

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

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| W.B., Appellant |) | |
| |) | |
| and |) | Docket No. 20-0225 |
| |) | Issued: December 10, 2020 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Rochester Hills, 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:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On November 6, 2019 appellant, through counsel, filed a timely appeal from a September 24, 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.

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 has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 16, 2011 appellant, then a 43-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that date she fractured her left ankle when she stepped out of her postal vehicle onto the grass and twisted her left ankle while in the performance of duty. She stopped work on that date. OWCP initially accepted her claim for closed fracture of the left distal fibula and subsequently expanded the acceptance of her claim to include left ankle sprain and late effect fracture of the left lower extremity. It paid appellant wage-loss compensation beginning on November 1, 2011, and placed her on the periodic rolls effective July 1, 2012.

On February 2, 2012 appellant underwent authorized left leg and ankle surgery. A February 2, 2012 operative report noted a preoperative diagnosis of chronic ankle sprain and possible peroneal tendon injury.

By decision dated April 19, 2012, OWCP expanded the acceptance of appellant's claim to include consequential conditions of gastritis and delayed gastric emptying due to operative narcotic pain and nonsteroid, anti-inflammatory medication. On August 28, 2012 it further expanded the acceptance of appellant's claim to include sacroiliitis.

By decision dated March 8, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, as she had no residuals or continuing disability due to her accepted injury. It found that the special weight of the medical evidence rested with the January 17, 2016 report of Dr. Edward Sladek, a Board-certified orthopedic surgeon serving as the impartial medical examiner, who determined that appellant no longer had residuals or disability causally related to her accepted September 16, 2011 employment injury.⁴

On March 29, 2017 appellant filed a claim for a schedule award (Form CA-7).

³ Docket No. 18-1346 (issued April 3, 2019).

⁴ On January 18, 2017 an OWCP hearing representative affirmed the March 8, 2016 termination decision. Appellant subsequently requested reconsideration on February 9 and 17, 2017, June 26, 2017, and May 1, 2018. By decision dated May 31, 2018, OWCP denied appellant's May 1, 2018 reconsideration request pursuant to 5 U.S.C. § 8128(a). Appellant appealed to the Board. In an April 3, 2019 decision, the Board denied appellant's May 1, 2018 request for reconsideration pursuant to 5 U.S.C. § 8128(a), finding that her request neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant further merit review of appellant's claim regarding the termination of her wage-loss compensation and medical benefits, effective March 8, 2016.

In support of her schedule award claim, appellant submitted a February 22, 2017 form letter by Dr. Philip T. Henning, an osteopath specializing in physical medicine and rehabilitation. Dr. Henning indicated that appellant had reached maximum medical improvement (MMI).

In a June 15, 2017 development letter, OWCP advised appellant of the type of evidence needed to establish her schedule award claim. It requested that she provide a medical report from her attending physician, which included a statement that the accepted condition had reached MMI and an impairment rating utilizing the appropriate portions of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).⁵ OWCP afforded appellant 30 days to submit the necessary evidence.

In a September 11, 2017 report, Dr. Catherine Watkins Campbell, a Board-certified occupational medicine and family medicine specialist, reviewed appellant's history and noted diagnoses of closed fracture of the left fibula, left ankle sprain, late effect fracture of the left lower extremity, gastritis, delayed gastric emptying, and sacroiliitis. She discussed that a January 13, 2014 electromyography and nerve conduction velocity (EMG/NCV) study revealed mild chronic sensorimotor peripheral polyneuropathy in the lower extremities and indicated that these abnormalities affected the peroneal nerves more than the other nerves. Dr. Watkins Campbell noted appellant's current complaints of burning pain, numbness, and pins and needle sensation in the lateral aspect of the lower left leg and entire left foot. Upon physical examination, she observed abnormal gait with short steps and variable tenderness throughout the lumbar and sacral regions bilaterally. Sensory and motor examinations of the lower extremities were normal.

Dr. Watkins Campbell reported that the examination showed no residuals of appellant's ankle sprain or sacroiliitis conditions. She also noted that delayed gastric emptying was only a temporary aggravation caused by the initial use of nonsteroidal medication and was not a result of the accepted September 16, 2011 employment injury. Dr. Watkins Campbell noted that the operative report showed longitudinal tears in the peroneal tendon and, accordingly, she provided an impairment rating based on the peroneal tendon injury. Utilizing the diagnosis-based impairment (DBI) rating method found at Table 16-2, Foot and Ankle Regional Grid of the sixth edition of the A.M.A., *Guides*, she noted that appellant was a class of diagnosis (CDX) of 1, with a default value of five percent for mild motion deficits for the diagnosis of strain, tendinitis, or history of ruptured tendon, specifically involving the posterior tibial, anterior tibial, Achilles, or peroneal tendon. Dr. Watkins Campbell assigned a grade modifier for physical examination (GMPE) of 1 due to minimal palpatory findings, mild or arthrodesis in position of function, and muscle atrophy.⁶ She also assigned a grade modifier for clinical studies (GMCS) of 1 due to imaging studies. After applying the net adjustment formula, $(1-1) + (1-1)$, which resulted in 0 adjustment, Dr. Watkins Campbell calculated that appellant had five percent permanent impairment of the left lower extremity. She reported that appellant had reached MMI as of February 22, 2017 according to a statement from Dr. Henning and provided a permanent impairment worksheet.

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ No grade modifier for functional history (GMFH) was noted.

OWCP routed the case file to Dr. Ari Kaz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), for review and opinion as to whether appellant sustained permanent impairment as a result of her accepted September 16, 2011 employment injury. In a July 17, 2018 report,⁷ the DMA noted that he had reviewed appellant's case file, including Dr. Watkins Campbell's September 11, 2017 report and permanent impairment findings, and noted that appellant's claim was accepted for closed fracture of the left fibula, left ankle sprain, and late effect of fracture of the left lower extremity. He indicated that there were no residuals of appellant's ankle sprain and determined that appellant was a class 0 for no permanent impairment. The DMA also reported that he would not be providing an impairment rating for a distal fibula fracture as there was no evidence that appellant sustained a distal fibula fracture as part of her claim.

The DMA applied the DBI rating method of Table 16-2, Foot and Ankle Regional Grid, and reported that under the diagnosis category of peroneal tendon strain, appellant was a CDX of 1, with a default value of five percent, due to mild motion deficits. He indicated that appellant had a GMPE of 1 due to mild range of motion deficits and mild atrophy and a GMCS of 0 due to normal clinical study. The DMA explained that he differed from Dr. Watkins Campbell's classification of a GMCS of 1 due to normal clinical findings. Applying the net adjustment formula $(1-1) + (0-1)$, he found that appellant had four percent permanent impairment of the left lower extremity. Utilizing the range of motion (ROM) methodology of Table 16-20, Hindfoot Motion Impairment, and Table 16-22, Ankle Motion Impairment, the DMA indicated that appellant had two percent permanent impairment for eversion of 10 degrees. He explained that, while peroneal tendon tear was not an accepted diagnosis, it was present at the time of the February 2, 2012 surgery and should qualify as an impairment rating. The DMA noted a date of MMI of September 11, 2017.

On September 19, 2018 OWCP requested clarification from the DMA regarding an impairment rating for a tendon injury. In a September 28, 2018 addendum report, the DMA indicated that he agreed with Dr. Watkins Campbell that an impairment rating should be provided for the condition of peroneal tendon injury. He reported that appellant had four percent permanent impairment of the left lower extremity utilizing the DBI method and two percent permanent impairment of the left lower extremity utilizing the ROM method.

In a December 3, 2018 supplemental report, Dr. Watkins Campbell indicated that she had reviewed the DMA's reports and agreed with his rating of four percent permanent impairment of the left lower extremity based on the sixth edition of the A.M.A., *Guides*. She noted that she also agreed with the September 11, 2017 MMI date.

In a January 18, 2019 letter, OWCP noted that appellant's wage-loss compensation and medical benefits had been terminated, effective March 8, 2016. It advised her that additional medical evidence was needed to establish that her requested impairment rating was for a condition causally related to the accepted September 16, 2011 employment injury. OWCP afforded her 30 days to submit the requested information.

⁷ In an initial April 29, 2018 report, Dr. Kaz indicated that he was not able to provide an impairment rating because all the medical records were not included in the case record.

By decision dated February 25, 2019, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body as a result of her accepted September 16, 2011 employment injury. It noted that Dr. Watkins Campbell, appellant's treating physician, had failed to provide a rationalized opinion explaining how her indicated impairment resulted from the accepted September 16, 2011 employment injury.

On March 4, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on July 12, 2019.

Appellant subsequently submitted a June 5, 2019 report by Dr. Watkins Campbell. Dr. Watkins Campbell noted that her impairment rating was based on the accepted conditions of left ankle sprain, closed fracture of the left fibula, and late effect of fracture of the lower extremities. She concluded that appellant's current impairment of four percent left lower extremity impairment was directly related to these conditions and were directly related to the September 16, 2011 workplace injury.

By decision dated September 24, 2019, an OWCP hearing representative affirmed the February 25, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁸ and its implementing regulations⁹ 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 of a member 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 and the Board has concurred in such adoption.¹⁰ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.¹¹

The sixth edition of the A.M.A., *Guides* provides the DBI 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 impairment for the diagnosed condition CDX, which is then adjusted by grade modifiers of GMFH, GMPE, and GMCS. The

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404.

¹⁰ *Id.* at § 10.404(a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹² A.M.A., *Guides* (6th ed. 2009) 3, section 1.3.

net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹³ Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grids and calculations of modifier scores.¹⁴

OWCP's procedures and Board precedent provide that termination of a claim for all benefits due to a finding of no residuals of the accepted condition does not bar a subsequent schedule award.¹⁵ Rather, the claims examiner should consider the schedule award matter separately from the termination of benefits.¹⁶ This is because a claimant may have an employment-related condition that results in a permanent impairment under the A.M.A., *Guides* without a disability for work or the need for continuing medical treatment.¹⁷ If a claimant applies for a schedule award after termination of compensation benefits and submits sufficient medical evidence reflecting a permanent impairment as a result of the work-related injury or exposure, the claims examiner should further develop the claim.¹⁸

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.¹⁹

ANALYSIS

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

In support of her schedule award claim, appellant submitted reports by Dr. Watkins Campbell dated September 11, 2017 through June 5, 2019. Dr. Watkins Campbell reported that physical examination showed no residuals of appellant's ankle sprain or sacroiliitis conditions. However, she explained that she would provide an impairment rating based on appellant's peroneal tendon injury, as noted on the February 2, 2012 operative report.

In a July 17, 2018 report and September 19, 2018 response to OWCP's request for clarification, Dr. Kaz, serving as a DMA, indicated that he agreed with Dr. Watkins Campbell that an impairment rating should be provided for the condition of peroneal tendon injury. He explained that, although peroneal tendon tear was not an accepted condition, it was present at the time of the February 2, 2012 surgery and should qualify as an impairment rating.

¹³ *Id.* at 494-531.

¹⁴ *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹⁵ *See G.H.*, Docket No. 19-1800 (issued September 4, 2020); *M.K.*, Docket No. 17-1691 (issued January 23, 2018).

¹⁶ *R.H.*, Docket No. 17-1017 (issued December 4, 2018).

¹⁷ Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.808.11 (February 2013); *B.K.*, 59 ECAB 228 (2007).

¹⁸ *M.K.*, Docket No. 16-0243 (issued May 9, 2016).

¹⁹ Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.808.5b (March 2017); *Veronica Williams*, 56 ECAB 357 (2005) (a schedule award can only be paid for a condition related to an employment injury).

In a December 3, 2018 supplemental report, Dr. Watkins Campbell indicated that she agreed with the DMA's findings and rating of permanent impairment.

The Board finds that, because OWCP undertook development of the issue of expansion when it sent the claim to DMA Dr. Kaz, further development of the expansion issue was required prior to OWCP's denial of the schedule award claim. Both Dr. Watkins Campbell and Dr. Kaz have consistently determined that appellant sustained a permanent impairment of her left lower extremity due to a peroneal tendon injury and opined that this condition was causally related to the accepted September 16, 2011 work-related injury. Therefore, pursuant to OWCP's procedures, it should have accepted the condition as work related or undertaken further development on this issue.²⁰

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.²¹ OWCP has an obligation to see that justice is done in a manner that will resolve the relevant issues in this case.²²

The case shall therefore be remanded for OWCP further develop the medical evidence on the issue of claim expansion to include a peroneal tendon injury as causally related to her accepted September 16, 2011 employment injury, thereby warranting a schedule award. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* merit decision regarding appellant's schedule award claim.

CONCLUSION

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

²⁰ Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.808.6(c)-(d) (March 2017); *see also* *L.W.*, Docket No. 16-1317 (issued June 21, 2017).

²¹ *See, e.g., M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769, 770-71; *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985).

²² *See L.T.*, Docket No. 18-1405 (issued April 8, 2019); *A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 10, 2020
Washington, DC

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

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board