

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

S.W., Appellant)	
)	
and)	Docket No. 19-1078
)	Issued: January 9, 2020
)	
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Cincinnati, OH, Employer)	
)	
)	

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
JANICE B. ASKIN, Judge

JURISDICTION

On April 16, 2019 appellant, through counsel, filed a timely appeal from a March 12, 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 12, 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 her left upper extremity, warranting a schedule award.

FACTUAL HISTORY

On January 4, 2005 appellant, then a 45-year-old expeditor/clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 4, 2015 she injured her neck, arm, and chest when bending down to pull open a truck door while in the performance of duty. On February 17, 2005 OWCP accepted this claim, assigned File No. xxxxxx159 for sprain/strain of the neck and brachia neuritis or radiculitis.

On June 1, 2009 appellant, filed an occupational disease claim (Form CA-2) alleging that she developed cervical disc disease due to factors of her federal employment including throwing priority packages, bending over, hanging priority pouches, and other repetitive motions. OWCP assigned the claim File No. xxxxxx128. On July 8, 2009 it accepted the claim for aggravation of cervical intervertebral disc disorder with myelopathy and aggravation of left brachial neuritis or radiculitis. On November 23, 2009 appellant underwent a cervical magnetic resonance imaging (MRI) scan which demonstrated mild-to-moderate multilevel disc degeneration with a mild-to-moderate broad-based disc bulge at C4-5 displacing the cord and causing left neural foraminal narrowing. On November 15, 2010 she was released to return to full-duty work.⁴

On May 19, 2018 appellant filed a schedule award claim (Form CA-7) in File No. xxxxxx128 alleging permanent impairment due to her accepted cervical intervertebral disc disorder with myelopathy and aggravation of left brachial neuritis or radiculitis.

In a May 24, 2018 development letter, OWCP advised appellant of the deficiencies of her claim and requested medical evidence containing a detailed description of her permanent impairment specific to the accepted work-related conditions in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*),⁵ a date of MMI, a final rating of permanent impairment, and a discussion of the rationale for calculation of appellant's claimed permanent impairment of a scheduled member. It afforded her 30 days to respond.

In a note dated May 9, 2018, Dr. Rashid M. Khan, an internist, reported that appellant had reached MMI on May 17, 2018 due to her accepted cervical conditions.

⁴ On January 5, 2011 appellant filed an occupational disease claim (Form CA-2) alleging that she developed a ganglion cyst on her right wrist due to factors of her federal employment including repetitive movements and motions. OWCP assigned this claim File No. xxxxxx442. On February 4, 2011 it accepted appellant's January 5, 2011 claim for aggravation of ganglion cyst right wrist and right wrist tendinitis. By decision dated September 13, 2018, OWCP granted her a schedule award for two percent permanent impairment of the right upper extremity due to aggravation of ganglion cyst right wrist and tendinitis right wrist. On August 31, 2018 it administratively combined File No. xxxxxx128, File No. xxxxxx159, File No. xxxxxx442, and File No. xxxxxx306. OWCP designated File No. xxxxxx128 as the master file.

⁵ A.M.A., *Guides* (6th ed. 2009).

By decision dated July 30, 2018, OWCP denied appellant's schedule award claim under File No. xxxxxx128. On August 7, 2018 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In a November 15, 2018 electromyogram, appellant exhibited C5-6 nerve root denervation and chronic reinnervation, chronic right C7 nerve root radiculopathy, and mild left median neuropathy the wrist or carpal tunnel syndrome.

In a letter dated January 10, 2019, counsel requested referral to Dr. Rohn T. Kennington, a Board-certified family practitioner, for an impairment rating regarding appellant's accepted cervical conditions.

A hearing was held on January 8, 2019. Appellant testified that she had continuing medical issues with her left arm and wrist. She noted that she had retired from the employing establishment on April 30, 2018. Counsel requested an additional 30 days to submit medical evidence of permanent impairment of the left upper extremity.

In a letter dated February 28, 2019, counsel again requested referral to Dr. Kennington for an impairment rating regarding appellant's accepted cervical conditions.

By decision dated March 12, 2019, OWCP's hearing representative affirmed OWCP's July 30, 2018 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ and its implementing federal regulations⁷ 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.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.¹⁰ Furthermore, the back is specifically excluded from the definition of

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a).

⁹ 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).

¹⁰ *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

organ under FECA.¹¹ 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*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*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.¹² 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.¹³

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.¹⁴ Before the A.M.A., *Guides* can be utilized, a description of the 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.¹⁵

OWCP's procedures 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 her left upper extremity, warranting a schedule award.

In support of her schedule award claim for permanent impairment of her left upper extremity, appellant submitted a note dated May 31, 2018 from Dr. Khan opining that she had

¹¹ 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).

¹² *Supra* note 9 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

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

¹⁴ *M.G.*, Docket No. 19-0823 (issued September 17, 2019); *I.T.*, Docket No. 18-1049 (issued December 31, 2018).

¹⁵ *M.G.*, *id.*; *A.T.*, Docket No. 18-0864 (issued October 9, 2018).

¹⁶ *Supra* note 9 at Chapter 2.808.6(a).

¹⁷ *Id.* at Chapter 2.808.6(c).

reached MMI in her July 8, 2009 claim for aggravation of cervical intervertebral disc disorder with myelopathy, and aggravation of left brachial neuritis or radiculitis. Dr. Khan did not provide a diagnosis or an impairment rating.

Appellant has not provided a medical report describing that her permanent impairment resulted from a spinal nerve impairment in sufficient detail so that the claims examiner and others reviewing the file would be able to clearly visualize the impairment with its resulting restrictions and limitations.¹⁸ Although OWCP requested a medical opinion on the extent of appellant's permanent impairment, she did not provide such a rating. The evidence submitted does not establish that appellant had a neurologic deficit consistent with radiculopathy, ratable pursuant to *The Guides Newsletter*. As the reports of record do not comport with the A.M.A., *Guides* or *The Guides Newsletter*, appellant has not submitted medical evidence establishing permanent impairment of her left upper extremity due to her accepted employment injuries. The Board thus finds that appellant has not met her burden of proof.

Appellant may request a schedule award or increased schedule award at any time based on evidence of new exposure, or medical evidence showing a 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 her left upper extremity, warranting a schedule award.

¹⁸ *M.G.*, *supra* note 14; *B.V.*, Docket No. 17-0656 (issued March 13, 2018).

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 9, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board