

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

**M.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Columbus, OH, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 16-1428  
Issued: February 13, 2017**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 28, 2016 appellant, through counsel, filed a timely appeal from a June 10, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (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 her burden of proof to establish permanent impairment warranting a schedule award.

---

<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On October 24, 2008 appellant, then a 39-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 23, 2008 she sustained injury to her left foot/ankle when she came down on a stick with her left foot. OWCP accepted appellant's claim for left ankle sprain and left ankle impingement syndrome. She later stopped work and received disability compensation on the daily rolls beginning October 8, 2010.

On May 13, 2013 appellant underwent OWCP-authorized left ankle arthroscopy with extensive debridement. She stopped work on May 13, 2013 and returned to full-duty work on November 5, 2013.

On July 24, 2014 appellant filed a claim for compensation (Form CA-7) claiming a schedule award due to her October 23, 2008 work injury.

In a letter dated January 31, 2014, appellant requested that appellant submit additional evidence in support of her schedule award claim, including a medical report containing an impairment rating calculated in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009) (A.M.A., *Guides*). Appellant submitted a number of reports from her physical therapy sessions.

By decision dated March 19, 2014, OWCP denied appellant's schedule award claim because she had not submitted medical evidence containing an impairment rating calculated under the sixth edition of the A.M.A., *Guides*.

Appellant submitted a March 19, 2014 report in which Dr. Martin Fritzhand, an attending Board-certified occupational medicine physician, provided an opinion that appellant had a four percent permanent impairment of her left lower extremity under the sixth edition of the A.M.A., *Guides*. He indicated that, under Table 16-2 (Foot and Ankle Regional Grid), he based his impairment rating on the diagnosis-based condition of left ankle arthritis, noting that appellant's three millimeter cartilage interval constituted a class 1 impairment. In a report dated October 27, 2014, Dr. Fritzhand opined that appellant's left ankle arthritis was due to the October 23, 2008 work injury.

Appellant timely requested a telephonic hearing with an OWCP hearing representative which was held on October 1, 2014. In a December 12, 2014 decision, the hearing representative set aside OWCP's March 19, 2014 decision. She remanded the case to OWCP for referral to an OWCP physician for an examination and an opinion on permanent impairment, to be followed by issuance of an appropriate decision.<sup>3</sup>

On remand OWCP referred appellant to Dr. James H. Rutherford, a Board-certified orthopedic surgeon, for examination and an opinion of the extent of her permanent impairment.

---

<sup>3</sup> The hearing representative indicated that, although the reports of Dr. Fritzhand were not fully rationalized, they were sufficient to require further development of the medical evidence, including referral of appellant to an OWCP referral physician.

In a January 20, 2015 report, Dr. Rutherford found no permanent impairment, under the sixth edition of the A.M.A., *Guides*, entitling her to a schedule award. He noted that at the time of his evaluation appellant had a normal examination of her left ankle and a normal range of motion. Recent x-rays of appellant's left ankle showed a normal joint space and normal mortise of the left ankle. Dr. Rutherford opined that, at the time of the January 20, 2015 evaluation, appellant had no ratable impairment or a zero percent permanent impairment of her lower extremities. He noted, "[Appellant] also does not have a diagnosis of left ankle osteoarthritis as a result of the injury of October 23, 2008 and thus she has no ratable impairment related to arthritis."

On February 4, 2015 an OWCP medical adviser agreed with Dr. Rutherford's assessment that appellant did not have permanent impairment under the sixth edition of the A.M.A., *Guides*.

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Fritzhand and Dr. Rutherford regarding appellant's permanent impairment. It referred appellant to Dr. John McGrail, a Board-certified orthopedic surgeon, for an impartial medical examination and an impairment rating evaluation.

In a report dated June 23, 2015, Dr. McGrail discussed appellant's factual and medical history, including the findings of diagnostic testing of the left ankle, and reported the findings of his examination of appellant on June 17, 2015. He noted that, upon examination, appellant exhibited normal range of left ankle motion and that muscle tone was equal in both ankles without atrophy. Dr. McGrail indicated that x-rays of appellant's ankles, which were obtained on January 20 and June 17, 2015, showed a left ankle within normal limits and no sign of arthritis. He found that appellant's left ankle appeared identical to her uninjured right ankle in the x-ray projections. Dr. McGrail concluded that appellant did not have permanent impairment under the sixth edition of the A.M.A., *Guides* entitling her to a schedule award. He found that appellant had a zero percent rating under Table 16-2 beginning on page 501 in that she was rated as class 0, indicating no significant objective abnormal findings or muscle or tendon injury. Dr. McGrail opined that appellant's October 23, 2008 work injury had resolved as there was no objective evidence of this injury. Dr. McGrail concluded that appellant exhibited no evidence of left ankle arthritis and did not qualify for an impairment rating under Table 16-2 for this condition.

On July 26, 2015 an OWCP medical adviser agreed with Dr. McGrail that appellant had no permanent impairment under the sixth edition of the A.M.A., *Guides*.

In a decision dated August 26, 2015, OWCP denied appellant's claim for a schedule award finding that the special weight of the medical evidence on this matter rested with the well-rationalized opinion of Dr. McGrail, the impartial medical specialist.

Appellant requested a telephonic hearing with an OWCP hearing representative and such a hearing was held on March 23, 2016. Counsel testified that appellant did in fact have left ankle arthritis and asserted that she should receive a schedule award based on this condition.

By decision dated June 10, 2016, an OWCP hearing representative affirmed OWCP's August 26, 2015 decision finding that appellant did not meet her burden of proof to establish permanent impairment entitling her to a schedule award.

## LEGAL PRECEDENT

The schedule award provision of the 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>

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.”<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

## ANALYSIS

OWCP accepted that on October 23, 2008 appellant sustained a left ankle sprain and left ankle impingement syndrome. On May 13, 2013 she underwent OWCP-authorized left ankle arthroscopy with extensive debridement. On July 24, 2014 appellant filed a Form CA-7 claiming a schedule award due to her October 23, 2008 work injury.

The Board finds that appellant had not met her burden of proof to establish permanent impairment entitling her to a schedule award.

---

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404 (1999).

<sup>6</sup> *Id.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (January 2010); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

<sup>7</sup> Federal (FECA) Procedure Manual, *id.* at Chapter 2.808.5a (February 2013); Chapter 3.700, Exhibit 1 (January 2010).

<sup>8</sup> 5 U.S.C. § 8123(a).

<sup>9</sup> *William C. Bush*, 40 ECAB 1064, 1975 (1989).

<sup>10</sup> *R.S.*, Docket No. 08-1158 (issued January 29, 2009).

The Board notes that OWCP found a conflict in the medical opinion evidence between Dr. Fritzhand and Dr. Rutherford regarding appellant's permanent impairment and referred appellant to Dr. McGrail for an impartial examination and an impairment rating evaluation.<sup>11</sup>

The Board finds that the weight of the medical evidence regarding appellant's entitlement to schedule award compensation rests with the opinion of Dr. McGrail.<sup>12</sup> In a report dated June 23, 2015, Dr. McGrail noted that, upon examination on June 17, 2015, appellant exhibited normal range of left ankle motion and that muscle tone was equal in both ankles without atrophy. He indicated that x-rays of appellant's ankles showed a left ankle within normal limits and no sign of arthritis. Dr. McGrail concluded that appellant did not have permanent impairment under the sixth edition of the A.M.A., *Guides* entitling her to a schedule award. He found that appellant had a zero percent rating under Table 16-2 beginning on page 501 in that she was rated as class 0, indicating no significant objective abnormal findings or muscle or tendon injury. Dr. McGrail opined that appellant exhibited no evidence of left ankle arthritis and did not qualify for an impairment rating under Table 16-2 for this condition.<sup>13</sup>

Appellant has not submitted any probative evidence showing that she had a permanent impairment under the sixth edition of the A.M.A., *Guides* causally related to the October 23, 2008 employment injury. She has therefore failed to meet her burden of proof.

Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

### CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish permanent impairment entitling her to a schedule award.

---

<sup>11</sup> See *supra* notes 8 and 9. On March 19, 2014 Dr. Fritzhand provided an opinion that appellant had a four percent permanent impairment of her left lower extremity under the sixth edition of the A.M.A., *Guides*. In contrast, Dr. Rutherford determined on January 20, 2015 that appellant did not have permanent impairment, under the sixth edition of the A.M.A., *Guides*, entitling her to a schedule award.

<sup>12</sup> See *supra* note 10.

<sup>13</sup> On July 26, 2015 an OWCP medical adviser agreed with Dr. McGrail that appellant had no permanent impairment under the sixth edition of the A.M.A., *Guides*.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 10, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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