

² 5 U.S.C. § 8101 *et seq.*

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 April 8, 2021 appellant, then a 46-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on April 5, 2021 he was knocked unconscious when his hands slipped off a pull-up bar and he fell directly onto his head while in the performance of duty. He noted that he was participating in an approved fitness activity to comply with his employing establishment's fitness policy and standards. Appellant stopped work on that date. OWCP accepted his claim for cervical herniated nucleus pulposus (HNP). By decision dated August 5, 2021, it expanded the acceptance of appellant's claim to include cervical radiculopathy.

On October 27, 2021 appellant underwent OWCP-authorized anterior cervical discectomy with fusion and plating at C6-7. OWCP paid him wage-loss compensation on the supplemental rolls, effective November 7, 2021, until he returned to full-time, sedentary duty on January 3, 2022.

On June 7, 2022 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On June 16, 2022 OWCP received a report and work status form dated April 19, 2022 wherein Dr. Willie S. Edwards, a Board-certified orthopedic surgeon, indicated that appellant was six months' status post cervical surgery and still complained of decreased range of motion and muscular tightness. On examination of appellant's cervical spine, Dr. Edwards observed no dermatomal paresthesias and 2+ reflexes. Upper extremity muscle strength was 5/5. Dr. Edwards diagnosed cervical HNP. He reported that there was a "15 percent impairment of the spine based on the industrial injury."

In a development letter dated June 16, 2022, OWCP requested that appellant provide a medical report from his treating physician, which included an impairment rating utilizing 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*). It afforded him 30 days to submit the requested information.

In a form report dated August 24, 2022, Dr. Edwards noted a date of injury of April 5, 2021 and diagnosis of cervical HNP. He reported a date of maximum medical improvement (MMI) of April 19, 2022. On a from report, Dr. Edwards checked a box indicating that, under the fifth edition of the A.M.A., *Guides*,⁴ appellant had 15 percent permanent impairment to his spine.

³ A.M.A., *Guides* (6th ed. 2009).

⁴ A.M.A., *Guides* (5th ed. 2001).

By decision dated October 11, 2022, 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 October 24, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received an operative report and hospital records dated October 27, 2021. The records did not contain a permanent impairment rating for appellant's April 5, 2021 employment injury.

By decision dated February 7, 2023, the Branch of Hearings and Review set aside the October 11, 2022 decision and remanded the case for OWCP to refer both of Dr. Edwards' reports to an OWCP district medical adviser (DMA) for an opinion regarding whether appellant had any impairment causally related to his accepted April 5, 2021 employment injury in conformance with the A.M.A., *Guides* and *The Guides Newsletter*. Following this and any other further development deemed necessary, OWCP was to issue a *de novo* decision.

OWCP subsequently referred the medical record, a statement of accepted facts (SOAF), and the case record to Dr. Michael Katz, a Board-certified orthopedic surgeon serving as a DMA, for review and a determination of appellant's date of MMI and permanent impairment under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. In a February 21, 2023 report, Dr. Katz discussed his review of the SOAF and the medical record. He noted the April 5, 2021 date of injury and appellant's accepted conditions of cervical disc displacement and cervical radiculopathy. Dr. Katz reported that Dr. Edwards did not observe myotomal motor/dermatomal sensory deficits in either upper extremity in his April 19, 2022 examination. He referenced Proposed Table 1 of *The Guides Newsletter* and reported that appellant was a Class 0 for no motor or sensory deficits of the spinal nerves in the left or right upper extremity. Dr. Katz concluded that appellant had zero percent permanent impairment of the upper extremities. He explained that Dr. Edwards' April 19, 2022 impairment rating was not correct because FECA does not provide for a schedule award for a spinal injury. Dr. Katz indicated that impairment ratings for a spinal nerve injury are determined using the method described in *The Guides Newsletter*. He noted a date of MMI as April 19, 2022.

On March 27, 2023 appellant referred appellant, along with an updated SOAF and the medical record, to Dr. Seth Jaffe, an osteopath and Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of his accepted April 5, 2021 employment injury and ability to work. In an April 24, 2023 report, Dr. Jaffe indicated that he had reviewed the SOAF, and noted appellant's accepted conditions for herniated disc with cervical radiculopathy. On examination of appellant's cervical spine, he observed tenderness to palpation and range of motion in the upper cervical spine and right and left trapezium. Sensory examination revealed decreased sensation in the thumb, ring, and small finger on the left to light touch. Dr. Jaffe diagnosed cervical radiculopathy and herniated disc. He explained that appellant's employment injury aggravated an underlying, preexisting degenerative condition that had resolved with surgery and conservative treatment. Dr. Jaffe concluded that appellant could return to his preinjury job. He completed a work capacity evaluation form (OWCP-5c), which indicated that appellant could work full duty.

By decision dated May 15, 2023, 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.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing regulations⁶ 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 of loss of a member 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 and the Board has concurred in such adoption.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.⁸

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based impairment (DBI) method of evaluation utilizing the World Health Organization's *International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement*.⁹ Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS).¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.¹²

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.¹³ Furthermore, the

⁵ *Supra* note 1.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404 (a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ A.M.A., *Guides* 3, section 1.3.

¹⁰ *Id.* at 493-556.

¹¹ *Id.* at 521.

¹² *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹³ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

back is specifically excluded from the definition of an organ under FECA.¹⁴ 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 procedures indicate that the July/August 2009 edition of *The Guides Newsletter* is to be applied.¹⁵

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.¹⁶

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 an April 19, 2022 report, Dr. Edwards noted cervical examination findings of dermatomal paresthesias and 2+ reflexes. He diagnosed cervical HNP. Dr. Edwards reported that appellant had "15 percent impairment of the spine based on the industrial injury." He did not, however, reference the July/August 2009 edition of *The Guides Newsletter*, which is the only appropriate table to use when calculating impairment to the upper or lower extremities caused by a spinal injury.¹⁷ The Board has held that an attending physician's report is of diminished probative value where the A.M.A., *Guides* are not properly followed.¹⁸

In a February 21, 2023 report, Dr. Katz, a DMA, reviewed appellant's history of injury and noted his accepted conditions of cervical disc displacement and cervical radiculopathy. He reported that Dr. Edwards observed no myotomal motor/dermatomal sensory deficits in either upper extremity in his April 19, 2022 examination. Dr. Katz referenced Proposed Table 1 of *The Guides Newsletter* and reported that appellant was a Class 0 for no motor or sensory deficits of the spinal nerves in the left or right upper extremity. He concluded that appellant had zero percent permanent impairment of the upper extremities. The Board finds that the DMA correctly applied the appropriate tables and grading schedules of the A.M.A., *Guides* and *The Guides Newsletter* to

¹⁴ See *id.* at § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁵ *Supra* note 7 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁶ *Id.* at Chapter 2.808.6f (March 2017). *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

¹⁷ *Supra* note 14.

¹⁸ *A.C.*, Docket No. 18-1306 (issued October 18, 2019); *M.C.*, Docket No. 15-1932 (issued March 7, 2016); *J.G.*, Docket No. 09-1128 (issued December 7, 2009).

find that appellant had zero percent permanent impairment of the upper extremities due to the accepted April 5, 2021 employment injury.¹⁹

Furthermore, on March 27, 2023, appellant was referred to Dr. Seth Jaffe, for a second opinion evaluation regarding the status of his accepted April 5, 2021 employment injury and ability to work. In an April 24, 2023 report, Dr. Jaffe explained that appellant's employment injury aggravated an underlying, preexisting degenerative condition that had resolved with surgery and conservative treatment. He concluded that appellant could return to his preinjury job and could work full duty.

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 schedule award claim.

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 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.

¹⁹ See *D.M.*, Docket No. 21-0792 (issued January 4, 2023); *C.T.*, Docket No. 22-0822 (issued November 29, 2022); *T.B.*, Docket No. 20-0642 (issued September 30, 2020).

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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