

³ The Board notes that appellant submitted new evidence on appeal. 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 his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On December 12, 2016 appellant, then a 46-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a fractured disc and nerve impingement causing pain from his lower back radiating into his right leg due to factors of his federal employment. On February 16, 2017 OWCP accepted the claim for aggravation of other spondylosis with radiculopathy, lumbosacral region. Appellant stopped work on November 9, 2016. OWCP paid him wage-loss compensation on the supplemental rolls from May 3 through September 16, 2017 and on the periodic rolls, effective September 17, 2017.

In a report dated November 18, 2016, Dr. Victor Hsu, a Board-certified orthopedist, evaluated appellant for lumbar spine and right leg pain. He diagnosed lumbar stenosis and spondylolisthesis of lumbosacral region and recommended spinal injections. Dr. Hsu subsequently treated appellant on January 20, 2017 and diagnosed spondylolisthesis of lumbosacral region, and spinal stenosis of the lumbar region. He noted that conservative treatment, including epidural injections and physical therapy, failed and he requested authorization to perform spinal fusion and insertion of spinal fixation device.⁴

Appellant was later treated by Dr. Venkatesh Sundararajan, a Board-certified anesthesiologist, on November 28, 2016 and January 30 and February 6, 2017, who diagnosed lumbar radicular syndrome and lumbar spinal stenosis. Dr. Sundararajan performed a series of right L5 and S1 transforaminal epidural steroid injections with fluoroscopy with minimal relief in symptoms.

On October 6, 2017 OWCP authorized a lumbar spine fusion and insertion of spinal fixation device.

On January 23, 2018 Dr. Eric Williams, a Board-certified orthopedist, performed an L5-S1 laminectomy with bilateral partial facetectomy and foraminotomy, L5-S1 instrumented posterior spinal fusion and posterolateral fusion with local bone, and transforaminal lumbar interbody arthrodesis with cage L5-S1. He diagnosed L5-S1 spondylolisthesis with foraminal stenosis, anxiety, and hypercholesterolemia. On May 1, 2019 Dr. Williams opined that appellant's work-related injury caused an exacerbation of his chronic back pain, L5-S1 spondylolisthesis, and symptomatic lumbar radiculopathy resulting in spinal surgery. He further noted that appellant's work-related condition affected his activities of daily living and precluded his ability to perform his work duties. Dr. Williams opined that appellant reached maximum medical improvement (MMI) from a surgical and rehabilitative standpoint. He cleared appellant to return to work with a series of restrictions.

⁴ A magnetic resonance imaging (MRI) scan of the lumbar spine dated November 10, 2016 revealed at L5-S1 bilateral pars interarticularis defects with grade one anterolisthesis of L5 on S1, uncovering of the disc with small diffuse disc bulge, and architectural distortion of both neural foramina resulting in severe bilateral neural foraminal narrowing.

On March 17, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award. In statements dated March 17, 2020, appellant, through counsel, noted that filing the Form CA-7 was an effort to preserve appellant's schedule award claim due to other serious medical conditions. He indicated that appellant requested to remain on the compensation rolls at this time. Appellant further indicated that medical evidence would be submitted at the appropriate time in support of the schedule award claim. He requested that any decision relative to the schedule award be held in abeyance until the medical evidence was provided.

In a development letter dated March 30, 2020, OWCP requested that appellant submit an impairment evaluation addressing whether he had reached MMI and provide an impairment rating using the sixth edition of the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ It indicated that, to date, no medical evidence had been received in support of his claim for a schedule award. OWCP advised that, if appellant's physician was unable or unwilling to provide the required report to notify OWCP in writing and if his case met the essential elements for a schedule award claim (work-related permanent condition and a schedule member) and the medical evidence was not sufficient to determine permanent impairment, he would be scheduled to be seen by a second opinion specialist. It afforded him 30 days to submit additional medical evidence in support of his schedule award claim. OWCP noted that, if the requested medical evidence was not received within 30 days from the date of the letter, a decision may be made based on the evidence in the file.

In response to the development letter, on April 8, 2020 counsel referred to his March 17, 2020 letter and reiterated that the filing of the Form CA-7 was to preserve appellant's schedule award claim due to other serious medical conditions. He indicated that no medical evidence would be submitted at this time in support of appellant's schedule award claim. Counsel advised that medical evidence would be submitted at the appropriate time and he requested that any decision relative to the schedule award be held in abeyance until the medical evidence is provided.

By decision dated May 8, 2020, 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.

On May 14, 2020 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on August 4, 2020. Appellant was represented by counsel, who provided a statement explaining that the Form CA-7 was submitted to preserve appellant's schedule award claim. Counsel noted that appellant was battling stomach cancer and was undergoing very intensive chemotherapy and it was for this reason that no medical report was submitted in support of the schedule award. He further indicated that appellant had not seen a doctor in relation to a permanent impairment evaluation.

Appellant was treated by Dr. Jason J. Sanderson, an osteopath, on June 10, 2020 for pain in the lumbar spine radiating into the right and left thigh. Dr. Sanderson diagnosed lumbosacral spondylosis with radiculopathy. He opined that appellant's condition was chronic with little expectation of a full recovery at this time. On July 1, 2020 Dr. Sanderson reviewed an offer of modified assignment and determined that appellant was unable to work in any capacity as listed in the modified job offer based on his current medical status. He indicated that appellant's chronic low back condition precluded him from bending, stooping, and carrying more than five pounds, or

⁵ A.M.A., *Guides* (6th ed. 2009).

standing/walking for four hours a day as listed in the job offer. Dr. Sanderson also noted that appellant was recently diagnosed with cancer.

On July 2, 2020 appellant was treated by Meaghan Descher, a physician assistant, for right foot pain and low back pain radiating into the right leg. He reported an onset in 2016. Ms. Descher diagnosed sacroiliitis, radiculopathy, lumbar region, spinal stenosis, lumbar region,; low back pain; and other intervertebral disc degeneration, lumbar region.

By decision dated September 18, 2020, an OWCP hearing representative affirmed the decision dated May 8, 2020.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁶ and its implementing federal regulations,⁷ 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 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.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

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.¹⁰ 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 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*.¹¹ 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.¹² 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.¹³

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹¹ *Supra* note 9 at Chapter 2.808.5 (March 2017).

¹² *Id.* at Chapter 2.808.6(a) (March 2017).

¹³ *Id.* at Chapter 2.808.6(c).

The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.¹⁴ OWCP procedures, however, further provide that if a claimant does not provide an impairment evaluation from his or her physician when requested, and there is an indication of permanent impairment in the medical evidence of file, the claims examiner (CE) should refer the claimant for a second opinion evaluation. The CE may also refer the case to the DMA prior to scheduling a second opinion examination to determine if the evidence in the file is sufficient for the DMA to provide an impairment rating. If the case is referred for a second opinion, the report should contain the information described in 6a above.¹⁵ If it does not contain this information, clarification with the second opinion should be sought.¹⁶

Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.¹⁷ Furthermore, the back is specifically excluded from the definition of organ under FECA.¹⁸ 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.¹⁹ 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.²⁰

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.

OWCP accepted the claim for aggravation of other spondylosis with radiculopathy, lumbosacral region. On March 17, 2020 appellant filed a schedule award claim based on his accepted spondylosis with radiculopathy, lumbosacral region. He did not submit any medical

¹⁴ *Id.*

¹⁵ Chapter 2.808.6a(1) provides that the medical evidence should include a detailed history of clinical presentation, physical findings, functional history, clinical studies or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment rating was calculated. *Supra* note 9 at Chapter 2.808.6a.

¹⁶ *Supra* note 9 at Chapter 2.808.6d (March 2017).

¹⁷ *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).

¹⁸ *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).

¹⁹ *Supra* note 9 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

²⁰ *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

evidence in support of a schedule award; rather, counsel noted that filing the Form CA-7 was an effort to preserve appellant's schedule award claim due to other serious medical conditions. Counsel requested that any decision relative to the schedule award be held in abeyance until the medical evidence was provided. By decision dated May 8, 2020, OWCP denied his schedule award claim, finding that he had not provided medical evidence establishing permanent impairment of a scheduled member or function of the body. This decision was affirmed by an OWCP hearing representative on September 18, 2020.

Under FECA,²¹ where a claimant is seeking a schedule award, he or she must submit a medical report that "must contain accurate measurements of the function of the organ or member, in accordance with the A.M.A., *Guides*."²² The burden is on the claimant to provide this evidence.²³ The regulations further provide that if the claimant's evidence is insufficient to meet the burden of proof, OWCP should inform the claimant of the additional evidence needed and provide the claimant with at least 30 days to submit it.²⁴ OWCP issued a development letter on March 30, 2020. In response to this letter, counsel indicated that no medical evidence would be submitted at that time in support of the schedule award claim.

Although OWCP requested a medical opinion establishing the extent of appellant's permanent impairment, there is no current medical evidence of record supporting that appellant has ratable permanent impairment of a scheduled member of the body. Although appellant did not submit Dr. Williams' May 1, 2019 report in support of his schedule award claim, the report addressed MMI opining that appellant "maximized his medical improvement for both a surgical and rehabilitation standpoint" and further noting that his work-related condition affected his activities of daily living and precluded his ability to perform his job. Dr. Williams diagnosed exacerbation of chronic back pain, L5-S1 spondylolisthesis, and symptomatic lumbar radiculopathy; however, he did not clearly link appellant's condition to a member of the body covered by FECA schedules.²⁵ Only radiculopathy of the leg causing permanent impairment to that extremity and not back pain could be covered by the schedules. Dr. Williams' evaluation could not be considered probative for purpose of recommending a schedule award under FECA because he failed to utilize *The Guides Newsletter* for rating the spine. He did not find permanent impairment resulting from a cervical, thoracic or lumbar spine condition causally related to the accepted employment factors in accordance with the sixth edition of the A.M.A., *Guides*. Additionally, Dr. Williams failed to provide information to visualize the character and degree of disability that appellant may have as a result of the leg radiculopathy. Rather, he generally opined that back pain and leg radiculopathy affected his activities of daily living.²⁶ Therefore, Dr. Williams' report is insufficient to establish permanent impairment of a scheduled member or

²¹ *Supra* note 2.

²² 20 C.F.R. § 10.333.

²³ *Id.* at § 10.115.

²⁴ *Id.* at § 10.121.

²⁵ *See T.M.*, Docket No. 19-1126 (issued September 22, 2020).

²⁶ *See P.B.*, Docket No. 20-0346 (issued July 8, 2020) (where the claimant submitted medical reports showing right shoulder pain and weakness and stating that claimant reached MMI, OWCP denied the claim because the medical reports did not describe appellant's impairment in sufficient detail).

function of the body causally related to appellant's accepted employment condition.²⁷ The Board finds, therefore, 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.²⁸

On appeal counsel asserts that OWCP improperly declined to hold appellant's case in abeyance indefinitely until appellant's counsel provided the requested medical evidence in support of the claim for a schedule award. He further asserted that OWCP has a responsibility to develop the evidence to ensure that justice is done. The Board notes that OWCP's regulations and procedures do not provide for an indefinite suspension of the adjudication of appellant's claim for a schedule award. Rather, proper administrative practice requires that where a claim for compensation is filed OWCP is tasked with timely processing the claim.²⁹ As noted above, 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.³⁰

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.

²⁷ See *M.G.*, Docket No. 19-0823 (issued September 17, 2019).

²⁸ 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).

²⁹ See *J.J.*, Docket No. 08-2130 (issued April 10, 2009) (in every case where a claim for compensation is filed, good administrative practice requires that a final determination be made and a compensation order issued).

³⁰ *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

ORDER

IT IS HEREBY ORDERED THAT September 18, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 2021
Washington, DC

Alec J. Koromilas, 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