

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

T.M., Appellant)	
)	
and)	Docket No. 19-1126
)	Issued: September 22, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Dayton, OH, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 23, 2019 appellant filed a timely appeal from an April 10, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

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.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 10, 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.*

FACTUAL HISTORY

This case has been previously before the Board.³ 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 July 9, 2011 appellant, then a 53-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that she strained her back on July 6, 2011 as a result of pulling trays of mail while in the performance of duty. OWCP accepted the claim for lumbar sprain/strain, thoracic sprain/strain, and cervical sprain/strain.

On February 26, 2019 appellant filed a claim for a schedule award (Form CA-7).

In support of her claim, appellant submitted a prescription note and a report dated November 26, 2018 from Dr. Mervet K. Saleh, a Board certified anesthesiologist and pain medicine specialist, who diagnosed sprain of ligaments of cervical spine, sprain of ligaments of thoracic spine, and sprain of ligaments of lumbar spine. Appellant also submitted diagnostic testing results dated November 26, 2018.

In a development letter dated March 7, 2019, OWCP requested that appellant's treating physician, Dr. Harvey D. Rhodes, a sports medicine specialist, submit an impairment evaluation report in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ and *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*). It afforded her 30 days to submit additional medical evidence in support of her schedule award claim. OWCP copied appellant on the letter and informed her that it was her responsibility to ensure the submission of the necessary evidence during the allotted 30-day period.

Appellant subsequently submitted a March 14, 2019 report from Dr. Saleh who reiterated her diagnoses and prescribed medication.

By decision dated April 10, 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, warranting a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations 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.⁵ 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, good administrative practice necessitates the

³ Docket No. 14-1833 (issued February 10, 2015).

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁶ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁷ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁸

Neither FECA nor its implementing 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 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.¹¹ 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.¹²

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.¹³ OWCP's 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 that the date on which this occurred (date of maximum medical improvement (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*.¹⁴ Its procedures further provide that, if a claimant has not submitted a permanent impairment evaluation, it should request a detailed report

⁶ *Id.* at § 10.404. See also Ronald R. Kraynak, 53 ECAB 130 (2001).

⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* at Chapter 2.808.5a (March 2017).

⁸ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ *K.Y.*, Docket No. 18-0730 (issued August 21, 2019); *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 7 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

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

¹³ *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁴ *Supra* note 7 at Chapter 2.808.5 (March 2017).

that includes a discussion of how the impairment rating was calculated.¹⁵ 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.¹⁶

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.

In support of her schedule award claim, appellant submitted reports dated November 26, 2018 and March 14, 2019 from Dr. Saleh. Dr. Saleh provided diagnoses of sprain of ligaments of the cervical, thoracic, and lumbar spine. However, she did not address MMI, nor did she find permanent impairment resulting from a cervical, thoracic or lumbar spine condition causally related to the accepted June 6, 2011 employment injury in accordance with the sixth edition of the A.M.A., *Guides*. Therefore, Dr. Saleh's reports are insufficient to establish permanent impairment of a scheduled member or function of the body causally related to appellant's accepted employment injury.¹⁷

In its March 7, 2019 development letter, OWCP requested a medical opinion from Dr. Rhodes regarding the extent of appellant's permanent impairment in accordance with the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter*. However, neither Dr. Rhodes, nor appellant submitted the requested evidence.

As the medical evidence of record does not establish permanent impairment of a scheduled member or function of the body, in accordance with either the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter*, appellant has not met her burden of proof to establish her schedule award claim.

On appeal appellant argues that Dr. Saleh's medical reports are sufficient to establish appellant's claim. As explained above, however, the Board finds that the evidence of record is insufficient to establish appellant's schedule award claim.

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.

¹⁵ *Id.* at Chapter 2.808.6(a) (March 2017).

¹⁶ *Id.* at Chapter 2.808.6(c).

¹⁷ See *M.G.*, Docket No. 19-0823 (issued September 17, 2019); see also *M.M.*, Docket No. 18-0292 (issued July 9, 2018).

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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