

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

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**J.C., Appellant**

**and**

**DEPARTMENT OF THE INTERIOR, BUREAU  
OF LAND MANAGEMENT, North Bend, OR,  
Employer**

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**Docket No. 19-1502  
Issued: January 15, 2020**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 28, 2019 appellant filed a timely appeal from a December 31, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> 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.<sup>3</sup>

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's December 31, 2018 decision was June 29, 2019. Since using July 3, 2019, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is June 28, 2019, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the December 31, 2018 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 his burden of proof to establish employment-related permanent impairment of a scheduled member or function of the body, warranting a schedule award.

## FACTUAL HISTORY

On March 23, 2016 appellant, then a 62-year-old civil engineering technician, filed a traumatic injury claim (Form CA-1) alleging cervical and left clavicle injuries due to falling down stairs on March 18, 2016 while in the performance of duty. OWCP accepted his claim for anterior displaced closed fracture of the sternal/medial end of the left clavicle, neck abrasion, and displaced closed fracture of the second cervical vertebra.<sup>4</sup>

On June 12, 2017 appellant filed a claim for a schedule award (Form CA-7) due to his accepted employment injuries. He submitted reports from attending physicians and nurses, dated in early- to mid-2017, which addressed the management of his neck and left clavicle pain.

In a July 26, 2017 development letter, OWCP requested that appellant submit additional evidence in support of his schedule award claim, including a report from an attending physician which evaluated his claimed permanent impairment 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> OWCP afforded him 30 days to submit such evidence.

On September 7, 2017 OWCP referred appellant to Dr. Ronald Teed, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that Dr. Teed examine appellant and provide an opinion regarding his upper extremity permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In a September 29, 2017 report, Dr. Teed noted that appellant reported that he still experienced some left clavicle pain near the sternum and rated his present pain level as 1 or 2 out of 10. Appellant denied pain radiating into his upper extremities and indicated that he did not experience paresthesias or paralysis. Dr. Teed advised that his physical examination revealed a negative Spurling test, no tenderness to palpation of the cervical spine, and no pain with gentle axial loading. Both shoulders had full active range of motion (ROM) as well as 5/5 strength, and there was no tenderness to palpation along the left shoulder. Dr. Teed noted that appellant had minimal tenderness over the medial third of the left clavicle and that he found no crepitance, fluctuance, palpable masses, or other defects. He diagnosed healed left clavicle fracture, healed second cervical vertebra fracture, and resolved neck abrasion. Dr. Teed determined that appellant had reached maximum medical improvement (MMI) and that he had no permanent impairment with respect to his accepted employment conditions.

By decision dated October 12, 2017, OWCP denied appellant's schedule award claim, finding that he had not met his burden of proof to establish employment-related permanent

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<sup>4</sup> Appellant did not immediately stop work, but retired from the employing establishment in April 2016.

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

impairment of a scheduled member or function of the body. It accorded the weight of the medical evidence to Dr. Teed.

On November 2, 2017 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. By decision dated January 5, 2018, OWCP's hearing representative set aside the October 12, 2017 decision. She remanded the case to OWCP for referral of appellant's case to a district medical adviser (DMA) for proper evaluation of his permanent impairment, to be followed by issuance of a *de novo* decision.

On February 1, 2018 OWCP referred appellant's case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, who served as a DMA. It requested that he review the medical evidence of record, including Dr. Teed's September 29, 2017 report, and provide an opinion regarding appellant's permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In a February 2, 2018 report, the DMA discussed the findings of Dr. Teed's September 29, 2017 report and noted that Dr. Teed had found that the fractures of the cervical vertebra and the sternal/medial head of the left clavicle had satisfactorily healed. He explained that it was appropriate to evaluate appellant's permanent impairment using *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*). The DMA opined, that for each upper extremity, appellant did not have a neurologic deficit consistent with radiculopathy stemming from the cervical spine. He found that appellant reached MMI on September 29, 2017, the date of Dr. Teed's examination, and concluded that he did not have permanent impairment of either upper extremity.<sup>6</sup>

By decision dated March 7, 2018, OWCP denied appellant's schedule award claim, finding that he had not met his burden of proof to establish employment-related permanent impairment of a scheduled member or function of the body. It noted that the DMA had reviewed the medical evidence of record, including Dr. Teed's September 29, 2017 report, and explained that appellant did not have upper extremity permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

On March 13, 2018 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. He submitted an October 23, 2018 report from Dr. Clifford Lin, an attending Board-certified orthopedic surgeon, who discussed his physical limitations.

By decision dated June 28, 2018, OWCP's hearing representative affirmed the March 7, 2018 decision, noting that the DMA correctly applied the standards of the sixth edition of the A.M.A., *Guides* in finding that appellant had no permanent impairment of either upper extremity.

On September 19, 2018 appellant requested reconsideration of the June 28, 2018 decision. He submitted an August 10, 2018 report from Dr. Victor K. Lin, Board-certified in physical medicine and rehabilitation. Dr. Lin reported his examination findings and noted that appellant had sustained a left clavicle fracture with decreased function of the neck and left shoulder. He determined that appellant had five percent permanent impairment of the whole person under

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<sup>6</sup> The DMA indicated that, given the absence of cervical radiculopathy, it was unnecessary to consider the ROM findings of record for the upper extremities.

Table 13-12 (Station and Gait Disorder) on page 336 of the sixth edition of the A.M.A., *Guides* due to his reported difficulty in walking. Appellant also had five percent permanent impairment of the whole person under Table 17-2 (Cervical Spine Regional Grid) on page 566 due to his cervical fracture. Dr. Lin indicated that appellant had a diagnosis-based (DBI) impairment of seven percent permanent impairment of the whole person (converted from 11 percent permanent impairment of the left upper extremity) under Table 15-5 (Shoulder Regional Grid) on page 403 due to his left clavicle fracture. He noted that Table 15-5 did contain not a diagnosis for fracture or dysfunction of the sternal/medial end of the clavicle, but posited that it was appropriate to use the diagnosis of acromioclavicular joint injury/disease given the magnitude of appellant's injury and its effect on his upper extremity ROM. Dr. Lin added the several whole person impairments he calculated and concluded that appellant had 17 percent permanent impairment of the whole person.

By decision dated December 31, 2018, OWCP denied modification of the March 7, 2018 decision. It found that Dr. Lin's August 10, 2018 report did not contain an impairment calculation made in accordance with the standards of the sixth edition of the A.M.A., *Guides*.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>7</sup> and its implementing regulations<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>

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.<sup>11</sup> However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.<sup>12</sup> The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for

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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> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

<sup>12</sup> *Supra* note 10 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3) (March 2017).

rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.<sup>13</sup>

### ANALYSIS

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

The Board finds that OWCP properly relied on the opinion of the DMA, who reviewed September 29, 2017 findings of Dr. Teed, an OWCP referral physician, and properly determined that appellant did not have permanent impairment under the standards of the A.M.A., *Guides*. In his February 2, 2018 report, the DMA noted that Dr. Teed found that the fractures of the cervical vertebra and the sternal/medial head of the left clavicle had satisfactorily healed. He correctly advised that it was appropriate to evaluate appellant's permanent impairment using *The Guides Newsletter* and opined, that for each upper extremity, appellant did not have a neurologic deficit consistent with radiculopathy stemming from the cervical spine.<sup>14</sup> The DMA found that appellant reached MMI on September 29, 2017 and properly concluded that he did not have permanent impairment of either upper extremity.

Appellant submitted an August 10, 2018 permanent impairment calculation from Dr. Lin, but this calculation lacks probative value because it was not made in accordance with the A.M.A., *Guides*. The Board has held that an opinion on permanent impairment lacks probative value if it is not derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.<sup>15</sup> Dr. Lin determined that appellant had five percent permanent impairment of the whole person under Table 13-12 (Station and Gait Disorder) of the sixth edition of the A.M.A., *Guides* and five percent permanent impairment of the whole person under Table 17-2 (Cervical Spine Regional Grid). However, these permanent impairment calculations are of limited probative value because, as noted above, neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the spine or the body as a whole.<sup>16</sup> Dr. Lin also indicated that appellant had a DBI rating of seven percent permanent impairment of the whole person (converted from 11 percent permanent impairment of the left upper extremity) under Table 15-5 (Shoulder Regional Grid). The Board notes that devising such a DBI permanent impairment rating relating to the shoulder was not appropriate because appellant's left clavicle fracture was at the sternal/medial end of the clavicle next to the cervical spine, rather than at the acromioclavicular or left shoulder end of the left clavicle. The A.M.A. *Guides*, per Table 15-5 on page 403, does not contain a provision for assigning permanent impairment to injury of the sternal/medial end of the clavicle.<sup>17</sup> The Board thus finds that appellant has not met his burden of proof.

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<sup>13</sup> *Supra* note 10 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

<sup>14</sup> *See supra* notes 12 and 13.

<sup>15</sup> *See N.A.*, Docket No. 19-0248 (issued May 17, 2019); *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989).

<sup>16</sup> *See supra* note 11.

<sup>17</sup> *See A.M.A., Guides* 403-05, Table 15-5 (Shoulder Regional Grid).

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 31, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 15, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board