

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

_____)	
B.J., Appellant)	
)	
and)	Docket No. 19-0960
)	Issued: October 7, 2019
U.S. POSTAL SERVICE, POST OFFICE, Detroit, MI, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 1, 2019 appellant, through counsel, filed a timely appeal from a February 26, 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.³

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.*

³ The Board notes that following the February 26, 2019 decision, OWCP received additional evidence. 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of her left lower extremity, warranting a schedule award.

FACTUAL HISTORY

On September 9, 2016 appellant, then a 28-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 6, 2016 she sustained an ankle sprain and blow to the knee when she reportedly lost her footing when walking down steps while in the performance of duty. She stopped work on September 7, 2016. On the reverse side of the claim form, the employing establishment indicated that the injury occurred in the performance of duty.

In a September 7, 2016 examination report, Dr. David Pommerening, an occupational and preventive medicine specialist, conducted an examination diagnosing left knee contusion and left ankle sprain. He authorized appellant to return to modified duty.

On October 12, 2016 OWCP accepted appellant's claim for left knee contusion.

Appellant continued to receive medical treatment. In an April 4, 2018 report, Dr. Elizabeth Hall, a Board-certified physiatrist, recounted appellant's complaints of pain in the left knee, both medial and laterally. Upon examination of the left knee, she observed that appellant could bear all her weight on the left leg without pain or tenderness. No effusion or instability was reported in the knee. Dr. Hall diagnosed resolved left patellar tendinitis status post September 6, 2016 work injury and left tibial/sural neuropathy status post September 6, 2016 work injury with some continued pain. She recommended that appellant return to work without restrictions. Dr. Hall reported that appellant had reached maximum medical improvement.

On July 2, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a July 10, 2018 development letter, OWCP requested that appellant provide an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ It afforded her 30 days to submit the requested information.

By decision dated August 13, 2018, OWCP denied appellant's claim for a schedule award finding that she had not submitted sufficient evidence to establish permanent impairment of a scheduled member or function of the body causally related to her accepted September 6, 2016 employment injury.

On August 23, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on January 3, 2019.

⁴ A.M.A., *Guides* (6th ed. 2009).

OWCP received a series of medical reports dated from September 19, 2016 to July 26, 2017 regarding appellant's continued complaints of left knee pain.

In a January 30, 2019 statement, appellant explained that she experienced difficulty with her leg at the onset of her fall and that her diagnosis changed after her physician ordered diagnostic testing. She alleged that the final diagnosis would have been evident had diagnostic testing been ordered at the onset of her fall.

By decision dated February 26, 2019, an OWCP hearing representative affirmed the August 13, 2018 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing federal regulations,⁶ 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants.⁷ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.⁸ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁹

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.¹⁰ OWCP's 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, describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.¹¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her left lower extremity, warranting a schedule award.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ *D.S.*, Docket No. 18-1140 (issued January 29, 2019); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹¹ *Supra* note 9 at Chapter 2.808.5 (March 2017).

OWCP accepted that on September 6, 2016 appellant sustained a left knee contusion while in the performance of duty. On July 2, 2018 she filed a claim for a schedule award.

Although the treatment records covering the period September 19, 2016 to July 26, 2017 reference appellant's ongoing left knee complaints, the medical evidence provided did not include an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.

The most recent medical report of record is an April 4, 2018 report by Dr. Hall who recounted appellant's complaints of continued left knee pain and provided examination findings. Dr. Hall diagnosed resolved left patellar tendinitis and left tibial/sural neuropathy status post September 6, 2016 work injury with some continued pain. She reported that appellant had reached maximum medical improvement. Dr. Hall did not provide an impairment rating.

The Board finds that appellant has submitted no medical evidence in conformance with the sixth edition of the A.M.A., *Guides* establishing that she has permanent impairment of her left lower extremity due to her accepted left knee injury. Consequently, appellant has not established entitlement to a schedule award.¹²

On appeal counsel alleges that the decision was contrary to law and fact. The Board finds that his argument is without merit as he has not submitted any medical evidence to establish that her left knee injury caused any permanent impairment to her left lower extremity.¹³

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 her burden of proof to establish permanent impairment of her left lower extremity, warranting a schedule award.

¹² See *C.T.*, Docket No. 18-0544 (issued May 22, 2019).

¹³ See *G.S.*, Docket No. 17-0481 (issued July 25, 2018).

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2019 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 7, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board