United States Department of Labor
Employees' Compensation Appeals Board

S.F., Appellant	)	
and	)	**Docket No. 19-0115**
	)	**Issued: July 25, 2019**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Lompoc, CA, Employer	)	

Appearances:
Appellant, pro se
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 October 19, 2018 appellant filed a timely appeal from an August 7, 2018 merit decision and a September 12, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish more than one percent permanent impairment of his left lower extremity, for which he previously received a

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 20, 2016 appellant, then a 39-year-old supervisory detention and deportation officer, filed a traumatic injury claim (Form CA-1) alleging that, on May 19, 2016, he injured his left ankle and foot while in the performance of duty. He did not initially stop work. OWCP accepted the claim for left Achilles tendon strain and authorized surgical repair of left Achilles tendon with allograft, which was performed on June 13, 2016 by Dr. Steven W. Pearson, a Board-certified orthopedic surgeon and appellant's treating physician.

On May 15, 2017 appellant filed a claim for a schedule award (Form CA-7).

By letter dated May 16, 2017, OWCP requested that Dr. Pearson provide an opinion as to whether appellant had permanent impairment of his left lower extremity due to his accepted employment-related condition pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

In a June 14, 2017 report, Dr. Pearson opined that appellant had reached maximum medical improvement (MMI) of the left lower extremity on January 13, 2017. He provided findings on physical examination and indicated that appellant had full range of motion with slight weakness and slight calf atrophy and that he was unable to perform a single heel rise. Using Table 16-2, Foot and Ankle Regional Grid, of the A.M.A., *Guides*,[4] Dr. Pearson opined that for the diagnosis of postoperative repair of ruptured Achilles tendon, appellant was class 0 with 0 percent whole person impairment as there were no significant objective abnormal finding of muscle or tendon injury when at MMI. He indicated that appellant's weakness was expected to improve over time.

On December 14, 2017 OWCP referred appellant for a second opinion evaluation with Dr. Pearson, the same physician who served as his initial treating physician, for an impairment rating rendered according to the A.M.A., *Guides*. In a February 2, 2018 report, Dr. Pearson, based upon a review of medical evidence, a statement of accepted facts (SOAF), and physical examination, diagnosed status post reconstruction left Achilles tendon rupture with persistent tendinitis. He opined that MMI was reached on January 13, 2017, consistent with his opinion while serving as appellant's treating physician. Using Table 16-2, Foot and Ankle Regional Grid, of the A.M.A., *Guides*, Dr. Pearson calculated one percent left lower extremity permanent impairment based on a class 1 diagnosis of Achilles tendon rupture with some palpatory findings. He assigned a grade modifier of 2 for physical examination (GMPE),[5] a grade modifier of 0 for

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

[4] *Id.* at 501, Table 16-2.

[5] *Id*. at 517, Table 16-7.

functional history (GMFH),[6] and a grade modifier of 0 for clinical studies (GMCS).[7] Dr. Pearson reported that, following assignment of grade modifiers, application of the net adjustment formula resulted in a negative 1, which amounts to a grade B or 1 percent lower extremity impairment. He noted that this differed from his previous finding of zero percent lower extremity impairment, which he issued on June 14, 2017 as the treating physician, as appellant's signs and symptoms had not resolved with time. Dr. Pearson also indicated that had no loss of range of motion.

In an April 4, 2018 report, Dr. Todd Fellars, a Board-certified orthopedic surgeon acting as a district medical adviser (DMA), reviewed the medical evidence of record and concurred with Dr. Pearson's February 2, 2018 impairment rating of one percent left lower extremity permanent impairment based on a diagnosis of ruptured Achilles tendon. He opined, however, that MMI was reached on February 2, 2018, the date of Dr. Pearson's most recent impairment rating.

By decision dated August 7, 2018, OWCP granted appellant a schedule award for one percent permanent impairment of his left lower extremity. The award covered a period of 2.88 weeks and ran from February 2 to 22, 2018.

On August 20, 2018 OWCP received appellant's August 17, 2018 request for reconsideration. In support of his request, appellant submitted an undated narrative disagreeing with the impairment rating. He contended that he was never referred for an appropriate second opinion evaluation as Dr. Pearson was his treating physician. Appellant indicated that he had continuing symptoms with his left lower extremity. He also felt that he had a greater permanent impairment of the left lower extremity as he had previously been granted a schedule award for five percent permanent impairment of his right lower extremity, after less invasive surgery on his right Achilles tendon. Appellant also submitted a copy of a July 9, 2012 schedule award decision for five percent right lower extremity impairment for a September 7, 2011 injury under OWCP File No. xxxxxx141.

By decision dated September 12, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim.

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. The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the

[6] *Id.* at 516, Table 16-6.

[7] *Id.* at 519, Table 16-8.

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

percentage loss of use of a member of the body for schedule award purposes.[10] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.[11]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[12] Under the sixth edition, the evaluator identifies the class of diagnosis (CDX) for the diagnosed condition, which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).[13] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[14] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[15]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.[16]

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

OWCP accepted appellant's claim for left Achilles tendon strain. It approved surgery for left Achilles tendon with allograft, performed by treating physician Dr. Pearson, on June 13, 2016. Appellant subsequently filed a claim for a schedule award (Form CA-7) and submitted an impairment rating from his treating physician Dr. Pearson in which he calculated that appellant had zero percent permanent impairment of left lower extremity for postoperative repair of ruptured Achilles tendon. OWCP subsequently referred appellant to the same physician, Dr. Pearson, for a second opinion impairment evaluation. Dr. Pearson opined, in his capacity as a second opinion examiner, that appellant had one percent left lower extremity permanent impairment for Achilles tendon rupture with some palpatory findings. He opined that MMI was reached on January 13, 2017. A DMA reviewed the medical evidence of record and concurred with Dr. Pearson's second opinion impairment rating of one percent permanent impairment of the left

[10] *See B.B.*, Docket No. 18-0782 (issued January 11, 2019); *Isidoro Rivera*, 12 ECAB 348 (1961).

[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*, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[13] *Id.* at 521.

[14] *Id.*

[15] *Id.* at 23-28; *see B.B.*, *supra* note 10; *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017); *see also E.B.*, Docket No. 18-1211 (issued February 27, 2019); *L.R.*, Docket No. 14-0674 (issued August 13, 2014); *Frantz Ghassan*, 57 ECAB 349 (2006).

lower extremity. By decision dated August 7, 2018, OWCP granted appellant a schedule award for one percent permanent impairment of the left lower extremity.

The Board finds that Dr. Pearson served as both a treating physician and a second opinion examiner for OWCP. OWCP's procedures provide that the attending/treating physician is the primary source of medical evidence in most cases and is expected to provide a rationalized medical opinion based on a complete medical and factual background in order to resolve any pending issues in a cases. Where the attending physician's report does not meet the needs of OWCP, it may schedule a second opinion examination.[17] The method for selecting second opinion physicians is flexible and the selection of the second opinion physician is generally conducted by a medical referral group that has contracted with OWCP to provide second opinion medical referrals or the use of the Medical Management application.[18] The Board has cautioned, however, that, if a physician was previously associated with a case, the appearance of impropriety should have been avoided.[19] Similarly, the Board has found that a treating physician cannot later serve as a DMA to avoid an appearance of impropriety.[20]

The Board finds that Dr. Pearson's prior association with appellant creates an appearance of impropriety, as he performed appellant's left Achilles tendon surgery and followed appellant as his treating physician less than one year before serving as OWCP's second opinion examiner.

On remand, OWCP should request a second opinion evaluation, from a different physician who is not associated with appellant, to provide a reasoned opinion regarding the nature and extent of appellant's permanent impairment and date of MMI in accordance with the sixth edition of the A.M.A., *Guides*. Following this and such further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's schedule award claim.

[17] *See* Federal (FECA) Procedure Manual, Part 3 -- OWCP Directed Medical Examinations, Chapter 3.500.3 (June 2015).

[18] *Id.* at Chapter 3.500.3(b)(2) and (3).

[19] *T.N.*, Docket No. 15-0690 (issued November 1, 2016). *See also J.S.*, Docket No. 16-1097 (issued December 5, 2016). The Board found that in selecting an impartial medical specialist OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.

[20] *See J.G.*, Docket No. 16-0328 (issued November 1, 2016); *T.N., id.*

CONCLUSION

The Board finds that this case is not in posture for a decision.[21]

ORDER

IT IS HEREBY ORDERED THAT the September 12 and August 7, 2018 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: July 25, 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

[21] The Board finds that it is unnecessary to address the second issue in this case or appellant's arguments on appeal in view of the Board's disposition of the first issue.