

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

E.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 12-1356
Issued: December 12, 2012**

Appearances:

*Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 12, 2012 appellant, through her attorney, filed a timely appeal from a March 20, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the denial of her schedule award claim. 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 met her burden of proof to establish that she sustained impairment of either upper extremity.

On appeal, appellant's attorney contends that there is a conflict in the medical opinion between an OWCP medical adviser and the attending physician regarding appellant's impairment to the upper extremities. OWCP should have referred the case to a referee physician to resolve the conflict pursuant to 5 U.S.C. § 8123(a).

¹ 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on August 26, 2001 appellant, then a 39-year-old mail handler, sustained a cervical strain/sprain while pulling trays in the performance of duty. On March 5, 2002 appellant accepted a limited-duty assignment offer as a modified mail handler.²

On October 19, 2010 appellant, through her attorney, filed a claim for a schedule award.

In an April 13, 2010 report, Dr. David Weiss, an osteopath specializing in family practice, reviewed the medical evidence of record and noted that surgery was performed on November 20, 2006. A follow-up magnetic resonance imaging (MRI) scan on April 15, 2009 revealed C5-7 fusion with small protrusion at C3-4 and C4-5. On May 20, 2009 an upper extremity electromyogram (EMG) study showed mild right carpal tunnel syndrome. A right shoulder MRI scan dated May 21, 2009 revealed distal supraspinatus tendinopathy and small bursa fluid with questionable labral tear. Upon physical examination of the right and left shoulders, Dr. Weiss found focal acromioclavicular (AC) joint tenderness, anterior cuff tenderness and tenderness over the proximal third of the long head of the biceps. The right shoulder had a positive Yergason sign. Semmes-Weinstein monofilament testing revealed diminished sensibility at 2.83 milligrams involving the C7 dermatome on the right and on the left.

Utilizing Table 15-21,³ on page 441, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*), Dr. Weiss assigned appellant to class 1 for sensory deficit right C7 nerve root (radial) and found that she had a one percent permanent impairment of the right upper extremity. Utilizing Table 15-5,⁴ he assigned her to class 1 for right shoulder rotator cuff tendinitis with residual loss and found that she had a four percent permanent impairment of the right upper extremity. Dr. Weiss concluded that appellant had a total combined five percent permanent impairment of the right upper extremity. Utilizing Table 15-21, he assigned her to class 1 for sensory deficit left C7 nerve root (radial) and found that she had a one percent permanent impairment of the left upper extremity. Utilizing Table 15-5, Dr. Weiss assigned appellant to class 1 for left shoulder rotator cuff tendinitis with residual loss and found that she had a two percent permanent impairment of the left upper extremity. He concluded that she had a total combined three percent permanent impairment of the left upper extremity. Dr. Weiss determined that appellant reached maximum medical improvement on April 13, 2010.

On September 25, 2011 Dr. Morley Slutsky, a medical adviser, reviewed Dr. Weiss' April 13, 2010 report and concluded that appellant had no ratable impairment to the upper extremities based on the accepted condition of neck strain under the sixth edition of the A.M.A.,

² On March 22, 2006 appellant, through her attorney, filed a notice of recurrence (Form CA-2a). By decisions dated July 26 and November 1, 2006, OWCP denied the claim for a recurrence of disability.

³ Table 15-21, pages 436-44, of the sixth edition of the A.M.A., *Guides* is entitled *Peripheral Nerve Impairment -- Upper Extremity Impairments*.

⁴ Table 15-5, pages 401-05, of the sixth edition of the A.M.A., *Guides* is entitled *Shoulder Regional Grid -- Upper Extremity Impairments*.

Guides. He concurred with Dr. Weiss that maximum medical improvement was achieved on April 13, 2010. Dr. Slutsky noted that Dr. Weiss premised his impairment ratings on nonemployment-related conditions of right and left C7 nerve root deficits and right and left rotator cuff tendinitis.

By decision dated October 4, 2011, OWCP denied appellant's schedule award claim on the basis that the medical evidence did not establish a ratable impairment of a scheduled member. It relied upon its medical adviser's September 25, 2011 report.

On October 6, 2011 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative, which was held on January 5, 2012. She provided testimony and the hearing representative held the case open for 30 days for the submission of additional evidence.

By decision dated March 20, 2012, OWCP's hearing representative affirmed the October 4, 2011 decision denying appellant's claim for a schedule award. He found that Dr. Weiss' April 13, 2010 report was of diminished probative value.

LEGAL PRECEDENT

The schedule award provision 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. 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁸ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.⁹ A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.¹⁰

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.*

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁹ See *Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (September 1995). This portion of OWCP procedures provide that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

¹⁰ See *Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

A schedule award is not payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.¹¹ As neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.¹² However, as FECA makes provision for the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.¹³

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁴

ANALYSIS

The Board finds that the medical evidence fails to establish that appellant sustained permanent impairment to a scheduled member of the body. OWCP accepted her claim for cervical strain/sprain. Although appellant may not receive a schedule award for permanent impairment to her back or spine,¹⁵ she may be entitled to a schedule award for any permanent impairment to her upper extremities, provided the medical evidence establishes such impairment.¹⁶ The Board finds the medical evidence of record does not establish that she sustained permanent impairment to her upper extremities due to the accepted cervical condition.

The Board finds that OWCP properly relied on a September 25, 2011 report from its medical adviser, Dr. Slutsky, who concluded that appellant had no ratable impairment of a scheduled member under the sixth edition of the A.M.A., *Guides* based on the accepted strain. OWCP's medical adviser reviewed the medical record and found no basis for rating impairment to a scheduled member of the body.¹⁷ He reviewed the April 13, 2010 assessment of Dr. Weiss,

¹¹ See *Tania R. Keka*, 55 ECAB 354 (2004).

¹² See *id.* FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

¹³ See *George E. Williams*, 44 ECAB 530 (1993). In 1966, amendments to FECA modified the schedule award provision to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member.

¹⁴ See *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

¹⁵ 5 U.S.C. § 8101(19); *Patricia J. Horney*, 56 ECAB 256 (2005).

¹⁶ See *George E. Williams*, *supra* note 13.

¹⁷ The Board notes that it is appropriate for OWCP's medical adviser to review the clinical findings of the treating physician to determine the permanent impairment. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (September 1995); *Richard R. LeMay*, 56 ECAB 341 (2006).

who based his impairment ratings on the nonemployment-related conditions of right and left C7 nerve root deficits and right and left rotator cuff tendinitis. As these conditions were not accepted, Dr. Slutsky concluded that there was no medical evidence of impairment to the upper extremities resulting from the accepted cervical strain. Therefore, there was no ratable impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*. Moreover, the July 9, 2002 report of a Dr. Adrian S. Prawak obtained a history that appellant did not have any radiating symptoms into her upper extremities or arms. This evidence speaks against any preexisting conditions of the cervical spine.

Appellant did not submit sufficient medical evidence to establish that she sustained a permanent impairment to a specified member, organ or function of the body listed in FECA or its implementing regulations. The Board finds that she is not entitled to a schedule award as a result of her accepted employment-related cervical strain.

On appeal appellant's attorney asserted that the opinion of Dr. Slutsky is in conflict with the opinion of Dr. Weiss. Although Dr. Weiss found a five percent permanent impairment of the right upper extremity and a three percent permanent impairment of the left upper extremity under the sixth edition of the A.M.A., *Guides*, the ratings were based on conditions not accepted by OWCP as employment related, *i.e.*, right and left C7 nerve root deficits and right and left rotator cuff tendinitis. Appellant has not submitted medical evidence to establish permanent impairment due to her accepted employment injury.

Appellant may request a schedule award or increased schedule award 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 her burden of proof to establish that she is entitled to a schedule award for an employment-related upper extremity, impairment.

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 12, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board