United States Department of Labor
Employees' Compensation Appeals Board

M.K., Appellant	)	
and	)	**Docket No. 16-0243**
	)	**Issued: May 9, 2016**
U.S. POSTAL SERVICE, CLEVELAND ANNEX, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 24, 2015 appellant, through counsel, filed a timely appeal of a November 3, 2015 merit decision 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has established a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. The facts as set forth in the Board's prior decisions are incorporated herein by reference.[2] On June 24, 1997 appellant, then a 39-

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 10-1572 (issued May 23, 2011); Docket No. 12-724 (issued October 26, 2012).

year-old casual clerk, filed a traumatic injury claim (Form CA-1), alleging that on that date she sustained an injury to her right leg when a colleague rolled a bulk mail carrier into her leg. OWCP accepted her claim for a right leg contusion/laceration, tear of the Achilles tendon, tendinitis, and right leg cellulitis. It paid medical and wage-loss compensation benefits.

On October 6, 2009 OWCP terminated appellant's wage-loss compensation and medical benefits. This termination of benefits decision was affirmed by a hearing representative on May 6, 2010 and by the Board on May 23, 2011.[3] On January 13, 2012 OWCP denied modification of its decision, and on October 26, 2012 the Board affirmed this decision.[4]

In a November 20, 2012 report, Dr. Jessica Glazer Volsky, an osteopath, found that appellant had 31 percent permanent impairment of her right lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). She listed appellant's diagnosis as right Achilles tendinitis. Dr. Volsky noted that appellant reached maximum medical improvement. She conducted a physical examination and noted that the right foot and ankle were swollen and hypersensitive to touch. Dr. Volsky noted that appellant had decreased plantar flexion and dorsiflexion, and that the Achilles tendon was severely tender to palpation and was swollen. She noted that appellant was unable to walk on her toes or heels secondary to increased pain. Dr. Volsky noted crepitus and muscle strength 3/5. She concluded that, based on Table 16-2 of the sixth edition of the A.M.A., *Guides*,[5] appellant had a class 3 severe problem. Dr. Volsky assigned a grade modifier of 2 for functional history, based on Table 16-6, noting that appellant had a limp with routine use of a cane. She assigned a grade modifier of 3 for physical examination, based on Table 16-7, noting severe palpatory findings and ankle instability. With a net adjustment of negative 1 Dr. Volsky concluded that appellant had 31 percent permanent impairment of the right lower extremity.

On January 11, 2013 appellant filed a claim for a schedule award (Form CA-7).

In a January 17, 2013 report, Dr. Franklin B. Price, a physician Board-certified in internal medicine, found that appellant had 30 percent permanent impairment. He noted that appellant's Achilles tendon never healed properly and that she walked with pain, a limp, and an antalgic gait. Dr. Price noted that she falls occasionally because of instability in her ankle and her inability to fully dorsiflex the foot. He noted that appellant had only 3/5 strength on dorsiflexion of the right foot and 4/5 strength on plantarflexion. Dr. Price noted that on inversion and eversion of the right ankle there was some pain, which he would rate as 3 to 4 out of 10. He indicated that because of the severe impairment of her right ankle, appellant has 30 percent permanent impairment of her whole person as a result of the ankle injury.

By report dated January 31, 2013, the OWCP medical adviser agreed with the 31 percent impairment rating of Dr. Volsky. He noted that for the right lower extremity, right Achilles tendon tendinitis, applying Table 16-2 for class 3 for severe problem with a default C, would

[3] Docket No. 10-1572, *supra* note 2.

[4] Docket No. 12-724, *supra* note 2.

[5] A.M.A., *Guides* 501.

equal 34 percent impairment of the lower extremity. The medical adviser listed a grade modifier of 2 for functional history and 3 for physical examination, and noted that an adjustment for clinical studies was not applicable. He noted that this would yield a net adjustment of negative 1, which would move the category from C to B, and would equal 31 percent permanent impairment of the right lower extremity.

By decision dated April 19, 2013, OWCP denied appellant's claim for a schedule award, finding that as OWCP terminated appellant's compensation because she had been found by OWCP, in a decision dated October 6, 2009, that she had no residuals from her work injury.

On April 23, 2013 appellant, through counsel, requested a telephone hearing before the OWCP Branch of Hearings and Review. In a decision dated August 5, 2013, the OWCP hearing representative determined that further development of the medical evidence was necessary. He found that the termination of compensation benefits based upon a finding that appellant no longer has residuals of the accepted condition does not bar a subsequent schedule award claim.

On August 9, 2013 OWCP referred appellant to Dr. Manhal Ghanma, a Board-certified orthopedic surgeon, for a second opinion. In an August 30, 2013 report, Dr. Ghanma concluded that appellant had no residuals from her accepted injury. He opined that she had zero percent impairment of the right lower extremity due to the June 24, 1997 work injury. Dr. Ghanma noted that, pursuant to Table 16-2 of the A.M.A., *Guides*, appellant fell into class 0 as she had no significant objective abnormal findings of muscle or tendon injury at maximum medical improvement.

In a September 12, 2013 report, Dr. Price reported that appellant related a different history of injury than that noted by the second opinion physician. He noted that in his examination, besides being exquisitely tender in the Achilles tendon area, appellant had weakness when he tried to flex the right foot. Dr. Price noted that she walked with a slight limp and an antalgic gait, but he did not know if she was malingering.

By decision dated September 19, 2013, the hearing representative denied appellant's claim for a schedule award.

On September 23, 2013 appellant, through counsel, requested a telephone hearing. At the hearing held on March 24, 2014 appellant's counsel argued that Dr. Ghanma's opinions were biased as he is "pretty uniform in his finding against injured worker." He argued that OWCP should accept the opinion of treating physician, Dr. Volsky.

By decision dated May 2, 2014, the hearing representative affirmed the denial of the schedule award.

In an August 8, 2014 report, Dr. Catherine Watkins Campbell, Board-certified in family and preventive medicine, reviewed the medical record and conducted a physical examination. She noted that appellant was mildly but variably antalgic, and was able to effectively heel to toe walk. Dr. Campbell noted mild swelling of the right foot and ankle, but indicated that motor strength was normal. She indicated that palpation revealed a ban like tenderness around the lower calf but not down over the Achilles tendon. Dr. Campbell noted no evidence of instability. She determined that pursuant to Table 16-2 of the sixth edition of the A.M.A., *Guides*, a

diagnosis of right Achilles tendinitis with minimal palpatory findings would be class 1. Dr. Campbell noted that considering the multiple diagnoses associated with the reported disability, a functional history modifier of 2 (moderate) rather than 3 (severe) was chosen. Since the two-centimeter atrophy on the right was felt to be more likely related to the right knee and lumbar radiculopathy conditions and because the other right Achilles tendon findings were minimal, a physical examination modifier of 1 was chosen. Dr. Campbell noted that there were no applicable clinical studies. Applying the formula set forth in the A.M.A., *Guides*, a functional history modifier of 1 was found (2-1) and a physical examination modifier of 0 (1-1) which equaled a total modifier of 1, which moved the default class C to the right for a class D, which Dr. Campbell determined equaled two percent impairment of the right lower extremity.

On November 25, 2014 appellant, through counsel, requested reconsideration of the May 2, 2014 decision.

On October 9, 2015 Dr. Morley Slutsky, an OWCP medical adviser reviewed the medical evidence concerning appellant's entitlement to a schedule award and determined that appellant's final right lower extremity impairment was zero percent. He noted a lack of consistent objective findings related to the accepted ankle conditions. The medical adviser concluded that appellant's objective residuals were resolved as of June 28, 2008. He noted that although Dr. Campbell found evidence of a right ankle sprain, it was clear that the employment injury associated with appellant's right ankle injuries resolved long before Dr. Campbell's examination.

In a decision dated November 3, 2015, OWCP denied modification of the May 2, 2014 decision.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing regulations[7] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for 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 insure 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.[8] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[9]

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id.*

[9] *See* 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).

The sixth edition requires identifying the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[10] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[11]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.[12]

Section 8123(a) provides that, if there is a 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.[13] The implementing regulations state 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.[14] 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 rationale and based upon a proper factual background, must be given special weight.[15]

Termination of a claim for benefits due to a finding of no residuals of the accepted condition does not bar a subsequent schedule award, rather the claims examiner should consider the schedule award matter separately from the termination of benefits. If a claimant applies for a schedule award after termination and submits *prima facie* medical evidence reflecting permanent impairment as a result of the employment-related injury or exposure, the claims examiner should develop the claim further, even if a finding of no residuals has previously been made. If medical evidence establishes that impairment to the scheduled member exists, the claimant has the burden to prove that the condition for which a schedule award is sought is causally related to his or her employment.[16]

[10] A.M.A., *Guides* 494-531.

[11] *Id.* at 521.

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

[13] *R.C.*, Docket No. 12-437 (issued October 23, 2012).

[14] 20 C.F.R. § 10.321.

[15] *F.C.*, Docket No. 14-0560 (issued November 12, 2015).

[16] *Supra* note 12 at Chapter 2.808(11) (February 2013).

ANALYSIS

OWCP accepted appellant's claim for right leg contusion/laceration, tear of the Achilles tendon, tendinitis, and right leg cellulitis. However, on October 6, 2009 it terminated her medical and compensation benefits. Appellant then filed a claim for a schedule award. OWCP denied this claim.

The Board finds that there is an unresolved conflict in the medical opinion. The Board notes that the fact that appellant's benefits were previously terminated due to lack of residuals has no bearing on the issue of whether she is entitled to a schedule award. These are two separate issues.[17]

Dr. Price found that appellant had 30 percent permanent impairment of her whole person as a result of the ankle injury. However, his opinion is of diminished weight. OWCP does not authorize the payment of schedule awards for the permanent impairment of the whole person.[18] Furthermore, Dr. Price does not explain how he reached his conclusion, and for this reason, his report would also be entitled to diminished weight.[19]

When appellant first filed her claim for a schedule award, she submitted the opinion of Dr. Volsky who found in a November 20, 2012 report that appellant had 31 percent impairment to her right lower extremity pursuant to the A.M.A., *Guides.* The OWCP medical adviser reviewed Dr. Volsky's opinion and agreed that appellant had 31 percent impairment of her right lower extremity. These conclusions were reached after applying the sixth edition of the A.M.A., *Guides.* Dr. Volsky and the OWCP medical adviser applied Table 16-2 of the A.M.A., *Guides* and found that appellant's impairment rating was represented by class 3 as a severe problem. After applying a grade modifier of 3 for physical examination and 2 for functional history, Dr. Volsky noted that there was a net adjustment of negative 1, and concluded that appellant had 31 percent right lower extremity impairment.

Dr. Ghanma, the second opinion physician, disagreed with the conclusions of Dr. Volsky and Dr. Price that appellant had residuals and was entitled to a schedule award. He noted that pursuant to Table 16-2 of the A.M.A., *Guides*, appellant's impairment was measured by class 0 as she had no significant objective abnormal findings of muscle or tendon injury at maximum medical improvement, and that appellant therefore had no impairment to her right lower extremity under the A.M.A., *Guides.*

OWCP denied appellant's claim for a schedule award, as it found that the weight of the evidence was represented by the opinion of Dr. Ghanma.

On November 25, 2014 appellant, through counsel, requested reconsideration. In support thereof, appellant submitted the report of Dr. Campbell, who found that appellant still had residuals in her right lower extremity, although not as great as those found by Dr. Volsky.

[17] *Id.*

[18] *C.J.*, Docket No. 15-1151 (issued January 27, 2016).

[19] *See F.V.*, Docket No. 10-1522 (issued May 24, 2011).

Dr. Campbell applied Table 16-2 of the A.M.A., *Guides* and determined that appellant had a class 1 impairment due to right Achilles tendinitis with minimal palpatory findings. She found a functional history modifier of 2 and a physical examination modifier of 1. Based on these findings, and applying the formula as set forth in the A.M.A., *Guides*, Dr. Campbell determined that appellant had two percent impairment of the right lower extremity. His report was forwarded to the OWCP medical adviser, who concluded that appellant's objective residuals were resolved as of June 28, 2008, long before Dr. Campbell's examination, and that appellant had no impairment. OWCP denied appellant's claim for modification of the schedule award.

There remains an unresolved dispute as to whether appellant established her entitlement to a schedule award between appellant's treating physicians and the physician who conducted the second opinion examination for OWCP. Dr. Volsky, who conducted the initial schedule award examination for appellant, found that appellant had 31 percent impairment to her right lower extremity, a finding with which the initial OWCP medical adviser agreed. Dr. Campbell, who performed a subsequent examination on behalf of appellant, determined that appellant had two percent impairment of her right lower extremity. Accordingly, both of appellant's physicians determined that she was entitled to a schedule award for residual impairment of the right lower extremity after applying the A.M.A., *Guides.* However, second opinion physician, Dr. Ghanma, who performed the second opinion examination for OWCP, disagreed with appellant's physicians, and found that appellant had no impairment, and a new OWCP medical adviser agreed with his conclusion. The dispute between the physicians centers on the appropriate class to utilize when rating appellant pursuant to Table 16-2 of the A.M.A., *Guides.*

If there is disagreement between OWCP's referral physician and appellant's physician, OWCP will appoint a third physician who shall make an examination.[20] For a conflict to arise, the opposing physician's viewpoints must be of virtually equal weight and rationale.[21] The Board finds that the opinion of Dr. Ghanma is of equal weight as the opinions of Drs. Volsky and Campbell. Accordingly, there was an unresolved conflict in the medical evidence.

The Board finds that a conflict exists in the medical evidence with regard to the amount of appellant's impairment of her right lower extremity. The Board will remand the case for referral to an impartial medical specialist for resolution of the conflict in the medical opinion evidence. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical opinion evidence.

[20] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 3, 2015 is set aside, and the case is remanded for further consideration consistent with this opinion.

Issued: May 9, 2016
Washington, DC

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

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

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