

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

J.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pittsburgh, PA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 20-1071
Issued: January 4, 2021**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On April 20, 2020 appellant filed a timely appeal from November 15, 2019 and April 1, 2020 merit decisions 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 his 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 1, 2020 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

On June 3, 2007 appellant, then a 51-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that he had pain in the groin, upper leg and lower back when lifting a rest bar on June 1, 2007, while in the performance of duty. OWCP accepted the claim for sprain of the left groin, sprain of the left thigh, and sprain of the back, lumbar region. Appellant did not immediately stop work. OWCP paid wage-loss compensation on the supplemental rolls from August 12 through 31, 2007 and on the periodic rolls from September 2 through October 27, 2007.

On March 5, 2016 appellant filed a claim for a schedule award (Form CA-7).

In support of his claim, appellant submitted reports from Dr. Scott Stoll, a Board-certified physiatrist, dated March 24 and July 28, 2016, who performed left S1 and right S1 transforaminal epidural corticosteroid injections and diagnosed radicular low back pain, spondylosis, and facet syndrome. In reports dated April 11 through August 22, 2016, he was treated for low back pain. Dr. Stoll noted findings of bilateral lumbar paraspinal and gluteal region tenderness, decreased left and right lateral bending, diminished bilateral reflexes of 2/4 in all major groups, negative bilateral straight leg raise tests and intact sensation in the lower extremities. He diagnosed lumbago, lumbosacral radiculopathy at L5, neck pain, myofascial pain syndrome, low back pain, and sacroiliitis.

On October 12, 2016 appellant was treated by Dr. Troy Wood, a Board-certified physiatrist, who diagnosed chronic bilateral low back pain without sciatica, neck pain, thoracic spine pain, and myofascial pain syndrome. Dr. Wood performed a trigger point injection and recommended physical therapy.

In a November 15, 2016 development letter, OWCP requested that appellant submit a report from his attending physician, which addressed whether he had reached maximum medical improvement (MMI) and, if so, to evaluate permanent impairment in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ It afforded him 30 days to submit the necessary evidence.

Appellant submitted a November 29, 2016 report from Dr. Wood who reevaluated appellant for low back and cervical pain. Dr. Wood diagnosed chronic bilateral low back pain without sciatica, neck pain, thoracic spine pain, and myofascial pain syndrome. He performed a trigger point injection and recommended physical therapy. In a report dated December 2, 2016, Dr. Wood opined that appellant had not yet reached MMI. Appellant presented on November 29, 2016 with continued pain in the upper back, mid back, low back, and surrounding the thigh and buttocks regions. He reported that physical therapy reduced symptoms and overall improved functioning. Dr. Wood noted that appellant continued to receive injections into the trochanteric bursa, S1 joints, and myofascial trigger points as recently as October 2016, which provided benefit and relief of symptoms. He diagnosed lumbago, myofascial pain syndrome, chronic lumbago with bilateral radiculopathy, sacroiliitis, thoracic back pain, cervicgia, gluteus maximus and medius myofascial pain and tendinopathy. Dr. Wood noted current subjective and objective findings and

³ A.M.A., *Guides* (6th ed. 2009).

opined that appellant should continue to receive treatment to improve function and symptoms. He again opined that he had not reached MMI.

By decision dated December 19, 2016, OWCP denied appellant's claim for a schedule award, finding that the medical evidence of record was insufficient to establish that all of his conditions were at MMI.

OWCP continued to receive evidence. In reports dated February 1, April 17, May 23, August 24, and November 2, 2017 and January 29 and March 28, 2018, Dr. Wood diagnosed chronic bilateral low back pain, bilateral sciatica, neck pain, myofascial pain syndrome, lumbar facet syndrome, and sacroiliitis. On April 17, 2017 he noted that appellant reported a flare-up of symptoms of bilateral shoulder pain and low back pain. Dr. Wood performed a series of trigger point injections on April 17, May 23, August 24, and November 2, 2017, and March 28, 2018. On June 15, 2017 he performed bilateral S1 transforaminal epidural steroid injections and diagnosed radicular low back pain and lumbar degenerative disc disease with radiculopathy.

Dr. Wood continued to treat appellant on August 7, October 16, December 18, 2018, March 19, June 11 and July 2, 2019 for chronic bilateral low back pain without sciatica, lumbago, myofascial pain syndrome, neck pain, and thoracic spine pain. He continued to perform trigger point injections.

On August 8, 2019 appellant filed a claim for a schedule award (Form CA-7). In support of his claim, he submitted a July 22, 2019 letter from Dr. Wood, who reported first treating appellant in October 2016 for a low back injury, which occurred on June 1, 2007. Dr. Wood provided treatment modalities including physical therapy, intermittent epidural injections, trigger point injections, and oral medications. He indicated that appellant reached MMI in treatment for his low back injury and he did not expect appellant to obtain further pain relief or improved functional status. Dr. Wood opined that appellant had a consistent and chronic level of disability associated with the back injury, which was not expected to improve with further medical interventions. He noted recent subjective findings of achy pain ranging from 6-7/10 in the low back, left thigh, sacral area, S1 joint, and numbness in the bilateral buttocks. Dr. Wood noted objective findings of tenderness of bilateral lumbar paraspinal muscles and the bilateral gluteal regions, decreased lumbar range of motion, intact reflexes, sensation, and manual motor testing of the lower extremities.

In an August 12, 2019 development letter, OWCP requested that appellant submit an impairment evaluation from his attending physician addressing whether he had reached MMI and evaluating the extent of permanent impairment, if any, in accordance with the sixth edition of the A.M.A., *Guides*.⁴ It afforded him 30 days to submit the necessary evidence.

On August 1 and October 15, 2019 Dr. Wood performed bilateral L5 transforaminal epidural steroid injections and diagnosed radicular low back pain and lumbar degenerative disc disease with radiculopathy. On August 13, 2019 appellant reported 50 percent improvement in his

⁴ A.M.A., *Guides* (6th ed. 2009).

pain symptoms. Dr. Wood diagnosed chronic bilateral low back pain without sciatica, lumbago, myofascial pain syndrome, and neck pain.

By decision dated November 15, 2019, OWCP denied appellant's claim for a schedule award, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On January 2, 2020 appellant requested reconsideration.

On December 26, 2019 Dr. Wood performed a bilateral L4 transforaminal epidural steroid injection and diagnosed radicular low back pain and lumbar degenerative disc disease with radiculopathy. On January 7, 2020 he performed a thoracolumbar trigger point injection and diagnosed lumbago, thoracic spine pain, and spondylosis of the lumbar spine.

By decision dated April 1, 2020, OWCP denied modification of the November 15, 2019 decision.⁵

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.⁶ 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 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.⁷ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁸ 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.⁹

Neither FECA nor its implementing 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

⁵ The Board notes that OWCP's April 1, 2020 decision references a January 2, 2020 decision; however, there is no January 2, 2020 decision found in the record. The appropriate subject of modification was the November 15, 2019 merit decision.

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

⁷ *Id.* at § 10.404. See also *Ronald R. Kravynak*, 53 ECAB 130 (2001).

⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

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

¹⁰ *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).

from the definition of 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's 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

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.¹⁴ 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 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 his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

Appellant provided a July 22, 2019 letter from Dr. Wood, who indicated that appellant reached MMI in treatment for his low back injury and he had no expectation that he would obtain further pain relief or improved functional status. Dr. Wood opined that appellant had a consistent and chronic level of disability associated with the back injury, which was not expected to improve with further medical interventions. Similarly, in reports dated August 1, 2019 through January 7,

¹¹ 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).

¹² *Supra* note 8 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 *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁵ *Supra* note 8 at Chapter 2.808.5 (March 2017).

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

¹⁷ *Id.*

2020, he performed a series of epidural steroid and trigger point injections and diagnosed lumbago, thoracic spine pain, and spondylosis of the lumbar spine. Although Dr. Wood stated that appellant had “a consistent and chronic level of disability associated with the back injury,” he failed to provide a rating of permanent impairment to a scheduled member or function of the body pursuant to the A.M.A., *Guides*. As such, Dr. Wood’s report is insufficient to establish entitlement to a schedule award.¹⁸

OWCP’s procedures provide that, to support a schedule award, the file must contain medical evidence which shows that the impairment has reached a permanent and fixed state, indicates the date on which this occurred, describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of permanent impairment in accordance with the A.M.A., *Guides*.¹⁹ Although OWCP requested a medical opinion establishing the extent of appellant’s permanent impairment, the evidence submitted does not contain an impairment rating in accordance with the A.M.A., *Guides*. Therefore, Dr. Wood’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.²⁰

The Board finds, therefore, 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 his burden of proof to establish his schedule award claim.²¹

On appeal appellant argues that Dr. Wood’s medical reports are sufficient to establish his schedule award claim. As noted above, there is no current medical evidence of record confirming that appellant has reached MMI with respect to all of his accepted conditions and no supporting rating of permanent impairment of a scheduled member or function of the body pursuant to the A.M.A., *Guides*.²²

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

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

¹⁹ *Supra* note 14.

²⁰ See *M.G.*, Docket No. 19-0823 (issued September 17, 2019); see also *M.M.*, Docket No. 18-0292 (issued July 9, 2018).

²¹ See *E.D.*, Docket No. 19-1562 (issued March 3, 2020); *I.R.*, Docket No. 16-1796 (issued January 13, 2017); *P.L.*, Docket No. 13-1592 (issued January 7, 2014).

²² *Supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2020 and November 15, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 4, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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