

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

J.S., Appellant

and

**DEPARTMENT OF AGRICULTURE,
NATIONAL FOREST SERVICE,
Pollack Pines, CA, Employer**

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**Docket No. 19-1226
Issued: December 23, 2019**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
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 May 13, 2019 appellant, through counsel, filed a timely appeal from a February 22, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 has met his burden of proof to establish entitlement to more than \$300.00 for a disfigurement 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 July 28, 2006 appellant, then a 27-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging burns to his face, neck, extremities, and other body parts due to encountering radiant heat from a fire while in the performance of duty on July 25, 2006. He stopped work on July 26, 2006, but later returned to limited-duty work without wage loss. OWCP initially accepted appellant's claim for second degree burns of his face, head, neck, and bilateral upper and lower extremities, and it later expanded the accepted conditions to include third degree burns in the same areas and post-traumatic stress disorder.

In August 2006, appellant underwent OWCP-authorized surgery, which included skin debridement of his face, ears, arms, and legs, and application of skin grafts to his arms, legs, and feet.

On June 3, 2016 appellant filed a claim for a schedule award (Form CA-7) due to his accepted employment conditions.

In a July 25, 2016 development letter, OWCP advised appellant that FECA provided a schedule award, not to exceed \$3,500.00, for serious disfigurement of the face, head, or neck if such disfigurement was likely to handicap an individual in securing or maintaining employment. It further provided instructions for submitting photographs of the claimed disfigurement. OWCP requested that he complete and submit an attached disfigurement award application form, and that he arrange for an attending physician to complete and submit the form.

On August 24, 2016 Dr. Michael Hebrard, Board-certified in physical medicine and rehabilitation, completed the disfigurement report form provided by OWCP, noting that reference should be made to his August 24, 2016 narrative report.³ In that report, he advised that his physical examination revealed that appellant had mild skin graft scars behind his ears.

On September 19, 2016 appellant completed the disfigurement award application form in which he reported that he sustained third degree burns of his ears and nose that required skin grafting, as well as second degree burns of his cheeks and neck. He alleged that this disfigurement was likely to handicap him in securing or maintaining employment because it was difficult for him to perform outdoor work due to the fact that his ears and nose sunburned very easily with accompanying blistering, bleeding, and scabbing.⁴

On April 6, 2018 OWCP referred appellant's case to Dr. David I. Krohn, a Board-certified internist and district medical adviser (DMA) for OWCP, and requested that he review the evidence of record and provide an opinion regarding appellant's claim for a disfigurement schedule award.

In an April 15, 2018 report, the DMA indicated that Dr. Hebrard had reported in his August 24, 2016 report that appellant had mild skin graft scars behind the ears, but that the black

³ Dr. Hebrard attached black and white copies of two photographs of appellant's head and neck.

⁴ By decision dated March 28, 2017, OWCP granted appellant a schedule award for 10 percent permanent impairment of each upper extremity and five percent permanent impairment of each lower extremity. The award was partially based on an August 30, 2016 report of Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, who served as an OWCP referral physician. OWCP only requested that Dr. Aubrey evaluate the permanent impairment of appellant's upper and lower extremities, a matter which is not currently before the Board.

and white copies of photographs of his head and neck in the case record did not demonstrate sufficient detail illustrating scarring behind the ears or any other facial disfigurement secondary to burns. In an April 19, 2018 letter, OWCP requested that appellant submit two hard copies of color photographs depicting disfigurement of his face, head, or neck. On April 30, 2018 it received hard copies of two photographs from appellant.

On June 11, 2018 the case record, including the recently submitted color photographs, was referred back to the DMA for further review. In a July 2, 2018 report, the DMA indicated that, based on his review of the color photographs, there was hyperpigmented discoloration of the neck on both sides, extending from behind each ear to below the angle of the mandible bilaterally. He noted there was no scarring or disfigurement of the face itself and no apparent loss of facial hair that might be the result of a scar secondary to a burn. The DMA opined that the medical record did not document any significant effect on activities of daily living, including breathing or eating. He indicated that there was no evidence of distortion of the face or nasal distortion affecting physical appearance, and no evidence of loss of supporting structure of part of the face, such as depressed cheek, nasal, or frontal bones. The DMA noted that there was no evidence of involvement of a bony structure or cartilage. He referenced the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁵ and indicated that, under Table 11-5 (Facial Disorder/Disfigurement) on page 262, appellant had permanent impairment which fell under class 1, grade C, and equaled three percent impairment of the whole person and seven percent impairment of the face.

OWCP requested that the DMA provide a supplemental report indicating when appellant reached maximum medical improvement (MMI). In a July 16, 2018 report, the DMA advised that appellant reached MMI on August 30, 2016.

OWCP's assistant district director then reviewed the evidence of record and, in a July 18, 2018 memorandum, noted that the DMA had indicated that appellant had hyperpigmented discoloration on his neck, but did not have scarring on his face. He also indicated that appellant had reached MMI. The assistant district director concluded that appellant's condition, including visible "scarring" of his neck, might impair his ability to obtain employment and that he should be granted a disfigurement schedule award in the amount of \$300.00.

By decision dated July 20, 2018, OWCP granted appellant a disfigurement schedule award in the amount of \$300.00. It advised that the award was based on the medical evidence of record and that it provided proper and equitable compensation for his disfigurement.

On July 27, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.⁶

During the December 11, 2018 hearing, counsel argued that there was no adequate explanation of how the sum of \$300.00 for the schedule award was determined. He asserted that \$300.00 was equitable given that appellant had his face burned, and that he had visible scars and abnormal pigmentation. Counsel noted that he recognized that the statute required that the injury

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ Appellant submitted a chart entitled, "Facial Disfiguration Structural Impairment by Class Chart," from an unknown source.

must result in permanent disfigurement of a character likely to handicap a claimant in securing or maintaining employment, but he felt that this standard was obtuse and unclear. Appellant testified that his burned skin was more sensitive and that it tore and blistered more easily than his unaffected skin.

By decision dated February 22, 2019, OWCP's hearing representative affirmed the July 20, 2018 decision. The hearing representative found that all relevant OWCP procedures were followed and that the disfigurement schedule award granted to appellant was reasonable given the nature of his medical condition.

LEGAL PRECEDENT

Section 8107(c)(21) of FECA provides that payment of compensation not to exceed \$3,500.00 may be made for disfigurement of the face, head, or neck which is likely to handicap the claimant in securing or maintaining employment.⁷ OWCP procedures further provide that a DMA will be asked to review such claims and to evaluate the employee's disfigurement. If the DMA finds that MMI has occurred, he or she will review the photographs submitted along with the medical evidence of record and place a memorandum in the file describing the disfigurement and stating whether MMI has occurred. If the DMA finds MMI has occurred, the concurrence of the district director or assistant district director must be obtained. Following the file review, the district director or assistant district director will also write a memorandum which contains a description of the disfigurement.⁸

In an appeal involving disfigurement, the question before the Board is whether the amount awarded by OWCP was based upon sound and considered judgment and was proper and equitable under the circumstances as provided by section 8107(c)(21) of FECA.⁹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish entitlement to more than \$300.00 for a disfigurement schedule award.

As noted above, section 8107(c)(21) of FECA provides that payment of compensation not to exceed \$3,500.00 may be made for disfigurement of the face, head, or neck which is likely to handicap the claimant in securing or maintaining employment.¹⁰ The Board finds that OWCP properly followed its procedures in determining that appellant was entitled to \$300.00 for facial disfigurement.¹¹

⁷ 5 U.S.C. § 8107(c)(21).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.10 (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.5 (January 2010); *see L.J.*, Docket No. 13-0104 (issued October 21, 2013).

⁹ *A.M.*, Docket No. 14-0787 (issued July 15, 2014).

¹⁰ *See supra* note 7.

¹¹ *See supra* note 8.

In a July 2, 2018 report, the DMA indicated that, based on his review of the color photographs in the case record, there was hyperpigmented discoloration of appellant's neck on both sides, extending from behind each ear to below the angle of the mandible bilaterally. He noted that there was no scarring or disfigurement of the face itself and no apparent loss of facial hair that might be the result of a scar secondary to a burn. Moreover, there was no evidence of distortion of the face or nasal distortion affecting physical appearance, or loss of supporting structure of part of the face, such as depressed cheek, nasal, or frontal bones. OWCP's assistant district director then reviewed the evidence of record. In a July 18, 2018 memorandum, he discussed appellant's medical condition and concluded that his condition might to some extent impair his ability to obtain employment and that he should be granted a disfigurement schedule award in the amount of \$300.00.

The Board finds that OWCP's awarding \$300.00 for permanent disfigurement was proper and equitable under the circumstances as provided by section 8107(c)(21) of FECA.¹² Although appellant believes \$300.00 is insufficient compensation for his disfigurement, he has not demonstrated that he is entitled to a greater award for permanent facial disfigurement.

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 entitlement to more than \$300.00 for a disfigurement schedule award.

¹² See *A.M.*, *supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 23, 2019
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