

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

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**J.U., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Salisbury, MD, Employer**

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**Docket No. 21-1298  
Issued: February 16, 2023**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On August 29, 2021 appellant filed a timely appeal from a June 2, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 permanent impairment of a scheduled member or function of the body, warranting a schedule award.

**FACTUAL HISTORY**

On September 10, 2018 appellant, then a 71-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a concussion with loss of consciousness, abrasions, and back strain when he fell to the floor while in the performance of duty. He stopped

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

work on September 13, 2018 and returned to part-time limited-duty work on October 25, 2018. On March 7, 2019 OWCP accepted the claim for concussion with loss of consciousness and abrasions, mid-back area. It paid appellant wage-loss compensation on the supplemental rolls from October 29, 2018 through August 30, 2019.

On September 12, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On September 13, 2018 Dr. Richard E. Bird, a Board-certified neurologist, treated appellant for different work injury that occurred on September 10, 2018 when a metal shelving case weighing 100 to 250 pounds fell on appellant, rendering him unconscious. He noted that he last saw appellant on August 15, 2019 for complaints of headaches, marked stiffness and pain in his neck, and chronic low back pain. Appellant reported working four hours a day, but could not tolerate the neck and back pain and ultimately retired. Findings on examination revealed neck range of motion of 50 percent or less in all directions, soreness and tightness throughout his neck, marked soreness in his quadratus lumborum muscles, pain over the lower spine, limited forward flexion, tenderness throughout the hips and buttocks, but an otherwise unremarkable neurological examination. Dr. Bird diagnosed mild-chronic post-concussion syndrome, significant chronic cervicgia, muscle contraction headaches, and significant low back pain with preexisting injuries. He advised that appellant reached maximum medical improvement (MMI).

In a development letter dated September 24, 2019, OWCP requested that appellant submit an impairment evaluation in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>2</sup> It afforded appellant 30 days to submit additional medical evidence in support of his schedule award claim.<sup>3</sup> No additional evidence was received.

By decision dated February 24, 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.

OWCP subsequently received additional evidence, indicating that appellant was treated by Dr. Bird from September 13, 2018 through October 4, 2019 for chronic post-concussion syndrome, cervicgia, and low back pain. Findings on examination revealed headaches, mild unsteadiness, neck stiffness, limited cervical range of motion, limited forward flexion, tenderness in the quadratus lumborum and over the lumbar spine, and tenderness in the trapezius and levator scapulae muscles. Dr. Bird referenced the need for more information relative to a disability determination and noted that appellant was at MMI on August 15, 2019.

On March 16, 2020 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>3</sup> Appellant retired effective September 27, 2019.

By decision dated May 26, 2020, OWCP's hearing representative vacated OWCP's February 24, 2020 decision and 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 A.M.A., *Guides* and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*). Following any further development deemed necessary, OWCP was to issue a *de novo* decision.

OWCP referred appellant, an updated SOAF, the medical record, and a series of questions, to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether his work-related condition resulted in permanent impairment thereby warranting a schedule award.

In an October 28, 2020 report, Dr. Hanley 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 noted that appellant was last treated by Dr. Bird on March 4, 2020 for complaints of a stiff neck, chronic headaches, and a grinding sensation in the neck. Appellant did not report any leg or arm pain attributable to his spinal injury. Findings on examination of the back revealed no kyphosis or scoliosis, some limitation of motion not inconsistent with the history of degenerative disease of the spinal axis, cervical range of motion was mildly limited in all planes, consistent again with degenerative disease, no signs of residual discomfort in the arms or legs, no limitation of motion of the shoulders or knees, and no effusion or swelling. Dr. Hanley diagnosed history of musculoligamentous straining injury to the neck, middle and lower back superimposed on preexisting degenerative disease with temporary aggravation of the underlying problem, and closed head injury with post-concussive symptomology. He indicated with regard to spinal injuries, OWCP did not recognize whole person impairment and individuals who sustained spinal injuries are rated based on the findings in the extremities attributable to the spine. Dr. Hanley noted that upon physical examination appellant had no subjective symptomology in the upper or lower extremities and no evidence whatsoever that he sustained a condition in the extremities causally related to the injury of September 10, 2018. He opined that appellant did not have permanent impairment pursuant to the July/August 2009 *The Guides Newsletter*. Dr. Hanley noted that appellant reached MMI in August 2019. In an October 28, 2020 upper extremity permanent impairment worksheet, he opined that appellant reached MMI on August 16, 2019. Dr. Hanley noted that there was no applicable spinal injury with extremity involvement.

OWCP also referred appellant, a SOAF, the medical record, and a series of questions, to Dr. Michael Sellman, a Board-certified neurologist, for a second opinion evaluation to determine whether his work-related condition resulted in permanent impairment thereby warranting a schedule award. In a January 13, 2021 report, Dr. Sellman 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 appellant was awake, alert, and oriented, could name, repeat, and comprehend, speech was fluent without dysarthria, no right- or left-sided confusion, and no problems with memory recall, knowledge, or vocabulary. Examination of the head revealed no tenderness to palpation, intact extraocular muscle movements, and no facial numbness. Appellant's reflexes were positive and equal reflexes, normal sensation, cervical muscular spasm and limited range of motion of the neck. Dr. Sellman noted that appellant sustained a mild cerebral concussion and mild post-traumatic headache disorder as a result of the

injuries to his head on September 10, 2018. He diagnosed post-traumatic cervical muscular pain and lumbar muscular pain from his work injury. Dr. Sellman advised that appellant reached MMI on August 15, 2019. He noted that pursuant to Table 13-18 of the A.M.A., *Guides* appellant had a class three headache disorder for four percent whole person impairment. With regard to his cervical spine injuries, Dr. Sellman noted that pursuant to Table 17.2 appellant had a class one impairment for five percent whole person impairment. He used the Combined Values Chart to calculate an impairment rating of eight percent impairment of the whole person for injuries sustained to his head and neck at work.

OWCP subsequently referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). In an April 30, 2021 report, Dr. Katz reviewed the SOAF and the medical record. He concurred with Dr. Hanley's opinion that there was no permanent impairment due to the accepted conditions of this claim. Dr. Katz noted the sole accepted conditions were concussion and abrasion of thorax and the brain and conditions related to it including headaches, and post-concussion symptoms were not scheduled members and not eligible for a schedule award under FECA. He further noted that FECA did not allow a schedule award for the spine, nor did it recognize whole person impairment for spinal conditions. Dr. Katz noted that neither Dr. Hanley nor Dr. Sellman identified any deficits in the extremities that could be rated under the proposed tables of *The Guides Newsletter* for spinal nerve impairment. Based on Drs. Hanley and Sellman's evaluation findings, he found that there was no permanent impairment of any spinal nerve, and thus no permanent impairment under FECA due to the accepted spinal conditions. 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 June 2, 2021, 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, 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.<sup>4</sup> 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.<sup>5</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>6</sup> The Board has approved the use

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<sup>4</sup> 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

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

<sup>6</sup> 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).

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>7</sup>

No schedule award is payable for a member, function, or organ of the body that is not specified in FECA or the implementing regulations.<sup>8</sup> The list of scheduled members includes the eye, arm, hand, fingers, leg, foot, and toes.<sup>9</sup> Additionally, FECA specifically provides for compensation for loss of hearing and loss of vision.<sup>10</sup> Neither FECA nor its regulations provide for a schedule award for impairment of the back or to the body as a whole.<sup>11</sup>

Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.<sup>12</sup> Furthermore, the back is specifically excluded from the definition of organ under FECA.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup>

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<sup>7</sup> *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).

<sup>8</sup> *D.L.*, Docket No. 20-0059 (issued July 8, 2020); *W.C.*, 59 ECAB 374 (2008); *Anna V. Burke*, 57 ECAB 521 (2006).

<sup>9</sup> 5 U.S.C. § 8107(c).

<sup>10</sup> *Id.*

<sup>11</sup> See *J.L.*, Docket No. 18-1380 (issued May 1, 2019). FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

<sup>12</sup> *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).

<sup>13</sup> 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).

<sup>14</sup> *Supra* note 6 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>15</sup> *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).

<sup>16</sup> See *G.S.*, Docket No. 18-0827 (issued May 1, 2019).

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.<sup>17</sup>

### 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.

In his October 28, 2020 report, OWCP's referral physician Dr. Hanley opined that, on physical examination, appellant had no signs of residual discomfort in the arms or legs, no limitation of motion of the shoulders or knees, and no effusion or swelling. He concluded that appellant had no subjective symptomology in the upper or lower extremities, and no evidence whatsoever that he sustained a condition in the extremities causally related to the injury of September 10, 2018. Dr. Hanley opined that appellant did not have permanent impairment pursuant to *The Guides Newsletter*.

In his January 13, 2021 report, Dr. Sellman, a neurologist, opined that pursuant to Table 13-18 of the A.M.A., *Guides* appellant had a class three headache disorder for four percent whole person impairment for injuries sustained to his head on September 10, 2018. With regard to his cervical spine injuries, he noted that pursuant to Table 17.2 of the A.M.A., *Guides* appellant had a class one impairment for a five percent whole person impairment. Although Dr. Sellman found class three headache disorder for four percent whole person impairment, FECA, as noted, does not allow schedule awards for a member, function, or organ of the body that is not specified in FECA or the implementing regulations.<sup>18</sup> The Board further notes that FECA, does not allow schedule awards for impairment of the body as a whole.<sup>19</sup> Accordingly, Dr. Sellman's whole person impairment rating does not comport with OWCP's procedures and is insufficient to establish permanent impairment.<sup>20</sup>

DMA Dr. Katz concurred with Dr. Hanley's opinion that there was no permanent impairment due to the accepted conditions of this claim. Dr. Katz noted the sole accepted conditions were concussion and abrasion of thorax and the brain and conditions related to it including headaches, and post-concussion symptoms were not scheduled members and not eligible for a schedule award under FECA. He further noted that FECA did not allow a schedule award for the spine, nor did it recognize whole person impairment for spinal conditions. Dr. Katz noted that neither Dr. Hanley nor Dr. Sellman identified any deficits in the extremities that could be rated under the proposed tables of *The Guides Newsletter* for spinal nerve impairment. He found that

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<sup>17</sup> *Supra* note 6 at Chapter 2.808.6(f) (March 2017).

<sup>18</sup> *D.L.*, Docket No. 20-0059 (issued July 8, 2020); *W.C.*, 59 ECAB 374 (2008); *Anna V. Burke*, 57 ECAB 521 (2006).

<sup>19</sup> *See M.M.*, Docket No. 17-0197 (issued May 1, 2018); *J.G.*, Docket No. 12-0995 (issued October 22, 2012).

<sup>20</sup> *See M.M.*, *id.*

there was no permanent impairment of any spinal nerve, and thus no permanent impairment under FECA due to the accepted spinal conditions. 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. The Board finds that the DMA properly used the findings of Drs. Hanley and Sellman, and provided an explanation in conformance with the A.M.A., *Guides* and *The Guides Newsletter*, that appellant had no permanent impairment of his upper and lower extremities due to either a motor or sensory deficit of the spinal nerves.<sup>21</sup>

As noted, neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.<sup>22</sup> As the medical evidence of record is insufficient to establish permanent impairment of a scheduled member or function of the body, the Board finds that appellant has not met his burden of proof to establish his claim for a schedule award.<sup>23</sup>

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.

### **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.

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<sup>21</sup> *Id.*

<sup>22</sup> 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).

<sup>23</sup> *See R.B., id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 2, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 16, 2023  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board