

² The Board notes that, following the May 11, 2023 decision, OWCP received additional evidence. 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.*

Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider 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 May 17, 2021 appellant, then a 54-year-old mobile equipment operator (materials handler) filed a traumatic injury claim (Form CA-1) alleging that on February 10, 2021 he injured the left side of his ribs, shoulder, and arm when he slipped on ice and caught himself with his right hand, pushing his elbow into his ribs, while in the performance of duty. He did not stop work. OWCP accepted the claim for cervical disc displacement.

A May 24, 2021 magnetic resonance imaging scan demonstrated an extremely large herniated disc to the left side at C6-7. On September 22, 2021 appellant underwent an OWCP-approved anterior cervical discectomy C6-7 with fusion.

On May 5, 2022 OWCP expanded the acceptance of appellant's claim to include cervical disc displacement at C2-3, C5-6, C6-7, cervical spine instability, and left cervical radiculopathy.

On May 10, 2022 appellant completed a claim for compensation (Form CA-7) requesting a schedule award.

In a May 10, 2022 development letter, OWCP requested that appellant submit an impairment calculation addressing whether he had reached maximum medical improvement (MMI) and provide an impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ 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 it in writing and if his case met the essential elements for a schedule award claim, he would be scheduled to be seen by a second opinion specialist. It afforded him 30 days to submit the necessary medical evidence.

On July 22, 2022 OWCP requested that appellant's attending physician, Dr. Thomas G. Craven, an orthopedic surgeon, provide an impairment calculation in accordance with the sixth edition of the A.M.A., *Guides* and the date of MMI.

In an August 2, 2022 report, Dr. Craven opined that appellant had reached MMI and applied the whole person provisions of the A.M.A., *Guides*, to reach nine percent permanent impairment of the whole person. He did not provide any findings in support of his conclusion.

³ 5 U.S.C. § 8101 *et seq.*

⁴ A.M.A., *Guides* (6th ed 2009).

On January 12, 2023 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions to Dr. Christopher Jordan, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the nature and extent of any permanent impairment for schedule award purposes in accordance with the sixth edition of the A.M.A., *Guides*, and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition*, (July/August 2009) (*The Guides Newsletter*).

In a February 6, 2023 report, Dr. Jordan reviewed the SOAF and the medical records and noted findings on physical examination, including pain in the midportion of the spine, and limited range of motion (ROM) of the neck. He found that sensation was intact in the upper extremities with three millimeters of two-point discrimination in both the right and left hands. Dr. Jordan reported full muscle strength in the upper extremities and equal reflexes. He reviewed January 20, 2022 x-rays and found that the C6-7 fusion was solid. Dr. Jordan applied *The Guides Newsletter* to appellant's cervical findings and found no radiculopathy and therefore no impairment. He related that appellant's physical examination showed intact sensation and essentially equal strength and that, as he could not identify a sensory or weakness problems, no rating was possible. Dr. Jordan concluded that, utilizing *The Guides Newsletter*, appellant would not qualify for any rating because physical examination did not reveal any evidence of peripheral nerve impairment. He found that appellant reached MMI in 2022 in accordance with Dr. Craven.

On February 14, 2023 OWCP requested that Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA), review Dr. Jordan's February 6, 2023 findings. In his April 11, 2023 report, the DMA determined that appellant had no neurological sensory or motor deficit in the upper extremities consistent with cervical radiculopathy. Dr. Harris concurred with Dr. Jordan's impairment rating and applied Table 15-24, page 425, of the A.M.A., *Guides*, reaching severity zero, with normal sensory and motor findings and referring to Proposed Table 1, Spinal Nerve Impairment: Upper Extremity Impairments, *The Guides Newsletter*, found that the class of diagnosis (CDX) for a cervical spinal condition, was a Class 0, or no ratable impairment. He opined that his determination was supported by the records reviewed and consistent with the methodology of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. Dr. Jordan further opined that the A.M.A., *Guides* did not allow for an alternative impairment rating based on ROM for the relevant diagnoses. Dr. Harris found that the date of MMI was February 2, 2023, the date of Dr. Jordan's report.

By decision dated May 11, 2023, OWCP denied appellant's schedule award claim.

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. However, FECA does not specify the manner in which the percentage of loss shall be determined. OWCP has adopted the

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

A.M.A., *Guides* as the uniform standard applicable to all claimants. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

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.⁸ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.⁹ The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.¹⁰

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.¹¹

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.

Following his request for a schedule award, appellant underwent a permanent impairment examination with Dr. Jordan, a second opinion physician. In a February 6, 2023 report, Dr. Jordan indicated that the examination did not demonstrate any neurological deficit in the upper extremities consistent with cervical radiculopathy, as he had no sensory or motor deficits. He opined that in accordance with *The Guides Newsletter*, that appellant had zero percent permanent impairment of his right upper extremity and zero percent permanent impairment of his left upper extremity.

Referencing *The Guides Newsletter*, the DMA, Dr. Harris concurred with Dr. Jordan calculations of zero percent permanent impairment of the bilateral upper extremities based on the DBI methodology described in *The Guides Newsletter* as there was no neurologic deficit in the

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a. (March 2017); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

⁹ *Supra* note 7 at Chapter 2.808.5.c(3) (March 2017).

¹⁰ *Id.* at Chapter 3.700, Exhibit 4 (January 2010); *see L.H.*, Docket No. 20-1550 (issued April 13, 2021); *N.G.*, Docket No. 20-0557 (issued January 5, 2021).

¹¹ *Id.* at Chapter 2.808.6f (March 2017); *see D.A.*, Docket No. 23-0695 (issued October 18, 2023); *K.R.*, Docket No. 21-0247 (issued February 25, 2022); *D.J.*, Docket No. 19-0352 (issued July 24, 2020).

bilateral upper extremities consistent with cervical radiculopathy. Thus, appellant had severity of 0 for sensory and motor deficits under Table 15-14, page 425 and Class 0 impairment under Table 1 of *The Guides Newsletter*, which resulted in zero percent left and right upper extremity permanent impairment determinations. He indicated that the A.M.A., *Guides* precluded impairment ratings based on ROM methodology for a cervical radiculopathy diagnosis.

The Board finds that the DMA, Dr. Harris, properly applied the standards of *The Guides Newsletter* to the physical examination findings of Dr. Jordan to determine that appellant did not have permanent impairment of a scheduled member or function of the body. Dr. Harris accurately summarized the relevant medical evidence including findings on examination, and reached conclusions that comported with these findings.¹² *The Guides Newsletter* rates permanent impairment from cervical radiculopathy based upon sensory or motor loss of the upper and lower extremities.¹³ As the medical evidence did not substantiate that appellant had sensory or motor loss of either upper extremity, Dr. Jordan and Dr. Harris properly determined that appellant did not have permanent impairment of the bilateral upper extremities based on the DBI methodology described in *The Guides Newsletter*.¹⁴ Dr. Harris also properly noted that the A.M.A., *Guides* did not allow for an impairment rating based on ROM for the relevant diagnoses.¹⁵

There is no current medical evidence of record utilizing *The Guides Newsletter* which establishes permanent impairment of the right and left upper extremities. Accordingly, the Board finds that appellant has not met his burden of proof.

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.

¹² See *D.M.*, Docket No. 21-0805 (issued July 19, 2023); *B.W.*, Docket No. 22-0522 (issued March 10, 2023); *M.B.*, Docket No. 22-0157 (issued August 26, 2022).

¹³ See *B.W.*, *id.*; *M.H.*, Docket No. 21-1250 (issued February 17, 2023); *E.F.*, Docket No. 18-1723 (issued May 1, 2019).

¹⁴ *Supra* note 12.

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 15, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy 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