

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

_____)
B.W., Appellant)

and)

DEPARTMENT OF DEFENSE, ARMED)
FORCES RETIREMENT HOME, Gulfport, MS,)
Employer)
_____)

**Docket No. 22-0522
Issued: March 10, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 16, 2022 appellant filed a timely appeal from a January 14, 2022 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 her burden of proof to establish greater than the nine percent permanent impairment of the left upper extremity, for which she previously received a schedule award.

_____)
¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances of this case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 12, 2004 appellant, then a 41-year-old physical therapy assistant, filed a traumatic injury claim (Form CA-1) alleging that, on May 11, 2004, she injured her left shoulder and left side of her neck when helping to reposition a patient in a wheelchair while in the performance of duty. On July 7, 2004 OWCP accepted the claim for aggravation of cervical radiculopathy. Appellant continued to work limited duty.

On November 25, 2005 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated July 30, 2007, OWCP granted appellant a schedule award for a nine percent permanent impairment of the left upper extremity (arm).³

On September 25, 2007 appellant appealed to the Board.⁴ By decision dated March 11, 2008, the Board affirmed the July 30, 2007 decision.

On March 5, 2017 appellant filed claim for an additional schedule award (Form CA-7).⁵

OWCP received hospital records reflecting that on November 3, 2016 Dr. Robert Kimber, an orthopedic surgeon, performed an anterior cervical discectomy and fusion at C4-C7.

In a development letter dated March 28, 2017, OWCP informed appellant of the type of medical evidence needed to establish her claim for an additional schedule award. It afforded her 30 days to submit the necessary evidence.

In an April 25, 2017 correspondence, appellant indicated that her physician was unwilling to provide a permanent impairment rating.

On October 13, 2017 OWCP referred appellant to Dr. Simon Finger, a Board-certified orthopedic surgeon, for a second opinion to evaluate appellant's work-related condition and any

² Docket No. 07-2428 (issued March 11, 2008); *Order Dismissing Appeal*, Docket No. 08-1670 (issued December 22, 2008); *Order Dismissing Appeal*, Docket No. 15-875 (issued April 29, 2015); *Order Dismissing Appeal*, Docket No. 15-1763 (issued February 10, 2016); Docket No. 18-1415 (issued March 8, 2019).

³ The award was based on the opinion of Dr. Raymond Fletcher, an OWCP second opinion physician, Board-certified in orthopedic surgery. In a June 6, 2007 report, Dr. Fletcher opined that appellant had a nine percent permanent impairment of the left upper extremity. By report dated June 25, 2007, an OWCP district medical adviser (DMA) concurred with Dr. Fletcher's opinion.

⁴ Docket No. 07-2428, *supra* note 2.

⁵ Appellant indicated that she had retired effective October 1, 2015.

resulting permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶

In a November 14, 2017 report, Dr. Finger noted that appellant had undergone cervical spine surgery in November 2016 and was currently experiencing improving hand weakness. He described his review of the statement of accepted facts (SOAF) and medical record. Examination findings included full painless neck range of motion (ROM), and bilateral negative upper extremity Spurling's signs. Dr. Finger found no atrophy in the upper extremities and no motor or sensory deficits present. He advised that maximum medical improvement (MMI) had been reached on November 14, 2017, and that, in accordance with *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), appellant had a zero percent permanent impairment because she had no motor or sensory loss.

In a January 31, 2018 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), noted that appellant had previously received a schedule award for nine percent permanent impairment of the left upper extremity. He reviewed the medical record, including Dr. Finger's November 14, 2017 evaluation, which he found to be the date of MMI. The DMA opined that appellant had no upper extremity permanent impairment in accordance with *The Guides Newsletter* because she had no neurologic deficit consistent with radiculopathy in the upper extremity.

By decision dated March 14, 2018, OWCP noted that appellant had previously received a schedule award for nine percent permanent impairment of the left upper extremity. It found that, based on Dr. Finger's physical examination findings as reviewed by the DMA, she was not entitled to an additional upper extremity schedule award because she had no motor or sensory loss due to peripheral nerve impairment.

On June 8, 2018 appellant requested reconsideration. She submitted evidence previously of record including diagnostic studies and medical records regarding the 2016 surgical procedure. In treatment notes dated November 21, 2016 to February 22, 2017, Dr. Kimber described appellant's postoperative care following the November 2016 cervical spine surgery.

OWCP also received a June 24, 2014 report from Dr. Eric Letnoff, an osteopathic physician Board-certified in orthopedic surgery. Dr. Letnoff diagnosed bilateral carpal tunnel syndrome and radicular syndrome of both upper extremities.

By decision dated June 29, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), finding that she had not submitted new and relevant evidence, or legal argument sufficient to warrant reopening the merits of her schedule award claim.

⁶ A.M.A., *Guides* (6th ed. 2009).

On July 17, 2018 appellant appealed to the Board.⁷ By decision dated March 8, 2019, the Board affirmed OWCP's decisions dated March 14 and June 29, 2018.

OWCP received an April 27, 2020 cervical spine residual functional capacity evaluation (FCE) questionnaire from Dr. Kimber who diagnosed cervical radiculopathy. Dr. Kimber reported that appellant had occipital headaches and chronic cervical pain. Work restrictions were provided.

On March 14, 2021 appellant filed a claim for an additional schedule award (Form CA-7).

In a development letter dated September 13, 2021, OWCP informed appellant of the type of medical evidence needed to establish her claim for an additional schedule award. It afforded her 30 days to submit the necessary evidence.

In a September 21, 2021 correspondence, appellant requested a second opinion examination for a schedule award. She noted that on July 19, 2021 she submitted an April 27, 2020 cervical spine FCE from Dr. Kimber.

On October 14, 2021 OWCP referred appellant back to Dr. Finger for an updated second opinion evaluation of appellant's work-related condition and any resulting permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.

Dr. Finger, in a November 30, 2021 report, reviewed the SOAF and noted that appellant's claim had been accepted for aggravation of cervical radiculopathy. He related that November 14, 2017 was the date of MMI, which was the date assigned in his prior impairment rating. Appellant's physical examination findings included full cervical ROM, painful arc of motion, full bilateral shoulder ROM, full bilateral upper extremities strength, intact bilateral rotator cuffs, no objective evidence of bilateral upper extremity dermatome loss of sensation, and preserved deep tendon bilateral upper extremity reflexes. Dr. Finger opined that appellant had no upper extremity permanent impairment pursuant to *The Guides Newsletter* because she had no sensory or motor loss associated with the cervical nerve roots.

In a December 16, 2021 report, Dr. Kenekwue Ugokwe, a Board-certified neurosurgeon serving as a DMA, noted that appellant had previously received a schedule award for nine percent permanent impairment of the left upper extremity. He reviewed the medical record, including Dr. Finger's most recent November 3, 2021 evaluation, and concurred with his MMI date of November 14, 2017. The DMA opined that appellant had no upper extremity permanent impairment in accordance with *The Guides Newsletter* because she had no neurologic deficit of the left upper extremity.

In a letter dated January 11, 2022, appellant informed OWCP that on March 21, 2018 she had filed a complaint against Dr. Finger with the Louisiana State Board of Medical Examiners due to his November 14, 2017 examination. She requested that OWCP refer her for a second opinion evaluation with another physician as Dr. Finger was clearly biased because of the complaint she had filed against him.

⁷ Docket No. 18-1415, *supra* note 2.

By decision dated January 14, 2022, OWCP denied appellant's claim for an additional left upper extremity schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁸ and its implementing federal regulations,⁹ 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.¹⁰ 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.¹¹

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement*.¹² Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by the grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and/or grade examination for clinical studies (GMCS).¹³ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁴ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹⁵

⁸ *Supra* note 1.

⁹ 20 C.F.R. § 10.404.

¹⁰ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Chapter 3.700, Exhibit 1 (January 2010).

¹¹ *W.G.*, Docket No. 21-0675 (issued December 28, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹² A.M.A., *Guides* 3 (6th ed. 2009), section 1.3.

¹³ *Id.* at 494-531.

¹⁴ *Id.* at 411.

¹⁵ *W.G.*, *supra* note 11; *R.R.*, Docket No. 17-1947 (issued December 19, 2018).

Neither FECA nor its regulations provide for a schedule award for impairment to the spine or to the body as a whole.¹⁶ Furthermore, the spine is specifically excluded from the definition of organ under FECA.¹⁷ 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.¹⁸ 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.¹⁹

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.²⁰

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish more than nine percent permanent impairment of her left upper extremity for which she previously received a schedule award.

By decision dated July 30, 2007, OWCP granted appellant a schedule award for nine percent permanent impairment of the left upper extremity (arm), due to her accepted cervical radiculopathy. By decision dated March 18, 2008, the Board affirmed OWCP's July 30, 2007 decision. The Board, by decision dated March 8, 2019, affirmed OWCP's March 14, 2008 decision denying her claim for an additional schedule award, and the June 29, 2018 decision denying further review. The Board's prior review of the medical evidence is *res judicata* absent any further review by OWCP under section 8128 of FECA.²¹

On September 13, 2021 appellant submitted a claim for an additional schedule award. OWCP referred appellant to Dr. Finger for another second opinion evaluation. In his November 30, 2021 report, Dr. Finger explained that he utilized *The Guides Newsletter* to rate appellant's left upper extremity permanent impairment. He determined that appellant exhibited

¹⁶ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.H.*, Docket No. 19-1788 (issued March 17, 2020); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹⁷ *See* 5 U.S.C. § 8107(c); *see G.S.*, Docket No. 18-0827 (issued May 1, 2019).

¹⁸ *Supra* note 10 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included in Exhibit 4.

¹⁹ *W.G.*, *supra* note 11; *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *A.H.*, *supra* note 16.

²⁰ *Supra* note 10 at Chapter 2.808.6f (March 2017).

²¹ *D.M.*, Docket No. 21-1209 (issued March 24, 2022); *T.R.*, Docket No. 20-0588 (issued June 25, 2021); *A.G.*, Docket No. 18-0329 (issued July 26, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

no sensory or motor loss in her upper extremity, and he thereafter concluded that appellant had no permanent impairment of the left upper extremity according to the standards of *The Guides Newsletter*. On December 16, 2021 the DMA reviewed Dr. Finger's report and concurred that, as appellant had no left upper extremity motor or sensory deficits related to the accepted aggravation of cervical radiculopathy, she had no left upper extremity permanent impairment under *The Guides Newsletter*.

The Board finds that Dr. Finger and the DMA, Dr. Ugokwe, properly applied the standards of *The Guides Newsletter* to determine that appellant did not have permanent impairment of a scheduled member or function of the body. *The Guides Newsletter* rates permanent impairment from cervical radiculopathy based upon sensory or motor loss of the upper extremities.²² As the medical evidence did not substantiate that appellant had sensory or motor loss of the left upper extremity, Dr. Finger and DMA Dr. Ugokwe properly determined that appellant did not have a ratable permanent impairment of the left upper extremity.

On appeal appellant asserts that OWCP refused to accept the April 27, 2020 cervical spine FCE findings by Dr. Kimber as the basis for additional schedule award compensation. However, Dr. Kimber did not provide a permanent impairment rating. The Board finds that the weight of the medical evidence rests with the opinions of Dr. Finger and Dr. Ugokwe, OWCP's DMA. Dr. Finger based his opinion on an accurate and factual medical history and provided findings on examination to support this opinion. As the opinions of both Dr. Finger and Dr. Ugokwe, OWCP's DMA, are detailed, well rationalized, and based on a proper factual background, their opinions represent the weight of the medical evidence.²³

There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter* demonstrating a greater percentage of nine percent permanent impairment of the left upper extremity. Accordingly, the Board finds that appellant has not submitted medical evidence establishing greater than nine percent permanent impairment of the left upper extremity for which she previously received a schedule award.

Appellant alleges that Dr. Finger, the second opinion physician, was biased and the referral process was unfair. However, she has not provided any objective evidence documenting bias and her disagreement with the decision issued in this case and Dr. Finger's opinion does not amount to bias.²⁴

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.

²² See *E.F.*, Docket No. 18-1723 (issued May 1, 2019).

²³ *D.M.*, Docket No. 20-1464 (issued July 14, 2021); *M.S.*, Docket No. 19-1011 (issued October 29, 2019); *D.S.*, Docket No. 18-1816 (issued June 20, 2019).

²⁴ *R.L.*, Docket No. 15-1356 (issued November 17, 2015).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish greater than nine percent permanent impairment of her left upper extremity for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2023
Washington, DC

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

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