

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

_____)	
W.S., Appellant)	
)	
and)	Docket No. 21-0419
)	Issued: October 8, 2021
U.S. POSTAL SERVICE, MOULTON POST OFFICE, Moulton, AL, Employer)	
_____)	

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 January 28, 2021 appellant filed a timely appeal from a December 17, 2020 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 December 17, 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 8, 2015 appellant, then a 39-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 1, 2015 she injured her lower back when lifting a large, heavy parcel while in the performance of duty. She stopped work on June 5, 2015 and returned the next day. OWCP initially accepted the claim for lumbar sprain (right side). It subsequently accepted a permanent aggravation of L5-S1 herniated disc. OWCP paid all appropriate compensation and authorized an August 31, 2017 anterior lumbar discectomy and fusion L5-S1. Appellant returned to full-time full-duty work on May 4, 2019.

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

By decision dated June 1, 2020, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On June 24, 2020 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated September 1, 2020, an OWCP hearing representative found that the case was not in posture for a hearing and vacated OWCP's June 1, 2020 decision denying appellant's schedule award claim. The hearing representative remanded the case for OWCP to refer appellant, together with a statement of accepted facts (SOAF) and the medical record, to an appropriate Board-certified specialist for a permanent impairment evaluation in conformance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), a supplemental publication of the sixth edition of the A.M.A., *Guides*. Following any further development deemed necessary, OWCP was to issue a *de novo* decision.

OWCP referred appellant, an updated SOAF dated September 9, 2020, the medical record, and a list of questions, to Dr. Curt L. Freudenberger, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether her work-related condition resulted in permanent impairment thereby warranting a schedule award.

In an October 14, 2020 report, Dr. Freudenberger discussed appellant's factual and medical history, reviewed the SOAF and the medical record, and reported the findings of his physical examination of appellant. He advised that she was status post single-level lumbar fusion with a resolved or nonverifiable radiculopathy. Dr. Freudenberger advised that appellant's principle complaint was consistent with a single-level fusion of low back pain with mild guarded range of motion. On physical examination, he noted that she had full range of motion. With regard to appellant's lower extremities, Dr. Freudenberger indicated that she had a nonverifiable waxing and waning L5 versus S1 distribution radiculopathy. However, on examination, appellant had excellent strength, was able to toe-and-heel walk, preserved deep tendon reflexes, and a negative

³ A.M.A., *Guides* (6th ed. 2009).

straight leg raise test. Dr. Freudenberger also related that there was no evidence of any persistent motor or sensory deficits. He opined that any concerns regarding a lower extremity component appeared to have resolved over the course of treatment and that any clinical complaints were either minimal to nonexistent *versus* nonverifiable. Dr. Freudenberger opined that appellant had five percent whole person permanent impairment based on the diagnosed-based impairment methodology under the A.M.A., *Guides*, Table 17-4, Grade A, for status post single-level procedure with resolved radiculopathy. He further opined that *The Guides Newsletter* was not applicable as she had a full resolution of radiculopathy. In an October 20, 2019 lower extremity permanent impairment worksheet, Dr. Freudenberger opined that appellant reached maximum medical improvement (MMI) on October 20, 2020. He also opined that she had five percent permanent impairment under Table 17-4 for single level fusion.

OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). In a December 9, 2020 report, Dr. Katz reviewed the SOAF and the medical record, including Dr. Freudenberger's report. He opined that appellant reached MMI on October 14, 2020 the date of Dr. Freudenberger's impairment evaluation. Dr. Katz noted that FECA did not allow a schedule award for the spine, nor did it recognize whole person impairment for spinal conditions. Rather, spinal nerve injury was determined under *The Guides Newsletter* of. Dr. Katz noted that Dr. Freudenberger, in his evaluation, determined that there were no motor or sensory deficits in either lower extremity. Based on Dr. Freudenberger's evaluation findings, Dr. Katz found that there was no ratable impairment of any spinal nerve and thus no ratable impairment under FECA for the accepted spinal conditions. Under Proposed Table Two of *The Guides Newsletter*, he indicated that appellant had no motor deficit and no sensory deficit for spinal nerves L3 through S1, which resulted in Class 0 or 0 percent permanent impairment of both lower extremities. Dr. Katz also noted that the A.M.A., *Guides* did not allow for an alternative range of motion impairment calculation based on the key diagnostic factors for the accepted conditions.

By decision dated December 17, 2020, OWCP denied appellant's schedule award claim, finding that she had not established 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.⁴ 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.⁵ As of May 1, 2009, schedule awards are determined in

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

⁵ *Id.* at § 10.404. See also Ronald R. Kraynak, 53 ECAB 130 (2001).

accordance with the sixth edition of the A.M.A., *Guides* (2009).⁶ 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.⁷

Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.⁸ Furthermore, the back is specifically excluded from the definition of organ under FECA.⁹ 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.¹⁰ 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.¹¹

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.¹²

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.

⁶ 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).

⁷ *J.C.*, Docket No. 20-1071 (issued January 4, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁸ *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).

⁹ 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).

¹⁰ *Supra* note 6 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹¹ *J.C.*, *supra* note 7; *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

¹² *Supra* note 6 at Chapter 2.808.6(f) (March 2017).

In his October 14, 2020 report, Dr. Freudenberger opined that appellant had five percent whole person impairment under Table 17-4 of the A.M.A., *Guides*. As noted, neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.¹³

Dr. Freudenberger also opined that appellant did not have an impairment under *The Guides Newsletter* as she had a full resolution of her radiculopathy. Based on Dr. Freudenberger's evaluation findings, Dr. Katz found that there was no ratable impairment of any spinal nerve for either motor or sensory defect and thus no ratable impairment under FECA for the accepted conditions. Under Proposed Table Two of *The Guides Newsletter*, he explained that spinal nerves L3 through S1 had no motor or sensory deficits therefore appellant had Class 0 or 0 percent permanent impairment of the lower extremities. The Board finds that the DMA properly used Dr. Freudenberger's findings and provided an explanation in conformance with the A.M.A., *Guides* and *The Guides Newsletter*, that she had no permanent impairment of her lower extremities due to either a motor or sensory deficit of the L3-S1 spinal nerves.¹⁴

As appellant has not submitted medical evidence in conformance with either the A.M.A., *Guides* or *The Guides Newsletter*, to support a permanent impairment of her lower extremities, the Board finds that she has not met her burden of proof to establish her claim for a schedule award.¹⁵

Appellant may request a schedule award or increased schedule award at any time based on evidence of new exposure, or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

¹³ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *R.B.*, Docket No. 19-0848 (issued February 11, 2020); *C.S.*, Docket No. 19-0851 (issued November 18, 2019).

¹⁴ *Id.*

¹⁵ See *R.B.*, *supra* note 13.

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.

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 8, 2021
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