Schedule Awards under FECA

Annual CHEP Federal Workers' Compensation Conference 2017

U.S. Department of Labor
SOL/OWCP

Provisions of the Federal Employees' Compensation Act (FECA)

- Medical Coverage
- Continuation of Pay
- Compensation for Total/Partial Lost Wages
- Schedule Awards
- Vocational Rehabilitation
- Death/Burial Expenses

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Statute

The schedule award provisions at § 8107 (c) of FECA specify the number of weeks of compensation to be paid for permanent loss or loss of use of the member of the body so listed in the schedule. FECA provides explicit authority for the Secretary of Labor (delegated to OWCP) to add additional schedule members.

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Schedule Benefits Payable

Under 8107 (c)

- Arm, Hand, Fingers
- Leg, Foot, Toes
- Eye
- Hearing Loss
- Facial Disfigurement

Added By Regulation

- Lung, Larynx
- Kidney, Tongue
- Male/Female organs: Penis, testicle, ovary, uterus/cervix, vulva/vagina, breast
- Skin added by 2011 regulations

The statute or regulation specifies the number of weeks paid up to 312. (Except disfigurement-- $3500) Schedule benefits are claimed on a CA-7.

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Awards

A schedule award is <u>not</u> payable for the loss or loss of use of any member of the body or function not specifically enumerated in § 8107 of the FECA or its implementing regulations at 20 CFR Part 10.

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Inclusions...

- A schedule award compensates for the loss of or the loss of use of a schedule member.
- A schedule is payable <u>only</u> where medical evidence establishes permanent impairment due to employment injury and/or occupational exposure.
- Once an employment-related impairment is found, all impairment of the schedule member is included, including preexisting and non-employment related impairment. ECAB stated in *Raymond Gwynn*, 35 ECAB 247 (1983) (citing Larson) that "the employer takes the employee as he finds him." Note: New inclusion in the FECA Procedure Manual reaffirms this position. FECA Transmittal 17-02, FECA Procedure Manual 2-808-5.

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Exclusions

•While § 8107 (22) allows the Secretary of Labor to add to the list of organs for which a schedule award may be paid, the clear language of § 8101 (19) prohibits the addition of the back to the schedule provisions, as § 8101 (19) defines "organ" as meaning "a part of the body that performs a special function, and for purposes of this subchapter excludes the brain, heart, and back."

•The FECA does not provide for a schedule award for whole body impairment. *See Yera*, 48 ECAB 243 (1996).

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MEDICAL EVIDENCE

While claimant has the burden to claim the benefit and submit medicals, the agency must assist by providing occupational exposure data.

OWCP may undertake development in schedule award cases by using OWCP medical consultants, second opinion physicians and impartial specialists if needed to determine entitlement to an award.

Note: 2op generally used for hearing loss and asbestos cases.

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When is a Schedule Award Paid?

- A schedule award is paid when a claimant has reached maximum medical improvement. (MMI)
- The date of maximum medical improvement is generally the date that a schedule award commences.
- MMI may be the date that the medical examination on which the schedule award calculation is based.
- A schedule award must be specifically claimed during the employee's life; schedule awards claimed but unpaid at death may be paid under section 8109 if the employee dies from a cause unrelated to his injury.

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Maximum Medical Improvement

- Maximum medical improvement (MMI) is determined to be the date "from which further recovery or deterioration is not anticipated…over time there may be some expected change." See *M.H.* Docket No. 09-1888 (7/6/10). [Eventual improvement in appellant's range of motion did not supersede 2006 finding of MMI.]
- In cases where the individual declines surgical intervention or other therapeutic treatment, an MMI determination may still be reached as long as the physician indicates the individual is at MMI in lieu of additional treatment.
- The *Guides* rate only current permanent impairment. They do not afford a rating for possible future impairment.

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MMI and ECAB

- MMI is generally the date of the medical examination that OWCP finds establishes the impairment. *E.E.*, Docket No. 11-1586 (issued March 5, 2012).
- ECAB has further noted that the pay rate for a schedule award is the highest of date of injury, date disability begins, or the date of a recurrence of disability. *C.J.*, Docket No. 11-426 (issued January 11, 2012).
- FECA Procedure Manual chapter clarifies that retroactive MMI dates require rationale beyond "one year post surgery." See 2-0808-06(f)(2).

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AMA GUIDES USED…

- FECA does <u>not</u> specify manner by which a schedule loss under 5 U.S.C. 8107 should be determined.
- For consistent results and to ensure equal justice under the law to all claimants under the Act, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.
- DOL OWCP has used the American Medical Association's *Guides to the Evaluation of Permanent Impairment* standardized tables for this purpose for more than fifty years in FECA, dating back to the first *Guide for Extremities and Back* published in 1958.

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AMA Guides Sixth Edition

- In January 2008, the AMA published the Sixth Edition of the *Guides*. This Edition implements substantial reforms to the methodology of calculating permanent impairment. Adopted by OWCP's FECA Program for all decisions issued on/after May 1, 2009.
- ECAB has found OWCP's adoption of subsequent AMA editions a matter within OWCP's sound discretion, affirming using the date the decision is made, as opposed to the date of maximum medical improvement, as the date on which to determine which edition should be used. *K.A.* Docket No. 12-1210 & 13-516 (issued March 19, 2013).

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6th Edition is primarily Diagnosis-Based

- *Guides'* Diagnosis based grid for each organ system and chapter is the foundation of the new methodology.
- The diagnosis representing the source of the most impairment in a given body region will be used. If there is more than one ratable diagnosis in an affected extremity all regional impairments will be combined for a final impairment rating for that extremity (e.g. hand, wrist, elbow, shoulder).

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- Each diagnosis grid is divided into 5 classes of impairment ranked from "0" (no impairment) to "4" (very severe). Within each class are 5 severity grades categorized "A" through "E" with "C" being the default grade.
- The level of severity is determined based on criteria separated into key factors and non-key factors. The criteria are:
  - History of clinical presentation
  - Physical findings
  - Clinical studies or objective test results
  - Functional history

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Class of Impairment under the 6th

- The key factor for a given diagnosis establishes the class of impairment (from "0" to "4") and the non-key factors establish the severity grade ("A" through "E").
- For example, if the accepted diagnosis is shoulder impingement syndrome the key factor is history of clinical presentation. The severity grade would then be based on functional history, physical examination and clinical studies (non-key factors).

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Carpal Tunnel Syndrome

- Under the Sixth Edition of the *Guides*, a diagnosis of entrapment neuropathy (e.g. carpal tunnel, cubital tunnel, etc.) must be documented with nerve conduction velocity (NCV) testing in order to consider ratable impairment under the section on entrapment neuropathy.
- Preoperative electrodiagnostic test should be used in the impairment rating unless a postoperative study is clearly worse than the preoperative electrodiagnostic study.

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Spinal Impairment under the 6th

- The 6th Edition does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment.
- In *The Guides Newsletter*, the AMA offered an approach for rating extremity impairment where spinal impairment extends there.
- See *FECA Procedure Manual* 3-700 and *S.G.*, Docket No. 09-2310, 7/6/10.

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Special Determinations

- If conflict between *Guides* and FECA, **statute** controls
- The statute states that loss of more than one phalanx is the same as loss for the entire digit and loss of the first phalanx is one-half the compensation for loss of the entire digit. (5 U.S.C. 8107(15))
- Amputation at the wrist or ankle is considered the same as a total loss of that member. (5 U.S.C. 8107(19))
- With loss of vision, the impairment is based on the best **uncorrected** vision. (5 U.S.C. 8107 (19)) Loss of binocular vision or loss of 80% or more is the same as for loss of the eye. (5 U.S.C. 8107(14))

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Special Determinations (cont.)

- Total loss of a single paired organ such as one kidney, lung, breast, testicle or ovary is generally based on loss of one organ rather than loss of function of the pair.
- Respiratory impairment is generally based on the loss of use of both lungs and the impairment percentage is multiplied by twice the award for a single lung. However, for anatomical loss by injury or surgery the impairment percentage will be based on loss of lung tissue by weight or volume (including loss of the entire lung) and calculated based on the schedule for a single lung BUT
- A lung transplant is a 100% loss. Double lung transplant is 100% loss of both lungs.

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Loss of Hearing

- A modified version of the AMA *Guides* was adopted to evaluate hearing loss. If there is an employment-related loss, all hearing loss (including pre-existing loss) must be compensated.
- The National Institute for Occupational Safety and Health (NIOSH) established frequencies of 500, 1,000, 2,000 and 3,000 cycles per second (cps) as the criteria used for measuring hearing impairment. Since the NIOSH study did not include a method for calculating the percentage of binaural loss of hearing, that calculation is based on the method used in the AMA *Guides* whereby the percentage of hearing loss in the better ear is given 5 times the weight of the worse ear and the result is added to the percentage hearing loss of the worse ear and the sum divided by six.

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Recalculations?

- In accordance with DFEC's established practice when moving to an updated version of the *AMA Guides*, awards made prior to May 1, 2009, are not and should not be recalculated merely because a new Edition of the *Guides* is in use.

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Claim for an Increased Award

- A claimant who received a schedule award calculated under a previous Edition of the *AMA Guides* who subsequently claims an increased award on or after May 1, 2009 will receive a determination with a calculation based upon the Sixth Edition. An increase may be claimed based on a claim that the original award was in error or based on new exposure.
- If that later calculation results in a percentage impairment lower than the original award (as occurs), OWCP finds the evidence does not establish an increased impairment; and that there is no basis for declaring an overpayment.
- If an agency is aware that a schedule award has previously been issued for the same member, please flag this for the CE, particularly if the earlier award was many years ago.

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Schedule Awards & OPM Annuity Benefits

- The usual rule under the FECA is that if a claimant is entitled to FECA benefits and an annuity from OPM, you cannot receive both benefits—an election is required BUT
- FECA makes an exception to this rule for schedule awards—5 U.S.C. § 8116(a) permits the receipt of schedule awards concurrently with OPM benefits

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Skin Schedule Award

- Skin added to schedule by 2011 regulations
  - Retroactive date to September 11, 2001 for date of injury
  - Up to 205 weeks of compensation
  - This is payable in addition to the $3500 amount payable under 5 USC 8107 (c) (21) for serious "disfigurement of the face, head or neck which is likely to handicap a person in securing or maintaining employment"
  - Disfigurement award may be paid concurrent with schedule awards including the new schedule award for the skin
  - Conditions potentially causing impairment include: Atopic dermatitis, contact dermatitis, latex allergy, skin cancer, burns and scarring

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Recent Issues/Developments

- Complexities in the explanations and the language in the 6th Edition especially in Chapter 15 sometimes led physicians who have evaluated DFEC claimants to provide inconsistent interpretations for calculating upper extremity impairments.
- ECAB held that in light of the conflicting language in the Sixth Edition of the Guides "it is incumbent upon OWCP through its implementing regulations and/or internal procedures to establish a consistent method for rating upper extremity impairment." T.H. Docket No. 14-0943 (issued on November 25, 2016).

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FECA Bulletin17-06 (May 8, 2017)

- Upon initial review of a referral for upper extremity impairment evaluation, the District Medical Advisor (DMA) should identify (1) the methodology used by the rating physician i.e. Diagnosis Based Impairment (DBI) or Range of Motion ROM) and (2) whether the applicable tables in Chapter 15 of the Guides identify a diagnosis that can alternatively be rated by ROM.
- If the Guides allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used.

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FECA Bulletin 17-06 (May 8, 2017) con't

- The CE should not render a decision on the schedule award impairment rating until the necessary medical evidence has been obtained. As proceedings under the FECA are not adversarial in nature, nor is OWCP a disinterested arbiter, OWCP shares responsibility to development the evidence to see that justice is done. *Cantrell*, 34 ECAB 1223 (1983).
- OWCP DFEC will **not** revisit prior cases unless a request for reconsideration is received that contains new legal argument /relevant medical evidence addressing criteria in this Bulletin. Where the original decision for which review is sought used the 6th Edition and a recalculation results in a lesser impairment due to mathematical/other error, an overpayment will be declared.

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Review Process

- Attending physician letter
- District Medical Advisor
- Second opinion
- Referee opinion
- Final calculation
  - AMA Guides based on whole-person impairment converted to…
  - FECA award based on percentage impairment of total organ

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Awards and Appeal Rights

- A schedule award is issued as a formal decision that contains findings on the percentage of impairment found; the number of weeks awarded; the date of maximum medical improvement; the pay rate on which the award was based and whether the award is to be paid at the rate of 66 2/3 (no dependents) or 75% (at least one dependent such as a spouse or child)
- A schedule award is subject to the appeal rights of reconsideration request received within one year (based on new evidence/legal argument); OR hearing upon request made within 30 days of decision date; OR ECAB appeal within 180 days. Note: Unlike wage loss, may be paid as a lump sum under 5 U.S.C. 8135.

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References

- 5 USC 8101 *et seq*; 20 CFR Parts 1, 10, & 25
- FECA Procedure Manual, FECA Bulletin 09-03, Program Memos (162, 181, 217 for hearing loss); FECA Bulletin 17-06; FECA Transmittal 17-02.
- Decisions, Employees' Compensation Appeals Board

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