United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 16-0820**
	)	**Issued: August 5, 2016**
DEPARTMENT OF THE ARMY, JOINT MUNITIONS & LETHALITY COMMAND, Pine Bluff, AR, 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:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 15, 2016 appellant, through counsel, filed a timely appeal from a December 18, 2015 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.

[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.*

ISSUE

The issue is whether appellant met his burden of proof to establish more than one percent permanent impairment of his left lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On August 29, 2012 appellant, then a 33-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that on August 27, 2012 he injured his left leg while playing basketball at work.

OWCP accepted appellant's claim for partial rupture and tendinitis of his left Achilles tendon. On September 4, 2012 appellant underwent an OWCP-authorized left Achilles tendon repair. He returned to light-duty work for the employing establishment in October 2012.

In a report dated February 20, 2013, Dr. Larry L. Nguyen, an attending Board-certified orthopedic surgeon, reported physical examination findings for appellant's lower extremities including 5-/5+ plantar flexion strength, brisk capillary refill, and neurovascularly intact toes. He indicated that appellant "flexes and extends toes and ankle."

On May 22, 2013 Dr. Wesley Sprinkle, an attending osteopath and Board-certified physical medicine and rehabilitation physician, indicated that he examined appellant on that date and reported that his lower extremities exhibited normal strength, no instability, intact sensation, and no significant loss of range of motion. He noted that, under Table 16-2 (Foot and Ankle Regional Grid) of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009), appellant's diagnosis-based condition of Achilles tendon rupture fell under the class 1, grade C default value (palpatory findings and/or radiographic findings), of one percent. With respect to grade modifiers, appellant's physical examination modifier was 1, his functional history modifier was 1, and his clinical studies modifier was 1. Dr. Sprinkle indicated that, due to these grade modifiers, there was no movement from the default value of one percent and therefore appellant had a total left lower extremity impairment of one percent.

On June 14, 2013 Dr. Daniel D. Zimmerman, a Board-certified internist serving as an OWCP medical adviser, expressed agreement with Dr. Sprinkle's conclusion that appellant had a one percent permanent impairment of his left extremity impairment. He noted that, under Table 16-2 of the sixth edition of A.M.A., *Guides*, appellant's diagnosis-based condition of Achilles tendon rupture fell under the class 1, grade C default value of one percent (using the lower-range subclass of class 1 for palpatory findings and/or radiographic findings). Dr. Zimmerman noted that, with respect to grade modifiers, appellant's physical examination modifier was 1, his functional history modifier was 1, and a clinical studies modifier was not applicable because clinical studies were used to place appellant in class 1. Application of the net adjustment formula meant that there was no movement from the default value of one percent and therefore appellant had a total left lower extremity impairment of one percent. Dr. Zimmerman determined that appellant had reached maximum medical improvement by May 22, 2013.

In a July 29, 2013 decision, OWCP granted appellant a schedule award for one percent permanent impairment of his left lower extremity. The award ran for 2.88 weeks from May 22 to June 11, 2013 and was based on Dr. Zimmerman's impairment rating calculations which used the physical examination findings of Dr. Sprinkle.

On February 13, 2014 appellant filed a claim for additional schedule award compensation due to his accepted work injury. In a May 9, 2014 report, another OWCP medical adviser posited that the condition of appellant's left lower extremity had not changed and concluded that he had no additional impairment of his left lower extremity.

In a May 14, 2014 decision, OWCP denied appellant's claim for additional schedule award compensation. It noted that appellant had not submitted medical evidence supporting an increase in the permanent impairment of his left lower extremity for which he had already been compensated.

Appellant, through counsel, requested a telephone hearing with an OWCP hearing representative. He submitted an August 29, 2014 report in which Dr. Stephen Wilson, an attending Board-certified orthopedic surgeon, opined that he had seven percent left leg impairment. Dr. Wilson noted that, upon examination on August 29, 2014, appellant exhibited left ankle range of motion that was mildly restricted upon dorsiflexion. He reported that appellant had weakness upon dorsiflexion and plantar flexion of the left foot, and tenderness to palpation of the left Achilles tendon. Dr. Wilson indicated that, under Table 16-2 of the sixth edition of A.M.A., *Guides*, appellant's diagnosis-based condition of Achilles tendon rupture fell under the class 1, grade C default value of five percent (using the mid-range subclass of class 1 for mild motion deficits). He found that appellant had modifiers of 1 for functional history (pain questionnaire score of 63), 1 for physical examination (left ankle motion loss), and 2 for clinical studies (magnetic resonance imaging scan findings). Dr. Wilson found that appellant had a net adjustment of +1 after applying the net adjustment formula, requiring movement one space to the right of the five percent default value to the grade D value. He concluded that the total permanent impairment of appellant's left lower extremity was seven percent.

Prior to a hearing being held, OWCP's hearing representative issued an October 22, 2014 decision which set aside OWCP's May 14, 2014 decision and remanded the case to OWCP for additional development and a *de novo* decision. The hearing representative directed OWCP to refer the file to an OWCP medical adviser for review of Dr. Wilson's report.

In a December 16, 2014 report, Dr. Zimmerman, again serving as an OWCP medical adviser, indicated that Dr. Wilson partially based his impairment rating on range of motion loss as a rating factor without providing specific degrees of motion loss measured by goniometer, as required by the A.M.A., *Guides*.

In a February 4, 2015 letter, OWCP requested that Dr. Wilson provide a supplemental impairment rating report. In a February 19, 2015 report, Dr. Wilson noted that appellant had a loss of 20 degrees of plantar flexion and 10 degrees of dorsiflexion.

On April 5, 2015 Dr. Zimmerman found that the evidence of record did not show that appellant was entitled to additional schedule award compensation.

In a decision dated April 7, 2015, OWCP denied appellant's claim for additional schedule award compensation because the medical evidence of record did not establish that he had more than one percent permanent impairment of his left lower extremity. It noted that Dr. Zimmerman properly assessed appellant's permanent impairment.

Appellant requested a telephone hearing with an OWCP hearing representative. During the November 9, 2015 hearing, appellant's counsel argued that Dr. Wilson's supplemental report supported appellant's entitlement to additional schedule award compensation.

Appellant submitted a September 22, 2015 report in which Dr. Wilson repeated his opinion that appellant had seven percent permanent impairment of his left lower extremity under Table 16-2 of the sixth edition of the A.M.A., *Guides*.

By decision dated December 18, 2015, the hearing representative denied modification of OWCP's April 7, 2015 decision finding that appellant had not established more than one percent permanent impairment of his left lower extremity.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations[4] 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.[5]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the foot/ankle, the relevant portion of the leg for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.[6] After the Class of Diagnosis (CDX) is determined from the Foot and Ankle Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE), and grade modifier for Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[7] Under Chapter 2.3, evaluators are

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *W.B.*, Docket No. 14-1982 (issued August 26, 2015). For OWCP decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

[6] *See* A.M.A., *Guides* 501-08 (6th ed. 2009).

[7] *Id.* at 515-22.

directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[8]

Section 8123(a) of FECA provides in pertinent part: "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."[9] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[10] In situations where there exist 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.[11]

ANALYSIS

OWCP accepted appellant's claim for partial rupture and tendinitis of his left Achilles tendon. On September 4, 2012 appellant underwent an OWCP-authorized left Achilles tendon repair. On July 29, 2013 OWCP granted him a schedule award for one percent permanent impairment of his left lower extremity. The award was based on the impairment rating calculations of Dr. Zimmerman, an OWCP medical adviser, which used the physical examination findings of Dr. Sprinkle, an attending physician.

The Board finds that there is a conflict in the medical opinion evidence, regarding the extent of the permanent impairment of appellant's left lower extremity, between Dr. Zimmerman and Dr. Wilson, an attending physician.

In a June 14, 2013 report, Dr. Zimmerman indicated that, under Table 16-2 of the sixth edition of A.M.A., *Guides*, appellant's diagnosis-based condition of Achilles tendon rupture fell under the class 1, grade C default value of one percent (using the lower-range subclass of class 1 for palpatory findings and/or radiographic findings).[12] He noted that, with respect to grade modifiers, appellant's physical examination modifier was 1, his functional history modifier was 1, and a clinical studies modifier was not applicable.[13] Application of the net adjustment formula meant that there was no movement from the default value of one percent and therefore appellant had a total left lower extremity impairment of one percent.[14]

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

[9] 5 U.S.C. § 8123(a).

[10] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[11] *R.S.*, Docket No. 08-1158 (issued January 29, 2009).

[12] A.M.A., *Guides* 501, Table 16-2.

[13] *Id.* at 515-20.

[14] *Id.* at 521. Dr. Zimmerman determined that appellant had reached maximum medical improvement by May 22, 2013.

In contrast to Dr. Zimmerman's opinion, Dr. Wilson, in an August 29, 2014 report, opined that appellant had a higher percentage of permanent impairment of his left lower extremity. He indicated that, under Table 16-2 of the sixth edition of A.M.A., *Guides*, appellant's diagnosis-based condition of Achilles tendon rupture fell under the class 1, grade C default value of five percent (using the mid-range subclass of class 1 for mild motion deficits). Because Dr. Wilson provided an opinion that appellant's left ankle/foot condition fell under a subclass of class 1 with a default value of five, his opinion contrasts with that of Dr. Zimmerman who found that appellant's left ankle/foot condition fell under the lower subclass of class 1 with a default value of one. He found that appellant had modifiers of 1 for functional history (pain questionnaire score of 63) and 1 for physical examination (left ankle motion loss)[15] and therefore he chose the same grade modifier scores for functional history and physical examination as Dr. Zimmerman. However, Dr. Wilson chose a 2 score for the clinical studies grade modifier, whereas Dr. Zimmerman felt that this category of grade modifier was not applicable. He found that appellant had a net adjustment of +1 after applying the net adjustment formula, requiring movement one space to the right of the five percent default value to the grade D value. Dr. Wilson concluded that the total permanent impairment of appellant's left lower extremity was seven percent, but the Board notes that he appears to have inadvertently listed the value of seven percent for the value of grade D found on Table 16-2. The actual value of grade D on Table 16-2 is six percent.[16] Therefore, Dr. Wilson effectively provided an opinion that appellant has six percent permanent impairment of his left leg, an opinion which contrasts with Dr. Zimmerman's finding of one percent impairment.

For these reasons, the Board finds that there is a conflict in the medical evidence between Dr. Zimmerman, who served as an OWCP medical adviser and Dr. Wilson, appellant's attending physician, regarding the extent of the permanent impairment of appellant's left leg.[17]

Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence regarding appellant's left lower extremity impairment.[18] On remand OWCP should refer him, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter. Following this and any further development, it should issue a *de novo* appropriate decision regarding appellant's schedule award claim.

[15] Dr. Zimmerman objected to Dr. Wilson's reference to appellant's left ankle motion in deriving his grade modifier for physical examination under Table 16-7 by alleging that he had not followed the strictures of section 16.7 of the A.M.A., *Guides* with respect to ankle measurements. *See id.* at 517, Table 16-7, and 543-50. However, the Board notes that Dr. Zimmerman's argument is of limited relevance in the present case, because both Dr. Zimmerman and Dr. Wilson determined that appellant had a grade modifier 1 for physical examination.

[16] *See id.* at 501.

[17] *See supra* note 9.

[18] *See supra* note 10.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has more than one percent permanent impairment of his left lower extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: August 5, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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