United States Department of Labor
Employees' Compensation Appeals Board

V.C., Appellant	)	
and	)	**Docket No. 14-1230**
	)	**Issued: December 29, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Des Moines, IA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 6, 2014 appellant filed a timely appeal from March 13 and April 9, 2014 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether OWCP properly denied appellant's claim for intermittent periods of recurrence of disability from April 20 through May 31, 2013; and (2) whether appellant sustained a ratable impairment of her left lower extremity due to her accepted metatarsal injury.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence to the record following OWCP's April 9, 2014 decision. The Board's jurisdiction is limited to a review of evidence which was before OWCP at the time of its final review. 20 C.F.R. § 501.3(c).

FACTUAL HISTORY

On April 6, 2012 appellant, then a 45-year-old general expeditor/clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 3, 2012, she sustained a fracture to her left foot in the performance of duty when she fell forward while ascending stairs. She stopped work on that date. Appellant underwent surgery for a left foot fracture on April 9, 2012. OWCP accepted her claim for a closed fracture of the left metatarsal bones on May 21, 2012. Appellant first returned to work with restrictions of working no more than four hours per day on October 3, 2012. She stopped work again on October 4, 2012, but worked October 8 and 9, 2012. As of October 25, 2012, appellant was no longer working due to an inability to accommodate her restriction of working without a shoe on the left foot.

On November 6, 2012 appellant requested a schedule award.

By letter dated November 21, 2012, OWCP requested that appellant's physician respond to inquiries regarding the date of maximum medical improvement, objective findings, subjective complaints, and an impairment rating rendered according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

Appellant underwent a surgical procedure to remove hardware from her left foot on January 9, 2013.

On January 17, 2013 OWCP informed appellant that it could take no additional action on her claim for a schedule award as the medical evidence indicated that her condition had not yet reached maximum medical improvement.

A field nurse noted that appellant's treating physician had verbally stated that she was at maximum medical improvement as of April 1, 2013.

Appellant returned to limited-duty full-time work on April 1, 2013. However, she continued to experience pain and issues with being allowed to take her shoe off at work.

In a medical note dated April 4, 2013, Dr. David Yount, a podiatrist, stated that appellant needed to be able to "leave work intermittently" due to her left foot condition.

On April 11, 2013 appellant refused a modified job offer from the employing establishment, explaining that it did not met her medical restrictions. She later accepted a job offer dated April 24, 2013. The physical requirements of this position included sorting mail in manual casing while sitting for 6.5 hours per day; carrying trays for 15 minutes per day; walking for 15 minutes per day; and going on breaks and lunch. The position description noted that appellant had to wear a shoe during all activities other than sitting and sorting mail in a manual case.

In a duty status report dated April 12, 2013, Dr. Yount stated that appellant could resume limited duty full-time work with the restriction of being able to take her shoe off if she was in pain, and the ability to leave if her pain was "too much."

On May 7, 2013 appellant filed a claim for wage-loss compensation due to her accepted condition for intermittent periods of disability between April 20 and May 3, 2013. Her supervisor indicated that work was available for appellant within her restrictions during this time period, but that she elected not to report to work. In a time analysis form, appellant noted that on April 22 and 23, she was sent home by her employer; and that she was unable to work on April 26, 2013 and from May 1 through 3, 2013 due to pain. On May 21, 2013 appellant filed a claim for wage-loss compensation for additional periods of intermittent disability between May 4 and 17, 2013. In another time analysis form, she noted that she did not work on May 9, 10, 16, and, 17, 2013 due to recovering from her surgery.

By letters dated May 28 and 29, 2013, OWCP informed appellant that it had not received sufficient evidence to establish disability for the period April 20 through May 17, 2013. It authorized a payment for the dates of April 22 and 23, 2013.

In a medical note dated May 28, 2013, Dr. Yount stated that appellant could only work three days per week until further notice due to her foot condition.

On June 6, 2013 appellant filed a further claim for intermittent wage-loss compensation between May 18 and 31, 2013. In a time analysis form, appellant noted that she was unable to work due to recovery from surgery for part of May 21, 2013 and for all of May 30 and 31, 2013.

By letter dated June 10, 2013, OWCP informed appellant that it had not received sufficient evidence to establish disability for May 21, 30, and 31, 2013.

In a report dated June 13, 2013, Dr. Yount stated that appellant had obtained her maximum medical benefit and would be discharged from his care.

On June 19, 2013 OWCP referred the case, together with a statement of accepted facts, to Dr. Peter D. Wirtz, a Board-certified orthopedic surgeon, a second opinion physician, who was asked to review the medical evidence and provide information regarding appellant's current restrictions and prognosis of returning to her prior position.

In a report dated July 9, 2013, Dr. Yount stated that appellant took some days off work in May 2013 due to pain in her foot. He recommended she only work three days a week based upon her pain. Dr. Yount noted that she had obtained maximum medical benefit and discharged her from his care.

By decision dated July 30, 2013, OWCP denied appellant's claim for compensation for intermittent periods between April 20 and May 31, 2013. It found that the evidence of record did not establish her inability to perform limited-duty work on those dates. OWCP noted that appellant had been paid compensation for April 22 and 23, 2013 because she had not yet signed her temporary light-duty job offer on these dates.

By letter dated August 5, 2013, appellant, through her attorney, requested a telephonic hearing before an OWCP hearing representative.

In a report dated August 13, 2013, Dr. Wirtz stated that appellant's date of maximum medical benefit was April 1, 2013, when she returned to limited work activities. He diagnosed

her with a healed left fifth metatarsal fracture and stated "rule out peroneal nerve injury left leg." Dr. Wirtz noted that appellant was unable to return to her date-of-injury position. He noted that appellant was capable of working on a full-time basis as long as her restrictions reduced her pain production, and that her current symptomology would relate to limiting her standing, walking, and possible walking on soft surfaces to minimize pain.

On September 9, 2013 appellant again requested a schedule award. By letter dated September 20, 2013, OWCP requested that appellant's physician respond to inquiries regarding the date of maximum medical improvement, objective findings, subjective complaints, and an impairment rating rendered according to the sixth edition of the A.M.A., *Guides*.

In a note dated October 23, 2013, a district medical adviser stated that there were no current medical reports containing information sufficient to calculate an impairment rating for schedule award purposes.

In a report dated October 14, 2013, Dr. Robert D. Rondinelli, Board-certified in physical medicine and rehabilitation, stated that appellant visited his office requesting an impairment rating under the A.M.A., *Guides*. On examination of her left ankle, he noted dorsiflexion with knee extended at 80 degrees and with knee flexed at 90 degrees. Plantar flexion with knee extended was 35 degrees and with knee flexed was 50 degrees. Dr. Rondinelli stated that appellant's fracture of the left fifth metatarsal head had healed, and that she had "elements of complex regional pain syndrome type 1 (RSD) including symptoms of pain disproportionate to the inciting event, hyperalgesia, skin changes, temperature changes, discoloration, and periodic swelling. Appellant has dystrophic changes with contractures of her toes, weakness of the toes, and loss of motion of the ankle. There is no other diagnosis that better fits this situation." Dr. Rondinelli stated, "I have provided [appellant] with an overview of the diagnostic and therapeutic clarification needed here prior to MMI. As she is insistent on a rating at this time, if I were to rate her, I would use the [A.M.A., *Guides*, sixth edition] and rate her for complex regional pain syndrome, which is necessarily incomplete as I have not had opportunity to clarify the extent of pathology in this case. I would rate her at 11 percent whole person at this time due to a class I rating for complex regional pain syndrome type 1 compounded by less than optimal functional outcome."

On December 11, 2013 OWCP referred the case, together with a statement of accepted facts, to Dr. Daniel McGuire, a second opinion physician and Board-certified orthopedic surgeon, who was asked to calculate appellant's percentage of impairment based upon her accepted diagnosis of a left metatarsal fracture in accordance with the A.M.A., *Guides* and determine whether she had reached maximum medical improvement.

In a report dated January 8, 2014, Dr. McGuire stated that appellant had a fifth metatarsal fracture that was corrected by surgery in April 2012; one year from removal of hardware with minimal benefit; and a painful left fifth metatarsal of unclear etiology. He noted:

> "[Appellant] essentially would not really let me examine her.[...] On the left ankle, I was able to take the tibiotalar joint through good motion. As I began to examine around the fibula distally, she became quite, quite guarded and basically would not let me examine the lateral aspect of her foot. Medial aspect of the foot

> was unremarkable. Eventually, got the Lidoderm patch off. [Appellant] has a scar. She has a bony prominence here, probably on the proximal end of the 5th metatarsal. Exquisitely tender here. Conversely, I do not see any evidence of reflex sympathetic dystrophy at this left foot."

Dr. McGuire did not address percentage of impairment of the legs as related to the fracture of her fifth metatarsal, and noted that he was not assigning maximum medical improvement as of January 8, 2014.

On January 17, 2014 Dr. Paul L. Keller, a diagnostic radiologist, stated his impressions of an x-ray of appellant's left foot. He noted degenerative changes at the fifth tarsal-metatarsal joint, with no evidence of acute fracture. Dr. Keller noted that the remainder of her foot was remarkable only for degenerative changes of the interphalangeal joints. Dr. McGuire reviewed Dr. Keller's report on January 21, 2014. He stated that there was no evidence of fracture, but there was a bit of density lateral to the fifth metatarsal that may represent a painful mass felt on physical examination. However, Dr. McGuire noted that appellant did not really allow him to examine her foot, as she would not allow him to touch it for more than one or two seconds. He stated that she was not at maximum medical improvement, and as such he would not assign an impairment rating. Dr. McGuire noted, "The symptom she relayed to me and her limitations that she voiced to me do not fit with what I am seeing here on her clinical radiographs. I believe further evaluation is warranted with the orthopedic surgeon that is board certified, then with fellowship training in adult foot and ankle problems."

A hearing was held on January 22, 2014 before an OWCP hearing representative. At the hearing, appellant testified that the employing establishment would not allow her to be on the workroom floor without footwear, and that she was required to be on the workroom floor all night long. She stated that she was "pretty much forced" to sign the job offer even though she disagreed with the restrictions listed. Appellant stated that she worked three days a week based upon her physician's recommendations and filed CA-7 forms for wage loss for the other two days per week after April 24, 2013. She noted that her signed job offer stated that she could take her shoes off, but that when she took her shoes off, her supervisors stated that she could not do that for safety reasons. The hearing representative told appellant that he would look at her case file and an upcoming second opinion report before issuing her decision.

In a report dated February 17, 2014, a district medical adviser reviewed Dr. McGuire's report and concurred that because appellant had not yet reached maximum medical improvement, a schedule award could not be processed.

By decision dated March 13, 2014, OWCP denied appellant's claim for a schedule award, finding that the medical evidence failed to establish that she had reached maximum medical improvement.

By decision dated April 9, 2014, the hearing representative affirmed OWCP's July 30, 2013 decision denying appellant's claim for intermittent recurrence of disability between April 20 and May 31, 2013.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[3] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[4]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty.[5]

OWCP's procedures provide that if a claim of recurrence of disability is made within 90 days or less following the first return to duty, the focus is on disability, rather than causal relationship.[6]

OWCP will not pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify her disability and entitlement to compensation.[7]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a left metatarsal fracture as a result of a traumatic incident on April 3, 2012. Appellant claimed that she was totally disabled for intermittent dates from April 20, 2013 through May 31, 2013. OWCP paid appellant for April 22 and 23, 2013 and denied the remainder of her claim by decision dated July 30, 2013. A hearing representative affirmed this decision on April 9, 2014. Appellant has the burden of

[3] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[4] *Id.*, *see also E.B.*, Docket No. 13-2088 (issued February 21, 2014).

[5] *J.F.*, 58 ECAB 124 (2006); *Carl C. Graci*, 50 ECAB 557 (1999); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

[6] *See* Federal (FECA) Procedure Manual, Part 2 – Claims, *Recurrences*, Chapter 2.1500(5)(a) (June 2013).

[7] *See William A. Archer*, 55 ECAB 674, 679 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

establishing by substantial, reliable, and probative evidence that she was totally disabled for work for the claimed period.[8]

In a medical note dated April 4, 2013, Dr. David Yount, a podiatrist, stated that appellant needed to be able to "leave work intermittently" due to her left foot condition. In a duty status report dated April 12, 2013, he stated that appellant could resume limited-duty full-time work with the restriction of being able to take her shoe off if she was in pain, and the ability to leave if her pain was "too much." Dr. Yount stated in a medical note dated May 28, 2013 that appellant could only work three days per week until further notice due to her foot condition.

Dr. Yount did not address specific dates of disability in any of his reports. He advised restrictions of appellant being able to take her shoes off at work and of leaving work intermittently due to her pain. However, Dr. Yount did not state that she had been performing duties in excess of her limitation of being able to take her shoes off at work, and he did not explain, citing objective findings, why appellant was disabled on the dates claimed. Hence, his notes and medical reports lack both rationale and particularity for the dates of disability claimed. As such, Dr. Yount's reports are of diminished probative value on the issue of whether appellant was totally disabled intermittently between April 20 and May 31, 2013.[9]

OWCP advised appellant by letter dated June 10, 2013 of the evidence needed to establish her claim, including a physician's opinion as to why the accepted injuries would disable her for work for the claimed intermittent dates from April 20 to May 31, 2013. At the telephonic hearing held on January 22, 2014, the hearing representative advised appellant of the evidence needed to establish her claim. Appellant did not submit such evidence. She provided no reports addressing specific dates of disability between April 20 and May 31, 2013. While appellant alleged at the hearing that the employing establishment did not allow her to work within the restrictions of her accepted light-duty position, she provided no evidence of this assertion. Therefore, OWCP's April 9, 2014 decision denying appellant's claim for wage-loss compensation between April 20 and May 31, 2013 was proper under the law and facts of the case.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of FECA[10] and its implementing federal regulations[11] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions, and organs of the body.

[8] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

[9] *See Deborah L. Beatty*, 54 ECAB 340 (2003).

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[12] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[13] For decisions issued after May 1, 2009, the sixth edition is used to calculate schedule awards.[14]

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by OWCP.[15]

ANALYSIS -- ISSUE 2

On September 9, 2013 appellant filed a claim for a schedule award due to her work-related injuries. In a report dated July 9, 2013, Dr. Yount noted that she had obtained maximum medical benefit and discharged her from his care. In a report dated August 13, 2013, Dr. Wirtz stated that appellant's date of maximum medical benefit was April 1, 2013, when she returned to limited work activities. In a report dated October 14, 2013, Dr. Rondinelli provided an impairment rating of 11 percent of the whole person due to complex regional pain syndrome, but stated that maximum medical improvement had not yet been reached. On December 11, 2013 OWCP referred the case, together with a statement of accepted facts, to Dr. McGuire, who was asked to calculate appellant's percentage of impairment based upon her accepted diagnosis of a left metatarsal fracture in accordance with the A.M.A., *Guides* and determine whether she had reached maximum medical improvement. In a report dated January 8, 2014, Dr. McGuire declined to assign a date of maximum medical improvement. On January 21, 2014 he stated that she was not at maximum medical improvement. In a report dated February 17, 2014, a district medical adviser reviewed Dr. McGuire's report and concurred that because appellant had not yet reached maximum medical improvement, a schedule award could not be processed.

The Board finds that OWCP properly denied appellant's claim for a schedule award regarding the left metatarsal fracture as she had not yet reached maximum medical improvement. The reports of Drs. Yount and Wirtz do not meet the requirements of the A.M.A., *Guides* in that they do not provide findings sufficient to establish an impairment rating. Hence, their reports are of diminished probative value on the issue of calculating appellant's schedule award under the A.M.A., *Guides.* Drs. Rondinelli and McGuire stated that appellant had not yet reached maximum medical improvement with regard to her left foot condition. As noted, the period

[12] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[13] *Id.*

[14] FECA Bulletin No. 09-03 (issued March 15, 2009).

[15] *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury and maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[16] Because appellant had not yet reached maximum medical improvement, OWCP properly denied her claim for a schedule award.

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 OWCP properly denied appellant's claim for intermittent wage-loss compensation for the period April 20 through May 31, 2013. The Board further finds that appellant did not establish a ratable impairment of her left lower extremity due to her accepted metatarsal injury.

ORDER

IT IS HEREBY ORDERED THAT the April 9 and March 13, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 29, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[16] *See supra* note 18.