

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

J.S., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
ROYAL C. JOHNSON MEMORIAL)
VETERANS AFFAIRS MEDICAL CENTER,)
Sioux Falls, SD, Employer)

Docket No. 21-0739

Issued: November 24, 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 1, 2021 appellant filed a timely appeal from a March 12, 2021 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than nine percent permanent impairment of his right lower extremity for which he previously received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 29, 2002 appellant, then a 32-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on March 16, 2002 he sustained shoulder and hip injuries when he slipped on ice while entering his police vehicle while in the performance of duty. OWCP accepted the claim for L4-5 and L5-S1 herniated discs. It authorized L5-S1 discectomy surgery on October 4, 2002. OWCP paid appellant appropriate wage-loss compensation.

On September 13, 2004 appellant filed a claim for a schedule award (Form CA-7). By decision dated November 23, 2004, OWCP granted him a schedule award for a nine percent permanent impairment of his right lower extremity. The award ran for 25.92 weeks during the period June 14 through December 12, 2004.

Appellant underwent L5-S1 microdiscectomy surgery on December 12, 2007.

In a letter dated May 25, 2010, OWCP informed appellant that the employing establishment had provided him with a suitable position as a patient services assistant. It related that he had 30 days to accept the position and was advised that, under section 8106(c)(2) of FECA, if he refused a suitable work position, his compensation benefits for wage loss or schedule award would be terminated.

By decision dated July 15, 2010, OWCP terminated appellant's compensation benefits and entitlement to a schedule award, effective July 15, 2010, pursuant to 5 U.S.C. § 8106(c)(2) for refusal of suitable work.

On October 29, 2010 appellant, through counsel, requested reconsideration. By decision dated April 25, 2011, OWCP denied modification.

On May 5, 2011 appellant filed a claim for an increased schedule award (Form CA-7). In support of his claim, he submitted an August 17, 2010 impairment rating from Dr. Jem J. Hof, a Board-certified physiatrist. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),² Dr. Hof found 31 percent whole person permanent impairment.

In a report dated July 16, 2011, Dr. Morley Slutsky, Board-certified in occupational medicine, serving as a district medical adviser (DMA), reviewed the medical record and concluded that appellant had no additional right lower extremity permanent impairment under the A.M.A., *Guides*. He also concluded that the date of appellant's maximum medical improvement (MMI) was April 21, 2011.

By decision dated August 2, 2011, OWCP denied appellant's claim for an increased schedule award. It explained that, as there was no evidence that he sustained additional permanent impairment between November 23, 2004 and July 15, 2010, the date of the suitable work termination decision, he was not entitled to an increased schedule award.

² A.M.A., *Guides* (6th ed. 2009).

Appellant underwent another L5-S1 microdiscectomy surgery on December 23, 2016.

On September 24, 2018 appellant filed a Form CA-7 claim for an increased schedule award.

By decision dated March 19, 2019, OWCP denied appellant's claim for an increased schedule award. It found that he was not entitled to monetary compensation under a schedule award as he had refused an offer suitable work pursuant to 5 U.S.C. § 8106(c)(2).

On June 3, 2020 appellant filed another Form CA-7 for an increased schedule award. OWCP received a May 5, 2020 report from Dr. Matthew K. Wingate, a Board-certified orthopedic surgeon. Using Table 17-4, page 470 of the sixth edition of the A.M.A., *Guides*, Dr. Wingate determined that appellant had 14 percent whole person permanent impairment.

On September 22, 2020 Dr. Michael M. Katz, Board-certified in orthopedic surgeon, in his capacity as OWCP's DMA, found that Dr. Wingate's report could not be used to rate appellant's permanent impairment as FECA did not recognize a schedule award for the spine, nor did it allow whole person impairment ratings. He requested OWCP contact Dr. Wingate to provide a spinal nerve impairment using the method proposed in *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*).

On January 6, 2021 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Corey Welchlin, an osteopathic Board-certified orthopedic surgeon, for a permanent impairment rating. In a report dated February 1, 2021, Dr. Welchlin opined that appellant had no permanent impairment due to the accepted conditions. In support of this conclusion, he found no peripheral nerve impairment as appellant was orthopedically and neurologically intact, with subjective pain complaints and complaint magnification. Dr. Welchlin determined that the date of appellant's MMI was February 1, 2021, the date of appellant's examination.

On March 8, 2021 Dr. Katz reviewed Dr. Welchlin's report and concurred with his findings and conclusions.

By decision dated March 12, 2021, OWCP denied appellant's claim for an increased schedule award. It explained that, as there was no evidence that he sustained additional permanent impairment between November 23, 2004 and July 15, 2010, the date of the suitable work termination decision, he was not entitled to an additional schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA,³ and its implementing federal regulations,⁴ 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,

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

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.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

OWCP's regulations also provide that, following a termination of compensation under section 8106(c) of FECA, a claimant has no further entitlement to compensation under sections 8105, 8106, and 8107 of FECA, which includes payment of compensation for permanent impairment of a scheduled member.⁷ The Board has affirmed that a refusal to accept suitable work constitutes a bar to receipt of a schedule award for any future permanent impairment, which may be related to the accepted employment injury.⁸

Chapter 2.808.12 of OWCP's procedures discusses schedule awards and refusal of suitable work.⁹ It indicates, "Section 5 U.S.C. 8106(c) provides a penalty against employees who refuse offers of suitable employment, or who abandon suitable work without good cause. If a claimant refuses to accept a suitable offer of employment, the [claims examiner] should follow the sanction procedures as discussed in [Chapter 2.0814]. Once a § 8106(c) sanction decision has been issued, the claimant has no ongoing entitlement to compensation for continuing [temporary total disability] or schedule award payments."

However, the commencement of the schedule award begins on the date of MMI. If MMI was obtained prior to invoking the section 8106(c) sanction, then the claimant would be entitled to schedule award payments from the date of MMI through the date of the section 8106(c) sanction decision.¹⁰

ANALYSIS

The Board finds that appellant has not established greater than nine percent permanent impairment of his right lower extremity for which he previously received a schedule award.

⁵ *Id.* See also *A.K.*, Docket No. 19-1927 (issued March 31, 2021); *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ See 20 C.F.R. § 10.517.

⁸ *K.H.*, Docket No. 07-2022 (issued February 25, 2008); *Stephen R. Lubin*, 43 ECAB 564 (1992); see also *F.E.*, Docket No 20-0070 (issued August 4, 2020).

⁹ *Supra* note 6 at Chapter 2.808.12 (February 2013).

¹⁰ See *K.H.*, Docket No. 07-2022 (issued February 25, 2008) (the Board held that OWCP properly denied appellant's entitlement to schedule award compensation as section 8106(c) of FECA served as a bar to further compensation for disability arising from the accepted employment injuries); *Alfred R. Anderson*, 54 ECAB 179 (2002); *Stephen R. Lubin*, 43 ECAB 564 (1992) (where the Board found that the penalty provision of section 8106(c) may serve as a bar to compensation pursuant to appellant's claim for a schedule award for the period after the termination of compensation based on a refusal to accept a suitable offer of employment).

On June 3, 2020 appellant filed a Form CA-7 claim for an increased schedule award. In support thereof, he submitted a May 5, 2020 report from Dr. Wingate. Using Table 17-4, page 470 of the sixth edition of the A.M.A., *Guides*, Dr. Wingate determined that appellant had 14 percent whole person permanent impairment. He did not provide a date of MMI.

On September 22, 2020 Dr. Katz, a Board-certified in orthopedic surgeon, in his capacity as OWCP's DMA, found that Dr. Wingate's report could not be used to rate appellant's permanent impairment as FECA did not recognize a schedule award for the spine, nor did it allow whole person impairment ratings.

On January 6, 2021 OWCP referred appellant, together with a SOAF, the medical record, and a list of questions, to Dr. Welchlin for a permanent impairment rating. In a report dated February 1, 2021, Dr. Welchlin opined that appellant had no permanent impairment due to the accepted conditions. In support of this conclusion, he found no peripheral nerve impairment as appellant was orthopedically and neurologically intact, with subjective pain complaints and complaint magnification. Dr. Welchlin determined that the date of appellant's MMI was February 1, 2021, the date of appellant's examination. On March 8, 2021 Dr. Katz, the DMA, reviewed Dr. Welchlin's report and concurred with his findings and conclusions.

As noted above, a refusal of suitable work constitutes a bar to receipt of a schedule award for any future permanent impairment which may be related to the accepted employment injury.¹¹ As OWCP terminated appellant's compensation effective July 15, 2010, he is barred from receiving monetary compensation under a schedule award for any period of MMI after that termination decision.¹² The weight of the medical evidence establishes that appellant's date of MMI was February 1, 2021, a date well after the termination of appellant's benefits. Appellant is, therefore, precluded from an increased schedule award.

The Board, thus, finds that appellant has not met his burden of proof to establish greater than the nine percent permanent impairment of his right lower extremity previously awarded.

CONCLUSION

The Board finds that appellant has not established greater than nine percent permanent impairment of his right lower extremity for which he previously received a schedule award.

¹¹ *Supra* note 8.

¹² *E.J.*, Docket No. 12-0383 (issued August 20, 2012); *J.H.*, Docket No. 06-0886 (issued February 8, 2007).

ORDER

IT IS HEREBY ORDERED THAT March 12, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 24, 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