United States Department of Labor
Employees' Compensation Appeals Board

A.F., Appellant	)	
and	)	**Docket No. 16-0686**
	)	**Issued: August 22, 2016**
U.S. POSTAL SERVICE, TEUTONIA STATION, Milwaukee, WI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 23, 2016 appellant, through counsel, filed a timely appeal from a January 21, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 his burden of proof to establish more than two percent permanent impairment of the right lower extremity for which he received a schedule award.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

On appeal counsel asserts that the January 21, 2016 decision is contrary to law and fact.

FACTUAL HISTORY

On September 26, 2006 appellant, then a 48-year-old window clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 13, 2006 he injured his right foot and ankle by twisting it on a thick floor mat. OWCP accepted the claim for right foot sprain and stress fracture of the right third metatarsal. At the time of the right foot injury, appellant was working a rehabilitation position as a distribution/window clerk for an accepted 2001 right wrist injury. The job description indicated that he could sit or stand as needed. Appellant stopped work on October 26, 2007 and began receiving wage-loss compensation.

In August 2007, OWCP referred appellant to Dr. Paul Cederberg, a Board-certified orthopedic surgeon, for a second opinion evaluation. In reports dated August 30 and November 6, 2007, Dr. Cederberg diagnosed strain of the right foot and ankle superimposed on degenerative arthrosis of the right third tarsometatarsal joint. He noted that appellant had symptoms out of proportion to objective findings. Following Dr. Cederberg's review of the distribution/window clerk job description, he advised that appellant could perform the duties required.

In a December 17, 2007 report, Dr. John R. Krueger, an attending Board-certified family physician, advised that appellant could not stand for more than 15 minutes at a time and had difficulty wearing a shoe on his right foot due to pain.

OWCP determined that a conflict had been created regarding whether appellant had continued residuals, his ability to work, and the need for continued treatment. On April 16, 2008 it referred appellant to Dr. James H. Langenkamp, Board-certified in orthopedic surgery, for an impartial evaluation. In a May 15, 2008 report, following his review of the record and physical examination, he advised that there were no objective findings regarding appellant's right foot, and that he was medically capable of performing the physical requirements of the window clerk position for eight hours daily. The only additional treatment recommended was pain management.

Appellant retired on disability, effective May 15, 2008. He elected retirement benefits, effective January 31, 2009.

On August 28, 2012 appellant filed a schedule award claim (Form CA-7). In support he submitted an August 20, 2012 report in which Dr. Vance Masci, Board-certified in family and occupational medicine, reported the history of injury and appellant's current complaint of severe right foot pain that interfered with his ability to walk, noting that he could not wear a regular shoe. Dr. Masci diagnosed right foot stress fracture with multiple associated comorbidities,[3] and advised that appellant was probably at maximum medical improvement with regard to his right foot. He advised that, in accordance with the sixth edition of the American Medical Association,

[3] Dr. Masci also diagnosed left lower extremity degenerative joint disease to the ankle, knee, and hip and lumbar degenerative joint disease.

Guides to the Evaluation of Permanent Impairment (hereinafter A.M.A., *Guides*),[4] under Table 16-2, Foot and Ankle Regional Grid, for a diagnosis of metatarsal fracture, nondisplaced, appellant had two percent impairment, but that after applying modifiers 2 for functional history, 3 for physical examination, and 2 for clinical studies, using Table 16-9, he had 40 percent impairment.

Dr. Christopher Gross, an OWCP medical adviser, reviewed the record, including Dr. Masci's report. He advised that, based on Table 16-2, appellant had a class 1 impairment. Dr. Gross found modifiers 2 for functional history and physical examination and a modifier 1 for clinical studies. After applying the net adjustment formula, he concluded that appellant had two percent right lower extremity impairment with August 20, 2012 as the date of maximum medical improvement.

On February 19, 2013 OWCP granted appellant a schedule award for 12 percent right lower extremity permanent impairment, for a total of 5.76 weeks, to run from August 20 to September 29, 2012. Appellant requested a hearing before an OWCP hearing representative on March 14, 2013. On May 13, 2013 OWCP issued an amended decision. It noted that line 1 of the February 19, 2013 decision contained a typographical error. OWCP indicated that the award was for two percent right lower extremity permanent impairment. The number of weeks, period of the award, and payment were correctly reflected in the February 19, 2013 decision.

On March 14, 2013 appellant, through counsel, requested an oral hearing before OWCP's hearing representative.

In reports dated March 27 and April 1, 2013, Dr. Masci, the physician, reiterated that appellant was entitled to 40 percent permanent impairment. He maintained that Dr. Gross arbitrarily downgraded the award.

At the hearing, held on July 1, 2013, appellant's representative argued that Dr. Masci's opinion represented the weight of the evidence regarding a schedule award. The hearing representative questioned whether Dr. Masci assigned whole person impairment and indicated that clarification from Dr. Masci was needed. Appellant testified regarding his right foot condition, stating that he could not wear a shoe and could not drive.

In an August 5, 2013 report, Dr. Masci related that appellant had 40 percent right lower extremity permanent impairment or 16 percent whole person impairment.

By decision dated September 9, 2013, OWCP's hearing representative affirmed the May 13, 2013 schedule award. He noted that Dr. Masci did not clarify how he calculated appellant's impairment. The hearing representative noted that Table 16-9, referenced by Dr. Masci did not provide specific diagnoses or diseases and was to be used as an example to assist physicians in applying the A.M.A., *Guides*. He related that, under Table 16-2, the maximum impairment for a diagnosis of nondisplaced metatarsal fracture of the third metatarsal was two percent, the award granted. The hearing representative concluded that OWCP's medical adviser's opinion represented the weight of the medical evidence.

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

Appellant submitted a claim for increased schedule award (Form CA-7) on January 7, 2015. In a November 19, 2014 report, Dr. Neil Allen, Board-certified in internal medicine and neurology, reviewed medical evidence and described physical examination findings. He advised that, under Table 16-2, based on medical records and physical examination findings, appellant had a class 1 impairment with a default value of five percent, with modifiers 2 for functional history and physical examination, and a modifier 1 for clinical studies. Dr. Allen applied the net adjustment formula and concluded that appellant had seven percent right lower extremity permanent impairment.

On February 5, 2014 Dr. Michael Hellman, an OWCP medical adviser, reviewed the record including Dr. Allen's report. He advised that under Table 16-2, for a diagnosis of other metatarsal fracture, nondisplaced with abnormal examination findings, the default value for a class 1 impairment is one percent. Dr. Hellman agreed with Dr. Allen that appellant had grade modifiers 2 for functional history and physical examination, and a modifier 1 for clinical studies. OWCP's medical adviser applied the net adjustment formula and advised that maximum medical improvement was reached on August 20, 2012. He concluded that appellant had two percent impairment, the largest impairment allowed for his diagnosis.

By decision dated August 2, 2015, OWCP found that appellant was not entitled to a right lower extremity schedule award greater than the two percent previously awarded.

Appellant, through counsel, timely requested a hearing. At the hearing, held on November 13, 2015 he testified that he had retired on disability and had fallen the previous year and fractured his right ankle. Counsel argued that the weight of the medical evidence should rest with the attending physician, Dr. Allen or, at the least, that a conflict in medical evidence had been created between Dr. Allen and the medical adviser.

On January 21, 2016 OWCP's hearing representative affirmed the August 2, 2015 decision. The hearing representative noted that, under Table 16-2 of the A.M.A., *Guides*, the largest award for appellant's diagnosis is two percent, for which he previously received a schedule award.

LEGAL PRECEDENT

It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of any employment injury.[5]

The schedule award provision of FECA[6] and its implementing federal regulations[7] 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 for all claimants, OWCP has adopted

[5] *See Tammy L. Meehan*, 53 ECAB 229 (2001).

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[8] For decisions after May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[9]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[10] Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment class for the diagnosed condition Class of Diagnosis (CDX), which is then adjusted by Grade Modifier Functional History (GMFH), Grade Modifier Physical Examination (GMPE), and Grade Modifier Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[13]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[14] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[15] When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[16]

ANALYSIS

OWCP accepted right foot sprain and stress fracture of the right third metatarsal. On May 13, 2013 it granted appellant a schedule award for two percent permanent impairment of his

[8] *Id*. at § 10.404(a).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[10] A.M.A., *Guides*, *supra* note 4 at 5, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[11] *Id*. at 494-531.

[12] *Id*. at 521.

[13] *Id*. at 23-28.

[14] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[15] 20 C.F.R. § 10.321.

[16] *V.G.*, 59 ECAB 635 (2008).

right lower extremity. The award was based on an impairment rating by Dr. Gross, an OWCP medical adviser. This decision was affirmed by an OWCP hearing representative on September 9, 2013.

On January 7, 2015 appellant filed a claim for increased schedule award. He submitted a November 19, 2014 report from Dr. Allen who advised that appellant had seven percent right lower extremity permanent impairment. Dr. Hellman, an OWCP medical adviser, disagreed with Dr. Allen's impairment evaluation and advised on February 5, 2014 that appellant had two percent permanent impairment of the right lower extremity.

In his November 19, 2014 report, Dr. Allen reviewed medical evidence and described physical examination findings. He advised that, based on medical records and physical examination findings, under Table 16-2 appellant had a class 1 impairment with a default value of five percent, with modifiers 2 for functional history and physical examination, and a modifier 1 for clinical studies. Dr. Allen applied the net adjustment formula and concluded that appellant had seven percent right lower extremity impairment.

In contrast, in a February 5, 2014 report, Dr. Hellman, an OWCP medical adviser, advised that under Table 16-2, for a diagnosis of other metatarsal fracture, nondisplaced with abnormal examination findings, the default value for a class 1 impairment is one percent. He agreed with Dr. Allen that appellant had grade modifiers 2 for functional history and physical examination, and a modifier 1 for clinical studies. The medical adviser applied the net adjustment formula and advised that maximum medical improvement was reached on August 20, 2012. He concluded that appellant was entitled to two percent impairment, the largest impairment allowed for his diagnosis.

The Board finds that there is a conflict in the medical opinion evidence between Dr. Allen and Dr. Hellman regarding the degree of appellant's right lower extremity impairment.[17]

Table 16-2, Foot and Ankle Regional Grid, includes two specific diagnoses for other metatarsal fractures. The first "other metatarsal, nondisplaced with abnormal examination findings," has a default value of one percent with a range of impairment values from zero to two percent.[18] The second diagnosis listed is, "other metatarsal with angulation and metatarsalgia." It has a default value of five percent with a range of impairment values from three to seven percent.[19]

Dr. Allen did not specifically identify the diagnosis on which his impairment rating was based. However, he indicated that appellant had a class 1 impairment with a default value of five percent. The only diagnosis in Table 16-2 that has a class 1 default value of five percent is "other metatarsal with angulation and metatarsalgia." Dr. Hellman, however, indicated that appellant's appropriate diagnosis was the first-identified or "other metatarsal fracture,

[17] *Melvina Jackson*, 38 ECAB 443 (1987).

[18] A.M.A., *Guides*, *supra* note 4 at 504.

[19] *Id*.

nondisplaced with abnormal examination findings." He correctly indicated that the largest impairment value allowed for this diagnosis was two percent.[20] The physicians agreed regarding grade modifiers, finding a modifier 2 for functional history and physical examination, and a modifier 1 for clinical studies.

In order to resolve the conflict in the medical opinion evidence regarding the appropriate diagnosis to be used for rating appellant's right lower extremity impairment, the case shall be remanded to OWCP for referral to an impartial medical specialist for an examination and impairment evaluation of appellant's right lower extremity.[21] After this and other development deemed necessary, OWCP shall issue a *de novo* decision regarding his entitlement to schedule award compensation.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: August 22, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[20] *Id*.

[21] *See S.C.*, Docket No. 15-1630 (issued October 23, 2015).