

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

D.H., Appellant)
and) Docket No. 11-1757
U.S. POSTAL SERVICE, POST OFFICE,) Issued: April 18, 2012
Long Beach, CA, Employer)

)

Appearances:
Appellant, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 26, 2011 appellant filed a timely appeal from the February 2, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which awarded schedule compensation. 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. The Board also has jurisdiction to review OWCP's February 24, 2011 nonmerit decision denying reconsideration.

ISSUES

The issues are: (1) whether appellant has more than a five percent impairment of her left leg; and (2) whether OWCP properly denied her request for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 9, 2009 appellant, then a 61-year-old mail handler, sustained a traumatic injury in the performance of duty when she fell from a tractor-trailer and broke her left leg. OWCP accepted her claim for a torus fracture of the left tibia and fibula. Appellant underwent open reduction and internal fixation of her left tibial plateau.

Appellant claimed a schedule award and submitted an impairment rating from Dr. Daniel M. Zinar, a Board-certified orthopedic surgeon specializing in trauma and fractures. Dr. Zinar noted that she was 10 months postsurgery and still had occasional, intermittent pain about the knee, for which she used medication. Range of motion was zero to 130 degrees. There was some mild medial joint line tenderness and some slight tenderness about appellant's hardware on the left tibia. Appellant had a mild antalgic gait. Bilateral circumferences were equal about the thigh, knee and calf. Dr. Zinar found that appellant was at risk for post-traumatic arthritis and knee replacement.

Citing Table 36 of an unidentified source, Dr. Zinar found that appellant's impairment rating with post-traumatic arthritis was 20 percent of the lower extremity.

OWCP's medical adviser reviewed Dr. Zinar's findings and appellant's diagnosis. Based on Table 16-3, page 510, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009), he determined that appellant had a five percent impairment of the left lower extremity as a result of residual problems status post open reduction and internal fixation of her tibial plateau fracture. The medical adviser noted that Dr. Zinar documented no findings demonstrating significant post-traumatic arthritis or joint space narrowing.

On February 2, 2011 OWCP issued a schedule award for a five percent impairment of appellant's left lower extremity.

On February 7, 2011 appellant requested reconsideration. She explained that she had to retire because she could no longer do her job. Appellant was no longer able to sit on the floor with her grandchildren and play games or sit in the park on the grass. She stated that she had a screw in her leg and her left foot still had numbness. Occasionally appellant's left foot dragged, and she had to be careful not to trip or fall. Her left foot and leg became swollen with any prolonged standing or walking.

In a decision dated February 24, 2011, OWCP denied appellant's request for reconsideration. It found that she did not establish that OWCP erroneously applied or interpreted a point of law, nor did she advance a relevant legal argument not previously considered. OWCP also found that appellant did not submit any medical evidence to support an increased schedule award.

On appeal, appellant noted that she returned to her physician on May 5, 2011 for a final examination and that he would reissue his findings based on the sixth edition of the A.M.A., *Guides*. She advised that her leg would never be the same and described some of the difficulty it caused in her daily life.

LEGAL PRECEDENT -- ISSUE 1

FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.² Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.³

ANALYSIS -- ISSUE 1

Diagnosis-based impairment is the primary method of evaluation for the lower extremity.⁴ Table 16-3, page 509, provides lower extremity impairment ratings for various knee diagnoses. The default impairment rating for a class 1 (mild problem) tibial plateau fracture (nondisplaced with abnormal examination findings) is five percent. This default value may be adjusted up or down by one or two percent depending on appellant's functional history, physical examination and clinical studies. Appellant's mild antalgic gait⁵ and mild tenderness,⁶ however, supports no increase in the default rating. Dr. Zinar cited no clinical study showing moderate pathology from arthritis or loss of cartilage interval.⁷

In the absence of evidence that appellant currently suffers from at least a mild post-traumatic primary knee joint arthritis, the opinion of OWCP's medical adviser carries the weight of the medical opinion evidence. He used the applicable edition of the A.M.A., *Guides* and properly determined appellant's diagnosis-based impairment from the findings Dr. Zinar provided. Dr. Zinar cited a table from an unidentified source and he appeared to base his rating on an undocumented post-traumatic arthritis. The Board finds that his rating of 20 percent has little probative value.⁸ Accordingly, the Board will affirm OWCP's February 2, 2011 schedule award for a five percent impairment of appellant's left lower extremity.

Appellant noted that she returned to her physician on May 5, 2011 for a final examination, and that he would reissue his findings based on the sixth edition of the A.M.A., *Guides*. Should it support more than a five percent impairment of her left lower extremity, she may request an increased schedule award. As for appellant's complaint that her leg will never be the same, the purpose of the schedule award is to compensate her for permanent impairment. For

² *Id.* at § 8107.

³ 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

⁴ A.M.A., *Guides* 497 (6th ed. 2009).

⁵ *Id.* at 516 (Table 16-6).

⁶ *Id.* at 517 (Table 16-7).

⁷ *Id.* at 519 (Table 16-8).

⁸ *Paul G. Kingsley*, Docket No. 95-2975 (issued January 21, 1998); *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion not based on the appropriate standards for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

the complete loss of a lower extremity, as with amputation at the hip, a claimant may receive a maximum of 288 weeks of compensation.⁹ Partial losses are compensated proportionately.¹⁰ A five percent loss of use of appellants' left leg, entitles her to five percent of 288 weeks of compensation or 14.4 weeks of compensation, which is what OWCP awarded.

LEGAL PRECEDENT -- ISSUE 2

OWCP may review an award for or against payment of compensation at anytime on its own motion or upon application.¹¹ An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹²

A request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.¹³ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁴

ANALYSIS -- ISSUE 2

Appellant timely sent her February 7, 2011 reconsideration request within one year of the February 2, 2011 schedule award decision. The question for determination is whether OWCP properly denied that request.

Appellant's reconsideration request did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered by OWCP. Appellant did not submit relevant and pertinent new evidence not previously considered by OWCP.

Accordingly, the Board finds that appellant's request did not meet any of the requirements for obtaining a merit review of her case. The Board will therefore affirm OWCP's February 24, 2011 decision denying appellant's request.

⁹ 5 U.S.C. § 8107(c)(2).

¹⁰ *Id.* at § 8107(c)(19).

¹¹ *Id.* at § 8128(a).

¹² 20 C.F.R. § 10.606.

¹³ *Id.* at § 10.607(a).

¹⁴ *Id.* at § 10.608.

CONCLUSION

The Board finds that the medical evidence establishes no more than a five percent impairment of appellant's left lower extremity. The Board also finds that OWCP properly denied appellant's reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the February 24 and 2, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 18, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board