United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 16-0530**
	)	**Issued: December 21, 2016**
U.S. POSTAL SERVICE, BUSTLETON STATION, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 27, 2016 appellant, through counsel, filed a timely appeal from October 27 and November 30, 2015 merit decisions and a December 4, 2015 nonmerit 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.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish more than one percent permanent impairment of the left leg, for which she received a schedule award; (2) whether OWCP properly found a $14,933.39 overpayment of compensation; (3) whether it properly denied waiver of recovery of the overpayment; and (4) whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal counsel contends that the weight of the medical evidence regarding appellant's permanent impairment rests with the report of an attending physician. Alternatively, he contends that there is an unresolved conflict in the medical evidence between two OWCP physicians. Counsel, thus, contends that it was inappropriate for OWCP to declare an overpayment related to appellant's schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board with respect to the termination of compensation benefits.[3] In a January 12, 2015 decision, the Board reversed a January 29, 2014 OWCP decision terminating appellant's wage-loss compensation and medical benefits effective July 29, 2013. The Board found that the medical opinion of Dr. William H. Simon, a Board-certified orthopedic surgeon and the impartial medical specialist, was not rationalized on the issue of whether appellant had any continuing residuals and disability causally related to her accepted employment-related injuries. The relevant facts are set forth below.

OWCP accepted that on January 8, 2009 appellant, then a 49-year-old letter carrier, sustained a peroneal tendon strain of the left ankle and subluxation of the left peroneal tendon when she rolled her left ankle on broken raised cement in a driveway while delivering mail. It authorized arthroscopic left ankle surgery, a left peroneal tendon tenodesis with peroneal groove deepening, which was performed on April 1, 2009. On October 26, 2009 appellant returned to light-duty work, two hours a day, three days a week. In a November 21, 2011 medical report, Dr. Jamal Ahmad, a Board-certified orthopedic surgeon, released her to return to full-time full-duty work.

In a February 9, 2012 decision, OWCP accepted a recurrence of disability on November 21, 2011 and paid wage-loss compensation benefits. It also expanded the acceptance of appellant's claim to include a sprain, other joint derangement, plantar fibromatosis, and other enthesopathy and tarsus of the left ankle.

On March 27, 2014 OWCP received a February 6, 2014 report from Dr. Nicholas P. Diamond, an attending Board-certified osteopath. Dr. Diamond noted a history of injury, reviewed appellant's medical records, and provided examination findings. He diagnosed (derivative) right knee sprain and retropatellar chondromalacia secondary to gait abnormality, post-traumatic left peroneal tendon instability with intrasheath and peroneal groove subluxation, status post left peroneal tendon tenodesis with peroneal groove deepening performed on April 1, 2009, and residual left plantar fasciitis. Dr. Diamond opined that the January 8, 2009 work

[3] Docket No. 14-1275 (issued January 12, 2015).

injury was the competent producing factor of his findings. He classified appellant's peroneal tendon ankle strain with significant weakness as class 1 with a default impairment value of 10 percent under Table 16-2, page 501 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Diamond found grade modifiers two for Functional History Adjustment (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS) under Table 16-6, page 516, Table 16-7, page 517, and Table 16-8, page 519, respectively. He applied the net adjustment formula of (GMFH -- CDX) + (GMPE -- CDX) + (GMCS -- CDX), or = (2-1) + (2-1) + (2-1), which resulted in a 3 grade or 13 percent impairment of the left leg. Dr. Diamond classified appellant's right knee strain as class 1 with a default value of two percent under Table 16-3, page 509. He found a grade modifier 2 for GMFH and grade modifiers one for GMPE and GMCS. Dr. Diamond applied the net adjustment formula and found that appellant had two percent right leg impairment. He found that she reached maximum medical improvement (MMI) on the date of his examination.

On March 31, 2014 appellant filed a claim for a schedule award (Form CA-7). On April 9, 2014 OWCP referred the case to an OWCP medical adviser.

In an April 24, 2014 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed Dr. Diamond's report and the medical record. He advised that Dr. Diamond's classification of appellant's tendinitis and ruptured peroneal tendons as class 1 with a default impairment of 10 percent was not acceptable as it was not verified by other physicians. Dr. Berman classified her peroneal tendon strain as class 1 under Table 16-2, page 501. He found grade modifiers of 2 for GMFH, GMPE, and GMCS under Table 16-6, page 516, Table 16-7, page 517, and Table 16-8, page 519, respectively. Dr. Berman applied the net adjustment formula and found that appellant had seven percent permanent impairment of the left leg.

By decision dated July 9, 2014, OWCP granted appellant a schedule award for seven percent impairment of the left leg, for a total of $17,436.83. The award ran from February 6 to June 27, 2014. OWCP found that appellant was not entitled to a right leg schedule award as her claim had not been accepted for right knee strain.

In a July 15, 2014 letter, appellant, through counsel, requested an oral hearing before an OWCP hearing representative, which was held on November 24, 2014.[4]

By decision dated January 27, 2015, an OWCP hearing representative affirmed in part and set aside in part the July 9, 2014 decision. He found that Dr. Diamond did not provide a rationalized medical opinion to support that appellant sustained any work-related right leg impairment. The hearing representative remanded the case for referral of her to a second opinion physician for an examination and an opinion on the extent of her left leg impairment under the sixth edition of the A.M.A., *Guides*.

On February 12, 2015 OWCP referred appellant, together with a statement of accepted facts (SOAF) and the medical record, to Dr. Robert A. Smith, a Board-certified orthopedic

[4] By letter dated January 19, 2015, counsel informed OWCP that appellant had retired from the employing establishment and she was receiving retirement benefits from the Office of Personnel Management.

surgeon, for a second opinion. In a February 27, 2015 report, Dr. Smith noted a history of injury and appellant's treatment. On examination of the left calf, ankle, and foot, he reported a well-healed scar laterally over the peroneal tendons. Appellant stated that the scar was sensitive to touch, but Dr. Smith found no apparent keloiding or redness. Active measured range of motion of the ankle and subtalar joints was 20 degrees dorsiflexion (x 3), 40 degrees of plantar flexion (x 3), 25 degrees of inversion (x 3), and 15 degrees of eversion (x 3), respectively. Dr. Smith found no ankle instability. Motor strength was 5/5 in all muscle groups controlling the foot and ankle. There was no subluxation of the peroneal tendons with ankle motion. The sole of the foot was normal to palpation without nodularity or palpable fascial defect. There was no atrophy in the calves with each measuring 34 centimeters in circumference. Dr. Smith related that the examination was consistent with minimal palpatory findings (sensitive surgical scar). Using Table 16-2, Foot and Ankle Regional Grid, page 501 of the sixth edition of the A.M.A., *Guides*, he classified appellant's peroneal tendon strain Class of Diagnosis (CDX) as class 1 injury with a default impairment value of one percent in a range of zero to two percent. Dr. Smith also classified her plantar fasciitis as class 1 with a default value of one percent in a range of zero to two percent under Table 16-2. He found a grade modifier zero for GMFH under Table 16-6, page 516. Dr. Smith found grade modifiers one for GMPE and GMCS under Table 16-7, page 517 and Table 16-8, page 519, respectively. He applied the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), or = (0-1) + (1-1) + (1-1), which resulted in a -1 grade adjustment that required movement of the impairment rating one column to the left. Dr. Smith then combined the one percent impairment for class 1, grade B peroneal tendon strain with the one percent impairment for class 1, grade B plantar fasciitis, totaling two percent impairment of the left leg. He opined that appellant reached MMI on September 6, 2012, the date Dr. Norman B. Stempler, an orthopedic surgeon, released her to full-duty work.[5]

On April 24, 2015 Dr. Morley Slutsky, an OWCP medical adviser Board-certified in occupational medicine, reviewed the medical record, including Dr. Smith's February 27, 2015 report. He noted Dr. Smith's diagnosis of left foot plantar fasciitis and related that there were no palpatory findings of this condition at MMI and; therefore, there was no lower extremity impairment due to this condition. Dr. Slutsky indicated that a January 19, 2009 left ankle and foot magnetic resonance imaging (MRI) scan was normal and did not show plantar fasciitis. A March 9, 2009 left ankle and foot sonography also did not demonstrate plantar fasciitis. As such, Dr. Slutsky concluded that appellant did not meet the criteria to rate left foot plantar fasciitis because at MMI there were no significant palpatory or radiographic findings of this condition. He noted that the diagnosis-based impairment (DBI) was the preferred method for rating impairment under the sixth edition of the A.M.A., *Guides*. Dr. Slutsky found that the most impairing diagnosis for rating appellant's impairment was her left ankle peroneal strain with normal range of motion as calculated under Table 16-22 and Table 16-20, page 549. He classified this diagnosis as a class 1 impairment. Dr. Slutsky assessed a grade modifier zero for GMFH under Table 16-6, page 516, as appellant still had symptoms in the ankle joint and there was no documentation of an antalgic gait requiring the use of a single gait aid or external orthotic device for stabilization and no positive Trendelenburg test. He assessed a grade modifier one for

[5] The Board notes that it appears that Dr. Smith inadvertently noted that Dr. Stempler had released appellant to return to full-duty work on September 12, 2012 rather than September 6, 2012 as the record contains a September 6, 2012 duty status report (Form CA-17) in which Dr. Stempler released appellant to return to full-duty work with no restrictions on that date.

GMPE under Table 16-7, page 517, as range of motion was used to place appellant into the correct diagnostic class and, therefore, it could not be used again to assign a GMCS. Dr. Slutsky noted that there was tenderness to palpation and no other documented objective deficits. He found that a grade modifier for GMCS was not applicable under Table 16-8, page 519, according to section 16.3C, page 518, because there were no clinical studies taken at the time of MMI. Dr. Slutsky applied the net adjustment formula which resulted in a -1 grade adjustment, grade B, or one percent impairment of the left lower extremity. He concluded that the date of MMI was February 27, 2015, the date of Dr. Smith's examination.

In a May 29, 2015 decision, OWCP granted appellant a schedule award for one percent impairment of the left lower extremity, for a total payment of $2,503.44. The period of the award ran from February 27 to March 19, 2015. OWCP found that the weight of the medical evidence rested with Dr. Slutsky's April 24, 2015 report.

By letter dated June 9, 2015, appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In a notice dated July 10, 2015, OWCP advised appellant of its preliminary determination that an overpayment in the amount of $14,933.39 for the period February 6 to June 27, 2014 was created in her case, as she received a schedule award for seven percent impairment of the left leg, but the weight of the medical evidence established only one percent impairment of the left leg. It calculated the overpayment by noting that appellant was paid $17,436.83 in schedule award compensation from February 6 to June 27, 2014 for seven percent impairment of the left lower extremity while she was only entitled to $2,503.44 in compensation for the period February 27 to March 19, 2015 for one percent impairment. OWCP then subtracted $2,503.44 from $17,436.83, which resulted in an overpayment of $14,933.39 for the period February 6 to June 27, 2014. It found that appellant was not at fault in creating the overpayment because she was not aware or could not have been reasonably aware that it had incorrectly paid schedule award compensation. OWCP requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. It also notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On July 14, 2015 counsel requested a prerecoupment hearing before an OWCP hearing representative, which was held on September 14, 2015.

By decision dated October 27, 2015, an OWCP hearing representative affirmed the May 29, 2015 decision finding no additional impairment and finalized the overpayment of $14,933.39. She denied waiver of recovery of the overpayment as appellant had failed to submit any supporting financial documentation. The hearing representative requested immediate repayment of the overpayment.

In a November 24, 2015 decision, OWCP again denied waiver of recovery of the $14,933.39 overpayment based on appellant's failure to submit any supporting financial documentation. It directed repayment of the entire amount within 30 days.

By letter dated November 25, 2015, counsel requested reconsideration of the hearing representative's October 27, 2015 decision. He contended that appellant could not repay the overpayment based on an accompanying Form OWCP-20, which indicated that her monthly expenses exceeded her monthly income.

In a November 30, 2015 decision, OWCP rescinded the November 24, 2015 decision as the overpayment issue had already been addressed in the October 27, 2015 decision, which served as a final decision.

By decision dated December 4, 2015, OWCP denied further merit review of appellant's claim. It found that the evidence submitted was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

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, functions, and organs of the body. 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.[8] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9] For decisions issued after May 1, 2009, the sixth edition is used to calculate schedule awards.[10]

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 ankle, the relevant portion of the leg (foot) for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.[11] 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, grade modifier for physical examination, and grade modifier for clinical studies. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] Under Chapter 2.3, evaluators are directed to provide reasons for

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

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

[9] *Id.*

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

[11] *See* A.M.A., *Guides* 501-07 (6th ed. 2009).

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

their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[13]

Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that diagnosis-based impairment is the primary method of calculation for the lower limb and that most impairments are based on the diagnosis-based impairment where impairment class is determined by the diagnosis and specific criteria as adjusted by the grade modifiers for functional history, physical examination, and clinical studies. Chapter 16 further provides:

> "Alternative approaches are also provided for calculating impairment for peripheral nerve deficits, complex regional pain syndrome, amputation, and range of motion. Range of motion is primarily used as a physical examination adjustment factor and is only used to determine actual impairment values when it is not possible to otherwise define impairment."[14]

ANALYSIS -- ISSUE 1

OWCP accepted that on January 8, 2009 appellant sustained a peroneal tendon strain, sprain, other joint derangement, plantar fibromatosis, and other enthesopathy, and tarus of the left ankle, and subluxation of the left peroneal tendon in the performance of duty with arthroscopic left ankle surgery performed on April 1, 2009. On July 9, 2014 it issued a schedule award for seven percent permanent impairment of the left leg. However, in a subsequent decision, an OWCP hearing representative directed further medical development regarding appellant's permanent impairment. Following such development, OWCP issued a May 29, 2015 schedule award for one percent permanent impairment of the left lower extremity. This decision was affirmed by an OWCP hearing representative in an October 27, 2015 decision.

The Board finds that there is an unresolved conflict as to the impairment related to appellant's left lower extremity between appellant's treating physician and OWCP's referral physician. In a February 6, 2014 report, Dr. Diamond, an attending physician, opined that appellant had 13 percent impairment of the left lower extremity. Utilizing Table 16-2, page 501 of the sixth edition of the A.M.A., *Guides*, he classified her peroneal tendon left ankle strain with significant weakness as class 1 with a default value of 10 percent. Dr. Diamond assigned grade modifiers of 2 for GMFH, GMPE, and GMCS under Table 16-6, page 516, Table 16-7, page 517, and Table 16-8, page 519, respectively. Using the net adjustment formula, he determined that appellant had a 3 grade or 13 percent impairment of the left leg. By contrast, in a February 27, 2015 report, Dr. Smith, an OWCP referral physician, opined that appellant had two percent impairment of the left lower extremity. Utilizing Table 16-2, he classified her peroneal tendon left ankle strain as class 1 with a default value of one percent. Dr. Smith utilized the same table to determine that appellant's plantar fasciitis was class 1 with a default value of one percent. He assigned a grade modifier 0 for GMFH and grade modifiers 2 for GMPE and GMCS under Table 16-6, page 516, Table 16-7, page 517, and Table 16-8, page 519, respectively. Dr. Smith noted that the net adjustment formula resulted in a change to B or one percent

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

[14] *Id.* at 497, 544-53.

impairment for each condition noted above. He then determined that appellant had two percent impairment of the left lower extremity by combining the impairment ratings for the peroneal tendon strain and plantar fasciitis.

If there is disagreement between OWCP's referral physician and appellant's physician, OWCP will appoint a third physician who shall make an examination.[15] For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.[16] The Board finds that the two medical opinions of Dr. Diamond and Dr. Smith are of equal weight. The dispute between these physicians centers on their physical findings, which ostensibly supported their respective opinions. Accordingly, there was an unresolved conflict in medical opinion regarding the extent of appellant's left lower extremity impairment.

Because there is an unresolved conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a), the case will be remanded to OWCP for referral of appellant, together with the medical record and an updated SOAF, to an appropriate Board-certified specialist for an impartial medical examination to determine the extent and degree of appellant's left lower extremity permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

ISSUES 2, 3 and 4

As the case is not in posture for a decision regarding the appropriate percentage of appellant's left lower extremity permanent impairment, the finding of a $14,933.39 overpayment of compensation and denial of waiver of recovery of the overpayment must be set aside. It is premature for the Board to address the issue of any overpayment of compensation until the proper percentage of permanent impairment is determined.[17] In addition, in view of the Board's disposition of this case, the issue of whether OWCP properly denied merit review under section 8128 is moot.[18]

CONCLUSION

The Board finds that this case is not in posture for decision regarding the extent of appellant's left lower extremity impairment due to an unresolved conflict in the medical opinion evidence. The issues of overpayment, waiver, and nonmerit review are moot.

[15] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[16] *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[17] *See Lee Z. Watson*, Docket No. 04-2176 (issued March 1, 2005) (finding that when the decision providing the basis for the overpayment is reversed or set aside, the resulting overpayment issues are moot).

[18] Counsel's arguments on appeal are also moot in light of the Board's disposition of this case.

ORDER

IT IS HEREBY ORDERED THAT the December 4, November 30, and October 27, 2015 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 21, 2016
Washington, DC

Christopher J. Godfrey, 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