United States Department of Labor
Employees' Compensation Appeals Board

A.H., Appellant	)	
and	)	**Docket No. 18-0050**
	)	**Issued: March 26, 2018**
U.S. POSTAL SERVICE, POST OFFICE, London, OH, 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 8, 2017 appellant, through counsel, filed a timely appeal from a July 18, 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.

[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.*

ISSUE

The issue is whether appellant met his burden of proof to establish permanent impairment of his lower extremities warranting a schedule award.

FACTUAL HISTORY

On February 2, 2008 appellant, then a 35-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a back injury due to factors of his federal employment. He stopped work on December 31, 2007 due to administrative issues.[3]

On April 6, 2009 OWCP referred appellant to Dr. James H. Rutherford, a Board-certified orthopedic surgeon for a second opinion evaluation to determine whether appellant's federal employment factors caused or aggravated his lumbar, bilateral knee, and left ankle conditions.

In an April 27, 2009 report, Dr. Rutherford, based upon a review of the statement of accepted facts (SOAF) and medical records and physical examination, opined that appellant sustained a lumbar sprain and temporary aggravation of his bilateral knee genu varum and temporary aggravation of left ankle degenerative joint disease due to his duties as a letter carrier. He opined that appellant required no further treatment for these conditions as he had no active symptoms from his diagnosed conditions.

By decision dated June 2, 2009, OWCP accepted appellant's claim for lumbar sprain and temporary aggravation of his left ankle degenerative joint disease based on Dr. Rutherford's April 27, 2009 report.

By letter dated June 9, 2009, OWCP requested that Dr. Rutherford clarify whether appellant sustained a temporary aggravation of a knee condition causally related to the factors of his federal employment. In a June 11, 2009 addendum and response, Dr. Rutherford related that appellant's diagnoses of bilateral iliotibial band syndrome, capsulitis, and degenerative disease of the left knee were medically established and were temporarily aggravated by his federal employment. Dr. Rutherford opined that appellant's work-related aggravation ceased as of March 1, 2008 and noted appellant's last date of work exposure was December 21, 2007.

On June 25, 2010 appellant filed a claim for a schedule award (Form CA-7).[4]

By decision dated May 9, 2011, OWCP expanded acceptance of appellant's claim to include temporary aggravation of bilateral iliotibial band syndrome and bilateral patellar capsulitis based on Dr. Rutherford's June 11, 2009 addendum.

[3] On the reverse side of the form, appellant's supervisor noted that appellant submitted the Form CA-2 after receiving a February 8, 2018 notice of proposed removal. The employing established removed appellant from employment effective February 22, 2008 due to unsatisfactory performance and improper conduct.

[4] OWCP continued to address appellant's claim for wage-loss compensation commencing February 4, 2008 in multiple decisions, however, OWCP did not further develop appellant's schedule award claim until 2015.

In a June 7, 2011 report, Dr. Brant Holtzmeier, an attending Board-certified osteopathic family practitioner, reviewed Dr. Rutherford's reports and noted his disagreement with the diagnosis of temporary aggravation. He opined that appellant's letter carrier duties caused a substantial aggravation of appellant's preexisting left ankle degenerative joint disease. Furthermore, Dr. Holtzmeier concluded that appellant sustained a more severe lumbar injury than the accepted lumbar sprain, which he explained was based on the persistence of appellant's complaints.

On January 26, 2015 appellant again filed a claim for a schedule award (Form CA-7).

By development letter dated February 5, 2015, OWCP noted receipt of appellant's schedule award claim and the accepted conditions. It informed him that based on Dr. Rutherford's reports the accepted temporary aggravation of his accepted conditions had ceased over five years ago with a lumbar sprain as the only remaining unresolved condition. OWCP advised appellant as to the medical evidence necessary to support his schedule award claim and afforded him 30 days to provide this information. No evidence was received.

By decision dated March 11, 2015, OWCP denied appellant's claim as it found the evidence of record insufficient to establish a permanent impairment of a scheduled member as a result of his accepted employment injury.

In a letter dated March 18, 2015, appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on October 7, 2015.

On October 7, 2015 OWCP received a February 25, 2015 report, from Dr. Michael E. Hebrard, an examining Board-certified physiatrist, diagnosing lumbar sprain and strain, ankle and foot osteoarthritis, patellar tendinitis, and muscle, ligament, and fascia disorders. Medical and injury histories were detailed, objective testing reviewed, and physical examination findings provided. Dr. Hebrard opined that appellant's federal employment aggravated his current disabling condition and concluded that appellant reached maximum medical improvement (MMI) as of February 25, 2015. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[5] he found seven percent left lower extremity permanent impairment and seven percent right lower extremity permanent impairment. In reaching this impairment rating, Dr. Hebrard used Table 16-3, page 509 and assigned a default grade C for class 1 impairment for mild motion deficits and grade modifiers.

By decision dated November 12, 2015, an OWCP hearing representative vacated the March 11, 2015 decision and remanded the case to OWCP for referral to an impartial medical examiner to resolve the conflict in the medical opinion evidence between Dr. Rutherford, an OWCP referral physician, and Dr. Holtzmeier, a treating physician, as to whether appellant's accepted knee and ankle conditions were permanently or temporarily aggravated. She indicated that the issue of employment-related permanent impairment of either lower extremity related to the accepted knee and left ankle conditions are dependent on the resolution of that conflict. The hearing representative ordered that the impartial medical examiner comment on the nature of aggravation, whether temporary or permanent, and submit a permanent impairment award if

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

indicated. On April 7, 2016 OWCP referred appellant to Dr. Howard Sturtz, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence as to whether appellant sustained a permanent a temporary aggravation of the accepted conditions, and thereby a ratable permanent impairment pursuant to the sixth edition of the A.M.A., *Guides.*[6]

In a July 5, 2016 report, Dr. Sturtz, based upon a review of the medical evidence, injury history, SOAF, and physical examination, diagnosed resolved lumbar strain, resolved temporary aggravation of bilateral knee chondromalacia, resolved temporary aggravation of left ankle degenerative arthritis, and right ankle pain. He noted that appellant last worked at the employing establishment on December 21, 2007. Dr. Sturtz summarized the findings from the medical reports, objective tests, and factual evidence he reviewed. A physical examination revealed a normal walking manner along with no evidence of either limping or favoring one leg over the other, no bilateral knee crepitus or effusion, and no tenderness or joint line instability. Based on the length of time from when appellant last worked, Dr. Sturtz opined that it was unreasonable for appellant to continue to have symptoms from the aggravation. He noted his agreement with Dr. Rutherford that any aggravation was temporary and disagreed with Dr. Holtzmeier's opinion that appellant sustained a permanent aggravation due to his repetitive work duties. Dr. Sturtz concluded that, based on the lack of any objective findings or credible diagnostic studies, the accepted employment injuries resolved with no permanent ratable impairment.

By decision dated September 16, 2016, OWCP denied appellant's claim as it found the evidence of record insufficient to establish a permanent impairment due to a scheduled member as a result of his accepted employment injury.

In a letter dated September 26, 2017, appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on May 11, 2017.

By decision dated July 18, 2017, OWCP's hearing representative affirmed the September 16, 2016 decision denying appellant's claim for a schedule award. She found the special weight of the medical opinion evidence rested with the opinion of Dr. Sturtz, the impartial medical examiner, who concluded that appellant's accepted conditions had resolved without disability or permanent impairment.

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing regulations[8] 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

[6] *Id.*

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9] 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.[10]

Not all medical conditions accepted by OWCP result in permanent impairment to a scheduled member.[11] It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[12] OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred.[13] An impairment description must be in sufficient detail so the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.[14]

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."[15] 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.[16] 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.[17]

ANALYSIS

The Board finds that appellant has not established a permanent impairment of a scheduled member warranting a schedule award.

OWCP accepted appellant's occupational disease claim for a temporary aggravation of left ankle degenerative joint disease, temporary aggravation of bilateral iliotibial band syndrome, and bilateral patellar capsulitis, and lumbar sprain.

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[9] *Id.*

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

[11] *G.E.*, Docket No. 09-1412 (issued February 17, 2010); *Thomas P. Lavin*, 57 ECAB 353 (2006).

[12] *D.F.*, Docket No. 09-1463 (issued August 12, 2010); *Tammy L. Meehan*, 53 ECAB 130 (2001).

[13] *See D.S.*, Docket No. 08-0885 (issued March 17, 2009); *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

[14] *C.A.*, Docket No. 13-0762 (issued April 1, 2014); *Peter C. Belkind*, 56 ECAB 580 (2005).

[15] 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

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

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

Due to a conflict between Dr. Rutherford, an OWCP referral physician, and Dr. Holtzmeier, a treating physician, regarding permanent aggravation of appellant's preexisting left ankle degenerative joint disease and bilateral knee conditions, OWCP properly referred appellant to Dr. Sturtz as the impartial medical specialist, to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a).

In his July 5, 2016 report, Dr. Sturtz reviewed the medical records and the SOAF and discussed appellant's employment duties, his medical history, and provided examination findings. He opined that appellant sustained a temporary aggravation of his preexisting bilateral knee chondromalacia and left ankle degenerative joint disease which had ceased. In support of this conclusion, Dr. Sturtz related that it was unreasonable for appellant to continue to be symptomatic so many years following the accepted injury when there was a lack of any credible diagnostic studies or any credible objective findings to document residuals of the accepted conditions. In situations where there are 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 on a proper factual background, must be given special weight.[18] The Board finds Dr. Sturtz's report to be sufficiently detailed and well-reasoned to resolve the conflict of medical opinion evidence and established that appellant sustained a temporary rather than a permanent aggravation of a preexisting condition, and that the temporary aggravation had ceased. Dr. Sturtz properly concluded that appellant was not entitled to a schedule award. The Board finds that his report is entitled to the special weight of the medical evidence, afforded an impartial medical examiner, with regard to whether appellant sustained a temporary or permanent aggravation and entitlement to a schedule award for employment-related permanent impairment.[19]

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 the attorney's arguments are not substantiated.

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 met his burden of proof to establish permanent impairment of a scheduled member warranting a schedule award.

[18] *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Darlene R. Kennedy*, *supra* note 15; *Anna M. Delaney*, 53 ECAB 384 (2002).

[19] *Supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 18, 2017 is affirmed.

Issued: March 26, 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