United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 18-1313**
	)	**Issued: April 11, 2019**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Lansing, MI, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 20, 2018 appellant, through counsel, filed a timely appeal from a March 2, 2018 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 over 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish more than two percent permanent impairment of his left lower extremity, for which he previously received a schedule award; and (2) whether he has met his burden of proof to establish a date of maximum medical improvement (MMI) prior to May 17, 2016.

FACTUAL HISTORY

On September 8, 2008 appellant, then a 49-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on September 5, 2008 he twisted his left knee when pulling a wire container while in the performance of duty. He stopped work on September 5, 2008. OWCP accepted the claim for aggravation of tear of the left knee medial meniscus.[3] Appellant underwent left knee arthroscopy, partial medial meniscectomy on September 22, 2009.[4]

On April 26, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated May 4, 2016, OWCP notified appellant that the evidence of record did not contain a medical report providing an opinion on the issue of permanent impairment. Appellant was instructed to obtain a narrative medical report for a physician containing an evaluation of his permanent impairment, if any, with citation to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] He was afforded 30 days to provide the necessary report.

By decision dated June 9, 2016, OWCP found that appellant had not established permanent impairment of a scheduled member or function of the body in accordance with the A.M.A., *Guides*.

On June 16, 2016 counsel requested a telephonic hearing before an OWCP hearing representative.

Submitted to the record was a September 6, 2016 report by Dr. Catherine Watkins Campbell, Board-certified in occupational and family medicine, who indicated that appellant was seen on May 17, 2016 for evaluation. She noted appellant's history of injury, medical treatment, and physical examination findings. Dr. Watkins Campbell referenced the sixth edition of the

[3] The present claim, OWCP File No. xxxxxx606 has been administratively combined OWCP File No. xxxxxx645, with File No. xxxxxx645 serving as the master file. In OWCP File No. xxxxxx645, OWCP accepted that on November 23, 2007 appellant sustained a left shoulder strain when he was pulling a mail container from a semi-truck. Appellant also had a prior claim under OWCP File No. xxxxxx666, which has been administratively combined with the instant claim. OWCP accepted that appellant sustained a left shoulder sprain, with impingement, on December 14, 2007 when he pushed a cart loaded with mail in the performance of duty. By April 18, 2013 decision, OWCP determined that the claimant had established 12 percent permanent impairment of the right and left upper extremity and awarded schedule award compensation accordingly.

[4] On April 2, 2010 OWCP also accepted that appellant sustained a right shoulder lateral tear, impingement syndrome, and acromioclavicular degenerative disease under this claim.

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

A.M.A., *Guides*, Table 16-3[6] and found that appellant sustained two percent permanent impairment of the left lower extremity. She explained that appellant's left knee meniscal injury was rated as a diagnosis-based impairment (DBI) under Table 16-3, class 1 for partial (medial or lateral meniscectomy) with a default rating of two percent permanent impairment. Dr. Watkins Campbell then explained that appellant was assigned a 0 grade modifier for functional history (GMFH), a grade modifier of 1 for physical examination (GMPE), and a grade modifier of 1 for clinical studies (GMCS). She explained that the net adjustment of 0 resulted in the default 2 percent permanent impairment rating for the left lower extremity.

By decision dated November 14, 2016, OWCP's hearing representative set aside the June 9, 2016 decision and directed that Dr. Watkins Campbell's report be referred to an OWCP district medical adviser (DMA) for further review.

On November 18, 2016 Dr. Watkins Campbell's report, a statement of accepted facts (SOAF), and appellant's medical record were referred to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon acting as an OWCP DMA, for an opinion as to whether appellant had sustained permanent impairment of the left lower extremity.

In a November 21, 2016 report, Dr. Harris reviewed the SOAF and the medical evidence including Dr. Watkins Campbell's report. He referred to Table 16-3, Knee Regional Grid of the A.M.A., *Guides,* and explained that appellant had undergone a partial medial meniscectomy of the left knee. Dr. Harris concurred with Dr. Watkins Campbell's calculation that appellant had two percent permanent impairment of the left lower extremity, pursuant to Table 16-3.[7] He opined that the date of MMI was May 17, 2016, the date that appellant was seen for evaluation by Dr. Watkins Campbell.

By decision dated January 11, 2017, OWCP denied appellant's claim for an additional schedule award. It explained that, while appellant had two percent permanent impairment of the left lower extremity, he had previously been granted a schedule award for "12 percent permanent impairment of the left lower extremity" in OWCP File No. xxxxxx606 on April 18, 2013, and he was therefore not entitled to an additional schedule award.

By letter dated January 23, 2017, counsel requested a telephonic hearing before an OWCP hearing representative.

By decision dated May 5, 2017, OWCP's hearing representative found that at the time there was no evidence of record establishing that appellant had previously received a schedule award for 12 percent permanent impairment of the left lower extremity. She returned the case record to OWCP for issuance of a schedule award for two percent permanent impairment of the left lower extremity.

[6] *Id*. at 509.

[7] *Id.*

By decision dated June 28, 2017, OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity. The period of the award ran from May 17 to June 26, 2016, for a total of 5.76 weeks of compensation.

By letter dated July 6, 2017, counsel requested a telephonic hearing before an OWCP hearing representative, which was held on December 6, 2017. He explained that appellant agreed with the percentage of permanent impairment. However, the date of MMI should be changed to February 8, 2010 to avoid a Social Security offset.

By decision dated March 2, 2018, OWCP's hearing representative affirmed the June 28, 2017 decision. She found that no medical evidence had been submitted which established that appellant's permanent impairment of the left lower extremity had been improperly calculated or that appellant had a greater impairment. OWCP's hearing representative also explained that OWCP had properly found that appellant reached MMI on May 17, 2016, the date he was seen for evaluation by Dr. Watkins Campbell. She found that there was no strong persuasive proof to establish that appellant reached MMI on an earlier date.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,[8] and its implementing federal regulations,[9] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[10] For decisions issued after May 1, 2009, the sixth edition will be used.[11]

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class of diagnosis (CDX) condition, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[12] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[13]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's DMA for an opinion concerning the nature and percentage of

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Id*. at § 10.404(a).

[11] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017).

[12] A.M.A., *Guides* 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[13] A.M.A., *Guides* 521.

impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[14]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish more than two percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

Dr. Watkins Campbell examined appellant on May 17, 2016, related appellant's physical examination findings, and provided her opinion as to appellant's left lower extremity permanent impairment. She explained that appellant had undergone a partial medial meniscectomy of the left knee and that, under Table 16-3 of the A.M.A., *Guides*, this diagnosis resulted in two percent permanent impairment of appellant's left lower extremity.

Subsequently, Dr. Harris reviewed Dr. Watkins Campbell's report, again referenced Table 16-3, and concluded that appellant's partial medial meniscectomy resulted in two percent permanent impairment of the left lower extremity. Both Dr. Watkins Campbell and Dr. Harris were in agreement that appellant had two percent permanent impairment of the left lower extremity due to his accepted left knee tear of the medial meniscus for which he underwent a partial meniscectomy.

Counsel has stipulated that appellant's permanent impairment of the left lower extremity was properly calculated. As the record contains no other probative, rationalized medical opinion which indicates that appellant has greater permanent impairment of his left lower extremity based upon the A.M.A., *Guides*, appellant has not met his burden of proof to establish greater than two percent left lower extremity permanent impairment, for which he previously received a schedule award.[15]

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.

LEGAL PRECEDENT -- ISSUE 2

It is well established that the period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the employment injury. The Board has defined MMI as meaning that the physical condition of the injured member of the body has stabilized and will not improve further. The Board has also noted a reluctance to find a date of MMI which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of MMI in the selection

[14] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017).

[15] *See A.T.*, Docket No. 17-1940 (issued December 20, 2018).

of a retroactive date of MMI.[16] The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician, which is accepted as definitive by OWCP.[17]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish a date of MMI prior to May 17, 2016.

The Board notes that MMI means that the physical condition of the injured member of the body has stabilized and will not improve further,[18] and date of MMI is usually considered to be the date of the evaluation accepted as definitive by OWCP.[19] The Board requires persuasive proof of MMI if a retroactive date is selected.[20] Dr. Watkins Campbell examined appellant on May 17, 2016 and provided an impairment rating. Dr. Harris agreed with Dr. Watkins Campbell's permanent impairment rating. He selected May 17, 2016 as the date of MMI as that was the date appellant had been examined by the treating physician and formed the basis of the definitive permanent impairment rating. There is no persuasive evidence that choosing a retroactive date of MMI would be appropriate in the present case. The Board therefore finds that appellant reached MMI on May 17, 2016.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than two percent permanent impairment of his left lower extremity, for which he previously received a schedule award. The Board also finds that appellant has not met his burden of proof to establish a date of MMI prior to May 17, 2016.

[16] *J.H.*, Docket No. 14-1584 (issued October 5, 2016).

[17] *Mark A. Halloway*, 55 ECAB 321, 325 (2004).

[18] *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

[19] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.a (January 2010).

[20] *C.S.*, Docket No. 12-1574 (issued April 12, 2013); *P.C.*, 58 ECAB 539 (2007); *James E. Earle*, 51 ECAB 567 (2000).

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2019
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