United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 18-0008**
	)	**Issued: March 15, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Bellville, IL, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 2, 2017 appellant, through counsel, filed a timely appeal from an August 9, 2017 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 to consider the merits of this case.

ISSUE

The issue is whether appellant has established permanent impairment of her right ankle warranting a schedule award.

[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.*

FACTUAL HISTORY

On January 30, 2013 appellant, then a 40-year-old temporary carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 28, 2013 she injured her right ankle when she fell stepping off a curb while in the performance of duty. She stopped work on January 30, 2013 and was terminated from her employment at the end of her temporary appointment on April 10, 2013. OWCP accepted the claim for right ankle sprain and paid appropriate wage-loss and compensation benefits on the supplemental rolls from March 21, 2013 through August 24, 2014.

On November 12, 2015 appellant filed a claim for a schedule award (Form CA-7).

OWCP subsequently received a February 26, 2016 impairment rating from Dr. Neil Allen, a Board-certified neurologist. Dr. Allen provided a history of appellant's employment injury, as well as her medical history, and he noted appellant's physical examination findings. Using the diagnosis-based impairment (DBI) method from the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] Dr. Allen referenced Table 16-2, Table 16-6, Table 16-7, and Table 16-8 of the A.M.A., *Guides* to determine that appellant had a class 1, grade C right ankle impairment with mild ligamentous laxity, resulting in a default five percent rating. He assigned grade modifiers of one for functional history, diagnosis, physical examination, and clinical studies. Using the net adjust formula, Dr. Allen found no change in class or the grade resulting in five percent right lower extremity permanent impairment.

On April 3, 2016 an OWCP district medical adviser (DMA) reviewed the medical record, including Dr. Allen's impairment rating. He concluded that appellant had two percent right lower extremity permanent impairment using a DBI of right ankle sprain. The DMA noted that Dr. Allen did not identify the diagnosis used in his impairment rating. Referencing Table 16-2, page 501, he assigned class 1 for ankle sprain, which had an impairment rating from one to three percent. Next, the DMA assigned grade modifiers of one for functional history and physical examination and nothing for clinical studies as they were not applicable. Applying the net adjustment of zero resulted in a grade C default rating of two percent permanent impairment. The DMA concluded that appellant had two permanent impairment of the right ankle under the sixth edition of the A.M.A., *Guides* entitling her to a schedule award.

On September 1, 2016 OWCP referred appellant along with the medical record, a list of questions, and a statement of accepted facts (SOAF) to Dr. James B. Stiehl, for an impartial medical examination to resolve the conflict in the medical opinion evidence between Dr. Allen and the DMA regarding appellant's right lower extremity impairment rating.

In an October 4, 2016 report, Dr. Stiehl, based upon a review of the medical evidence and SOAF and physical examination, concluded that appellant had reached maximum medical improvement on September 17, 2014, the date of her discharge from treatment by Dr. Alan H. Morris, a treating Board-certified orthopedic surgeon. He noted that appellant's physical examination revealed no right ankle range of motion loss, palpatory abnormalities, or significant

[3] A.M.A., *Guides* (6th ed. 2009).

strength loss. Dr. Stiehl also noted that appellant exhibited normal functional activities. Based on these findings, he concluded that there was no permanent impairment of the right ankle due to the accepted right ankle sprain. Referencing Table 16-2, page 502, Dr. Stiehl rated appellant's ankle for joint instability/ligament laxity and assigned class 1 based on appellant's anterior talifibular ligament findings. Next, he assigned a grade modifier of zero for physical examination due to no clinical findings or apparent instability and normal x-ray findings and a grade modifier of one for functional history due to mild symptoms on activity. Using the net adjustment formula placed appellant's impairment in a grade A, resulting in a zero percent right lower extremity permanent impairment rating.

By decision dated November 9, 2016, OWCP denied appellant's request for a schedule award as it found the evidence of record insufficient to establish a permanent impairment due to the accepted work injury.

In a letter dated November 15, 2016, appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The hearing was held on June 8, 2017.

By decision dated August 9, 2017, OWCP's hearing representative affirmed the November 9, 2016 decision denying appellant's claim for a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[5] 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.[6] Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[7]

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."[8] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.*

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

[8] 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[9] Where a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.[10]

ANALYSIS

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

The Board notes that OWCP properly found a conflict in the medical opinion evidence between Dr. Allen and the DMA regarding appellant's permanent impairment and referred appellant to Dr. Stiehl for an impartial examination and an impairment rating evaluation.[11]

The Board finds that the weight of the medical evidence regarding appellant's entitlement to schedule award compensation rests with the opinion of Dr. Stiehl, the impartial medical examiner.[12]

The Board has carefully reviewed the opinion of Dr. Stiehl and finds that his October 4, 2016 report was sufficiently well rationalized to carry the special weight of the medical evidence. Dr. Stiehl's opinion was based on a proper factual and medical history, which he reviewed, and on the proper tables and procedures in the A.M.A., *Guides*.[13] In his report dated October 4, 2016, he reported no right ankle palpatory abnormalities, no range of motion loss, and no evidence of significant strength loss. Dr. Stiehl 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, referencing Table 16-2, on page 501. Dr. Stiehl rated appellant's right ankle impairment for ankle joint instability and ligament laxity and first determined that her anterior talifibular ligament instability placed her in class 1. He then determined that appellant's lack of findings on physical examination and functional history placed appellant in grade A, resulting in zero percent right lower extremity permanent impairment rating.

On appeal counsel contends that OWCP's decision was contrary to fact and law. Based on the findings and reasons stated above, the Board finds counsel's arguments are not substantiated.

[9] *Bryan O. Crane*, 56 ECAB 713 (2005)

[10] *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

[11] *See supra* notes 8 and 9. On February 26, 2016 Dr. Allen provided an opinion that appellant had five percent permanent impairment of her right lower extremity under the sixth edition of the A.M.A., *Guides*. In contrast, the DMA determined on April 3, 2016 that appellant had two percent right lower extremity permanent impairment under the sixth edition of the A.M.A., *Guides*.

[12] *See supra* note 10.

[13] *See R.H.*, Docket No. 16-1045 (issued December 6, 2016).

Appellant may request a schedule award or increased schedule award at any time 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 has not established a permanent impairment of her right ankle warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 9, 2017 is affirmed.

Issued: March 15, 2018
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