

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

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C.W., Appellant

and

DEPARTMENT OF THE ARMY, U.S. ARMY  
CORPS OF ENGINEERS, Washington, DC,  
Employer

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**Docket No. 19-1590  
Issued: September 24, 2020**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On July 23, 2019 appellant filed a timely appeal from a January 25, 2019 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> Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated September 18, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-1590 (issued September 18, 2020).

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

<sup>3</sup> The Board notes that following the January 25, 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 more than seven percent permanent impairment of her left lower extremity, or more than three percent permanent impairment of her right lower extremity, for which she previously received a schedule award.

## FACTUAL HISTORY

On August 26, 2008 appellant, then a 42-year-old office automation secretary, filed a traumatic injury claim (Form CA-1) alleging that on August 14, 2008 she sustained a sprained ankle, pulled muscles/tendons in the back, and a possible fractured/sprained shoulder when she slipped in a puddle of water in an office garage while in the performance of duty. OWCP accepted the claim for ankle sprain, shoulder/upper arm sprain, lumbar intervertebral disc displacement without myelopathy, thoracic or lumbosacral neuritis or radiculitis, disorder of bursae and tendons in the left shoulder.

In a report dated June 19, 2015, Dr. Eric G. Dawson, a Board-certified orthopedic surgeon, reviewed appellant's history of injury and the medical record, noting that magnetic resonance imaging (MRI) scans had demonstrated L4-5 spondylolisthesis and a herniated nucleus pulposus. On examination of the lower extremities, he noted sensory and motor deficits. Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>4</sup> as well as *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*), Dr. Dawson explained that only a class 1 impairment was allowed with a grade range from A to E under *The Guides Newsletter*. He observed: appellant's L5 left mild motor and sensory deficit would result in eight percent permanent impairment; the S1 moderate sensory deficit at grade C would result in four percent permanent impairment; the right L5 moderate sensory deficit would result in six percent permanent impairment; and the right S1 mild sensory deficit would result in one percent permanent impairment. He calculated that appellant's total percentage of permanent impairment was 19 percent lower extremity permanent impairment.

On November 9, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated November 14, 2017, OWCP informed appellant that the medical evidence was insufficient to establish her schedule award claim. It requested that she submit a detailed narrative medical report from her treating physician based upon a recent examination including a date of maximum medical improvement (MMI), the diagnosis upon which the impairment rating was based, a detailed description of any preexisting impairment, and a final rating of the permanent impairment and discussion of the rationale for calculation of the impairment, with references to the applicable criteria and tables of the sixth edition A.M.A., *Guides*. OWCP afforded appellant 30 days to submit additional medical evidence.

In response, Dr. Dawson noted, in a letter dated December 1, 2017, that appellant's date of MMI was June 9, 2015. He explained that the diagnosis upon which appellant's impairment was based was lumbar disc and nerve impingement. Dr. Dawson referred to *The Guides Newsletter* and observed that he had "quoted table, chart and page to the nth detail."

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<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

On July 27, 2018 OWCP referred the record to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), and requested that he evaluate appellant's permanent impairments under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. In a report dated July 30, 2018, Dr. Katz reviewed the medical record, including the June 19, 2015 report and December 1, 2017 letter of Dr. Dawson. With regard to Dr. Dawson's impairment rating, Dr. Katz opined that it could not be accepted as probative for the purpose of recommending a schedule award for the following reasons: he had not supplied specific grade modifiers for functional history or clinical studies; he did not calculate differing net adjustments to arrive at the figure of eight percent permanent impairment for "mild motor with sensory deficit" at L5; he stated that there was a moderate right L5 sensory deficit of six percent, but six percent was not an available value for this deficit; he stated that there was a moderate S1 sensory deficit grade C of six percent, but this value was actually two percent in Proposed Table Two; and Dr. Dawson did not appear to offer any further insight into his impairment calculations in his supplemental letter of December 1, 2017. Dr. Katz opined that for these reasons, Dr. Dawson's impairment evaluation could not be considered as probative for schedule award purposes, and that the records lacked sufficient detail to permit assignment of an impairment rating on the basis of a records review. He recommended that OWCP obtain a second opinion permanent impairment evaluation.

On August 29, 2018 OWCP referred appellant for a second opinion evaluation with Dr. Stuart J. Gordon, a Board-certified orthopedic surgeon. In a report dated October 4, 2018, Dr. Gordon related that he had reviewed the medical record and conducted a physical examination. On examination of the lumbar spine, appellant complained of pain centrally and to the left greater than the right. There was mild flattening of the lumbar lordosis, guarded but, full range. Straight leg raise tests were negative. An MRI scan taken on November 9, 2017 demonstrated a small left paracentral disc herniation going into the left L3 nerve root at L3-4; a right paracentral disc herniation at L4-5, and a broad-based bulge to the left at L5-S1. Dr. Gordon diagnosed chronic bilateral L4, L5, and S1 radiculopathy and indicated that the date of MMI was November 9, 2017.

Referring to the sixth edition A.M.A., *Guides* and *The Guides Newsletter*, Dr. Gordon calculated appellant's percentage of permanent impairment of the lower extremities. Using the diagnosis-based impairment (DBI) method with reference to appellant's right lower extremity condition, he noted grade modifiers of 1 each for clinical studies (GMCS), functional history (GMFH), and physical examination (GMPE) for the diagnosis of right L4 radiculopathy. Dr. Gordon classified mild sensory neuropathy for one percent permanent impairment of the right lower extremity and zero percent motor impairment. Similarly, for the diagnoses of right L5 and S1 radiculopathy, the GMCS, GMFH, and GMPE were 1, and the mild sensory neuropathy for each condition resulted in one percent permanent impairment. Thus, the total percentage of permanent impairment for the right lower extremity was three percent.

With reference to appellant's left lower extremity condition, Dr. Gordon noted that the GMCS, GMFH, and GMPE were 1 for each condition of left L4, L5, and S1 radiculopathy. For the left L4 radiculopathy, he determined that she had moderate sensory radiculopathy, which resulted in three percent impairment. For the left L5 radiculopathy, Dr. Gordon determined that she had moderate sensory deficits, which resulted in three percent impairment. For the left S1 radiculopathy, he determined that she had a mild sensory deficit, which resulted in one percent impairment. Thus, the total percentage of permanent impairment for the left lower extremity was seven percent. Dr. Gordon opined that the date of MMI was November 9, 2017, the date of appellant's last MRI scan.

On October 23, 2018 OWCP forwarded Dr. Gordon's October 4, 2018 report to Dr. Katz, serving as DMA, for his review and issuance of an addendum report. On October 24, 2018 Dr. Katz reviewed Dr. Gordon's report. Referring to Proposed Table 2: Spinal Nerve Impairment, Lower Extremity Impairment of *The Guides Newsletter*, noting that the class of diagnosis for spinal nerve condition was 1, and applying Dr. Gordon's grade modifiers to the default values, the DMA applied the net adjustment formula to appellant's bilateral L4, L5, and S1 conditions. The DMA concurred with Dr. Gordon's calculation of seven percent permanent impairment of the left lower extremity and three percent permanent impairment of the right lower extremity. He opined that this determination was supported by the records reviewed and consistent with the methodology of the sixth edition A.M.A., *Guides* and *The Guides Newsletter*. The DMA noted that the accepted conditions were not eligible for an alternative range of motion (ROM) based impairment calculation. He opined that the date of MMI was October 4, 2018.

By decision dated January 25, 2019, OWCP granted appellant a schedule award for seven percent permanent impairment of the left lower extremity and three percent permanent impairment of the right lower extremity. The award ran for 28.8 weeks from October 4, 2018 through April 23, 2019. It was based on the report of Dr. Gordon dated October 4, 2018 and the report of the DMA dated October 24, 2018.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>5</sup> and its implementing regulations<sup>6</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 of a member shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants through its implementing regulations, OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>7</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>8</sup> 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.<sup>9</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>10</sup> However, a schedule award is permissible where the employment-related spinal condition affects the upper

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> *Id.* See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

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

<sup>10</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *B.W.*, Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

and/or lower extremities.<sup>11</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. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.<sup>12</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish more than seven percent permanent impairment of the left lower extremity, or more than three percent permanent impairment of the right lower extremity, for which she previously received a schedule award.

OWCP initially received June 19, 2015 and December 1, 2017 reports from Dr. Dawson in which he referred to *The Guides Newsletter* and concluded that appellant had 12 percent left lower extremity permanent impairment, and 7 percent right lower extremity permanent impairment. OWCP properly referred these reports to its DMA, Dr. Katz. In his July 31, 2018 report, Dr. Katz explained that Dr. Dawson had not provided specific grade modifiers for functional history or clinical studies and that he not calculated appellant's permanent impairment explaining how he applied net adjustments to arrive at each rating for L5 and S1 motor and sensory loss. As Dr. Dawson's reports did not comport with *The Guides Newsletter*, the DMA properly determined that his report was insufficient to establish appellant's schedule award claim.<sup>13</sup>

OWCP thereafter referred appellant to Dr. Gordon for a second opinion evaluation. Referring to the sixth edition A.M.A., *Guides* and *The Guides Newsletter*, in his October 4, 2018 report, Dr. Gordon calculated appellant's percentage of permanent impairment of the lower extremities for the diagnoses of chronic bilateral L4, L5, and S1 radiculopathy. Using the DBI method, with reference to appellant's right lower extremity condition, he noted GMCS, GMFH, and GMPE modifiers of 1 each for the diagnosis of right L4 radiculopathy. Dr. Gordon classified mild sensory neuropathy for one percent permanent impairment of the right lower extremity and zero percent motor impairment. Similarly, for the diagnoses of right L5 and S1 radiculopathy, the GMCS, GMFH, and GMPE were 1, and the mild sensory neuropathy for each condition resulted in one percent permanent impairment. Thus, the total percentage of permanent impairment for the right lower extremity was three percent. With reference to appellant's left lower extremity condition, Dr. Gordon noted that the GMCS, GMFH, and GMPE were 1 for each condition of left L4, L5, and S1 radiculopathy. For the left L4 radiculopathy, he stated that she had moderate sensory radiculopathy, which resulted in three percent impairment. For the left L5 radiculopathy, Dr. Gordon stated that appellant had moderate sensory deficits, which resulted in three percent impairment. For the left S1 radiculopathy, he stated that she had a mild sensory deficit, which resulted in one percent impairment. Thus, the total percentage of permanent impairment for the left lower extremity was seven percent.

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<sup>11</sup> *Id.* at § 8107(c); *id.* at § 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 8 at Chapter 3.700, Exhibit 4 (January 2010).

<sup>13</sup> *See D.L.*, Docket No. 20-0059 (issued July 8, 2020).

In accordance with its procedures, OWCP properly routed the case record to its DMA, Dr. Katz, who indicated that he had reviewed Dr. Gordon's October 4, 2018 report. Dr. Katz correctly noted that FECA does not allow a schedule award for the spine, though it does allow for schedule awards for spinal nerve injuries resulting in impairment of the extremities.<sup>14</sup> With reference to *The Guides Newsletter*, he concurred with Dr. Gordon's calculations of permanent impairment based upon the bilateral L4, L5, and S1 radiculopathy conditions. Dr. Katz found that Dr. Gordon's calculation of seven percent permanent impairment of the left lower extremity and three percent permanent impairment of the right lower extremity was supported by the weight of the medical evidence.

The Board finds that the DMA properly applied the standards of the A.M.A., *Guides* and *The Guides Newsletter* to the physical examination findings of Dr. Gordon. The DMA accurately summarized the relevant medical evidence including findings on examination, and reached conclusions about appellant's conditions that comported with these findings.<sup>15</sup> He noted that the A.M.A., *Guides* did not allow for an impairment rating based on ROM for the relevant diagnoses.<sup>16</sup> The DMA properly referred to *The Guides Newsletter* in calculating appellant's percentage of permanent impairment of the lower extremities based on a spinal condition. As his report is detailed, well rationalized, and based on a proper factual background, the DMA's opinion represents the weight of the medical evidence.<sup>17</sup> There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter* demonstrating a greater percentage of permanent impairment of the bilateral lower extremities. Accordingly, the Board finds that, as appellant has not submitted medical evidence establishing more than seven percent permanent impairment of the left lower extremity or more than three percent permanent impairment of the right lower extremity, she has not met her burden of proof to establishment entitlement to additional schedule award compensation for the lower extremities.

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 more than seven percent permanent impairment of her left lower extremity, or more than three percent permanent impairment of her right lower extremity, for which she previously received a schedule award.

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<sup>14</sup> *Supra* note 21.

<sup>15</sup> *M.S.*, Docket No. 19-1011 (issued October 29, 2019); *W.H.*, Docket No. 19-0102 (issued June 21, 2019); *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

<sup>16</sup> *R.L.*, Docket No. 19-1793 (issued August 7, 2020).

<sup>17</sup> *See M.S., id.; D.S.*, Docket No. 18-1816 (issued June 20, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 25, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 24, 2020  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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