19-1222 (issued December 2, 2019); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁵ *Supra* note 10 at Chapter 2.808.5 (March 2017).

¹⁶ *Id.* at Chapter 2.808.6(a) (March 2017).

¹⁷ *Id.* at Chapter 2.808.6(c).

¹⁸ *See T.D.*, Docket No. 17-1495 (issued January 4, 2018).

¹⁹ *Supra* note 15.

Appellant provided additional medical reports from Dr. Dumonski; however, these reports failed to provide an assessment of her permanent impairment, pursuant to *The Guides Newsletter*, establishing ratable permanent impairment of a scheduled member or function of the body.²⁰ As such these reports are insufficient to establish entitlement to a schedule award.²¹

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, due to her accepted February 3, 2016 employment injury, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

²⁰ See *C.D.*, Docket No. 16-1489 (issued April 12, 2017).

²¹ *Supra* note 18.