



and (2) whether appellant met her burden of proof to establish disability for the period January 18, 2009 through March 10, 2013 causally related to her accepted work injury.

On appeal, counsel contends that there is a conflict of medical evidence between appellant's physician, Dr. Arthur Becan, an orthopedic surgeon, and OWCP's second opinion physician, Dr. Stanley Askin, a Board-certified orthopedic surgeon, concerning the percentage of appellant's left lower extremity impairment. He further contends that the medical evidence of record is sufficient to establish residuals of her employment injuries.

### **FACTUAL HISTORY**

OWCP accepted that on June 28, 2006 appellant, then a 41-year-old mail carrier, sustained a left knee and leg sprain and a left calf gastrocnemius muscle tear as a result of walking and climbing steps in the performance of duty.

On November 5, 2008 appellant, through counsel, filed a claim for a schedule award (Form CA-7) and submitted a July 3, 2008 report from Dr. Becan who determined, following a physical examination and review of the history of injury, that appellant had 20 percent permanent impairment of the left lower extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*).

Appellant, through counsel, also filed a claim for compensation (Form CA-7) for the period January 18, 2009 through March 10, 2013 and submitted an August 19, 2011 report from Dr. Laura Ross, a Board-certified orthopedic surgeon. Dr. Ross noted that appellant had been injured at work on June 28, 2006 while climbing steps with a full bag of mail. She reported results from a magnetic resonance imaging (MRI) scan which showed that there was a tear of the gastrocnemius muscle. Dr. Ross diagnosed anteromedial tear of the gastrocnemius muscle of the left calf and opined that appellant was at maximum medical improvement (MMI). She advised that appellant should continue with her permanent modified restrictions at work and did not recommend any other changes.

In a July 13, 2011 letter, OWCP requested additional medical evidence establishing appellant's disability for work during the period claimed and afforded her 30 days to respond to its inquiries.

By letter dated April 10, 2013, OWCP notified appellant that its schedule award requirements had changed effective May 1, 2009 and now required that all permanent impairment determinations be completed according to the sixth edition of the A.M.A., *Guides*. It afforded her 30 days to submit an additional schedule award report based on the sixth edition of the A.M.A., *Guides*. No further evidence was received.

In a decision dated May 15, 2013, OWCP denied appellant's schedule award claim finding that the medical evidence failed to establish a ratable impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

On May 23, 2013 appellant, through counsel, requested an oral hearing before an OWCP hearing representative and submitted reports dated April 26 and June 21, 2013 from Dr. Ross

who found that appellant still had some residual pain, but did not recommend any further treatment. Dr. Ross found limited range of motion of her left calf and advised that appellant should continue with current restrictions at work.

By decision dated August 2, 2013, an OWCP hearing representative found that the case was not in posture for a hearing and set aside the prior decision, remanding the case for further medical development. She noted that OWCP had already received a rating from Dr. Becan supporting injury-related permanent impairment and that this warranted further development by OWCP as to a rating under the sixth edition.

In a June 30, 2013 report, Dr. Ross reiterated her diagnosis and found appellant able to return to work on August 26, 2011 with the following restrictions: no more than three hours of sitting, standing, walking, standing and twisting, and reaching above the shoulder; no more than six hours of bending, pushing, and pulling; no more than one hour of driving and kneeling.

OWCP referred appellant to Dr. Askin for a second opinion evaluation to determine whether appellant continued to be disabled from work due to her accepted condition and whether she had any permanent impairment due to the accepted work injuries. In an August 30, 2013 report, Dr. Askin reviewed appellant's medical history, records, and a statement of accepted facts and provided findings from a physical examination of appellant. He found that she had no objectively determinable injury-related imperfections and no permanent impairment. Dr. Askin opined that appellant's employment-related conditions had resolved without residuals. He noted that there was no work-related impairment or limitation that would preclude appellant's assumption of employment activities referable to the accepted injury. Dr. Askin concluded that the date of MMI was August 19, 2011. In a December 5, 2013 addendum report, he reiterated that appellant's accepted conditions had fully resolved and her clinical presentation reflected no ratable impairment. Dr. Askin found that appellant had no significant objective abnormal findings of muscle or tendon injury and determined that she had no ratable impairment according to the sixth edition of the A.M.A., *Guides*.

On December 14, 2013 OWCP's medical adviser Dr. Andrew Merola, a Board-certified orthopedic surgeon, reviewed the evidence of record and found that there were no physical sequelae to document a schedule award. He summarily concurred with Dr. Askin that there was no ratable impairment of the left lower extremity and determined that the date of MMI was December 5, 2013, the date of Dr. Askin's second opinion examination.

By decision dated January 6, 2014, OWCP denied appellant's schedule award claim finding that the medical evidence failed to establish a ratable impairment of a scheduled member.

On January 13, 2014 appellant, through counsel, requested an oral hearing before an OWCP hearing representative regarding the January 6, 2014 decision, which was held on June 12, 2014.

By decision dated August 6, 2014, OWCP also denied appellant's claim for disability for the period January 18, 2009 through March 10, 2013 finding that the medical evidence submitted was insufficient to support disability due to the employment injuries.

By decision dated August 29, 2014, OWCP's hearing representative affirmed the January 6, 2014 schedule award decision.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim, including that he or she sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.<sup>3</sup>

The schedule award provision of FECA<sup>4</sup> and its implementing regulations<sup>5</sup> 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.<sup>6</sup> The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.<sup>7</sup> The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that this issue is not in posture for a decision. Following an August 2, 2013 hearing representative decision, OWCP referred appellant to Dr. Askin for a second

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<sup>3</sup> See *Bobbie F. Cowart*, 55 ECAB 476 (2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant had not established that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Id.*

<sup>7</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>8</sup> See *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

opinion evaluation to determine whether she had any permanent impairment due to the accepted work injuries.

In an August 30, 2013 report, Dr. Askin made physical examination findings and responded to four questions from the claims examiner relating to completion of an impairment rating for an accepted left lower extremity injury. In his physical examination, he found that appellant had no objectively determinable injury-related imperfections and no permanent impairment. While Dr. Askin was asked to perform a rating of impairment pursuant to the sixth edition and provide detailed measurements followed by an explanation of the basis under the sixth edition for his impairment rating, he responded that he did not find anything wrong with appellant referable to the June 28, 2006 occurrence and that she therefore has no objectively determinable injury and no permanent impairment. In lieu of completing an attached permanent impairment worksheet he concluded that “there is absolutely nothing wrong with appellant from a physical standpoint.”

Following receipt of his initial second opinion report, OWCP contacted Dr. Askin and requested that he review additional questions and provide detailed responses in a supplemental report, using medical rationale, to explain how he arrived at his conclusion with supportive references to the sixth edition of the A.M.A., *Guides*. The claims examiner specifically instructed that his supplemental report must include citation to detailed measurements and tables used to arrive at his findings regarding the nature and extent of permanent impairment to the left lower extremity. In a December 5, 2013 addendum report, Dr. Askin again reiterated that appellant’s accepted conditions had fully resolved and that her clinical presentation reflected no ratable impairment. He provided no citation to the sixth edition of the A.M.A., *Guides* or specific measurements taken in the course of his physical examination. Rather, Dr. Askin again noted that there is absolutely nothing wrong with appellant from a physical standpoint.

The Board finds that this issue is not in posture for a decision as Dr. Askin did not adequately address the nature and extent of permanent impairment causally related to the accepted left lower extremity condition. On remand, OWCP should refer appellant to a second opinion physician for resolution of the medical issues relating to the nature and extent of permanent impairment, if any.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.<sup>9</sup> Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>10</sup> When OWCP selects a physician for an opinion on the nature and extent of permanent impairment it has an obligation to secure, if necessary, clarification of the physician’s report and to have a proper evaluation made.<sup>11</sup> Because it referred appellant to a second opinion physician, it has the

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<sup>9</sup> *Richard Kendall*, 43 ECAB 790 (1992).

<sup>10</sup> *Phillip L. Barnes*, 55 ECAB 426, 441 (2004).

<sup>11</sup> *Alva L. Brothers, Jr.*, 32 ECAB 812 (1981).

responsibility to obtain a report that will resolve the issues of the nature and extent of permanent impairment causally related to the accepted work injury.<sup>12</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8102(a) of FECA sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: “The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...” In general the term “disability” under FECA means “incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.” This meaning, for brevity, is expressed as disability for work. For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant has not established that she was disabled for the period January 18, 2009 through March 10, 2013 causally related to her employment injuries. While OWCP accepted that she sustained a left knee and leg sprain and a left calf gastrocnemius muscle tear, appellant bears the burden of proof to establish through medical evidence that she was disabled during the claimed time periods and that her disability was causally related to her accepted injuries. The Board finds that she submitted no rationalized medical evidence explaining how the employment injuries materially worsened or aggravated her medical conditions and caused her to be disabled for work for the period January 18, 2009 through March 10, 2013.

In her reports Dr. Ross diagnosed anteromedial tear of the gastrocnemius muscle of the left calf and opined that appellant was at maximum medical improvement. She found that appellant had limited range of motion of her left calf and indicated that appellant still had some residual pain, but did not recommend any further treatment. Dr. Ross advised that appellant should continue on her permanent modified restrictions at work and did not recommend any other changes. In a report dated June 30, 2013, she reiterated her diagnosis and indicated that

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<sup>12</sup> See *Ramon K. Farrin, Jr.*, 39 ECAB 736 (1988).

appellant was advised that she was able to return to work with restrictions on August 26, 2011. As Dr. Ross failed to offer any probative medical opinion on whether appellant was disabled on the dates at issue due to her accepted conditions, her reports are of diminished probative value. Thus, the Board finds that the reports from Dr. Ross are insufficient to establish appellant's claim for compensation.

Appellant has not submitted any rationalized medical evidence establishing that she was disabled for the period January 18, 2009 through March 10, 2013 causally related to the accepted employment injuries. Thus, she has not met her burden of proof to establish that she is entitled to compensation for any disability.

On appeal, counsel contends that the medical evidence of record is sufficient to establish that appellant continues to suffer residuals of her employment injuries. Based on the findings and reasoning stated above, the Board finds counsel's argument is not substantiated.

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.

### **CONCLUSION**

The Board finds that this matter is not in posture for a decision regarding the nature and extent of appellant's permanent impairment. The Board further finds that appellant has not met her burden of proof to establish disability for the period January 18, 2009 through March 10, 2013 causally related to her accepted left lower extremity condition.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 29, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision. It is further ordered that the August 6, 2014 decision of OWCP is affirmed.

Issued: October 7, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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