

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

_____)	
Y.S., Appellant)	
)	
and)	Docket No. 19-0218
)	Issued: May 15, 2020
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Jackson, MS, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 7, 2018 appellant, through counsel, filed a timely appeal from a September 4, 2018 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

On May 2, 2016 appellant, then a 52-year-old lead mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral plantar fasciitis, neuralgia, and neuritis of her feet due to factors of her federal employment, including the constant standing and walking on concrete surfaces required by her job.³ She did not stop work at the time she filed her claim. OWCP accepted appellant's claim for arthritis of both feet.⁴

Appellant received regular treatment for her foot problems from Dr. Rose Sotolongo, a podiatrist. In a May 26, 2016 report, Dr. Sotolongo noted that appellant chiefly complained of pain and swelling in both feet. She advised that her physical examination of appellant's lower extremities revealed stable vascular status, no edema up to the ankle, no venous stasis changes, normal vibratory and sharp dull sensation, and normal muscle mass. Dr. Sotolongo diagnosed pain, idiopathic neuropathy, and osteoarthritis of both feet. She indicated that appellant was disabled from work.

On October 3, 2016 Dr. Sotolongo noted that appellant reported that she had gout and that she had been diagnosed with degenerative arthritis of the feet in 2009. She diagnosed osteoarthritis of both feet (right worse than left) and "pain in joints." In a November 17, 2016 report, Dr. Sotolongo indicated that appellant had degenerative arthritis in "multiple joints" and found that her pain and reported inability to bend limited her activities of daily living and prevented her from performing her current job duties. In a letter dated March 16, 2017, she indicated that appellant had reached maximum medical improvement (MMI).

On April 13, 2017 appellant filed a claim for a schedule award (Form CA-7) due to her accepted employment conditions.

In an April 18, 2017 development letter, OWCP requested that appellant submit a report from her attending physician which evaluated permanent impairment in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ It afforded her 30 days to submit the necessary evidence.

³ Appellant noted that she first became aware of her claimed condition on August 1, 2009 and first realized its relation to her federal employment on February 9, 2015.

⁴ Appellant stopped work for various periods and, although OWCP initially denied her claim for wage-loss compensation benefits, it later paid her such benefits on the supplemental rolls for intermittent disability from work between October 3, 2016 and January 20, 2017.

⁵ A.M.A., *Guides* (6th ed. 2009).

Appellant submitted a June 23, 2017 report from Dr. Sotolongo who noted that appellant had pain in her limbs, peroneal tendinitis, arthralgia (joint pain), enthesopathy, and hammertoes bilaterally. Dr. Sotolongo noted that appellant reported that she was limited in her daily activities and was unable to work on a sustained basis and that her chronic symptoms included chronic bilateral foot and ankle pain. She noted that appellant's arthralgia and pain from stenosis was "determined to be a permanent impairment of the lower legs" and advised that she would be unable to stand on concrete work floors. Dr. Sotolongo indicated that appellant's foot and ankle disability index score was 55.67,⁶ and noted, "It has been determined that she has a five percent impairment rating." Appellant also submitted one page of an incomplete and undated report in which Dr. Sotolongo noted in the diagnosis section of the report, "Permanent impairment -- diagnosis nerve injury (five percent) to lower extremity impairment."⁷

On July 11, 2017 OWCP routed Dr. Sotolongo's reports, a statement of accepted facts (SOAF), and the case file to Dr. William Tontz, Jr., a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and a determination regarding whether appellant sustained permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In an August 8, 2017 report, the DMA reviewed the case file, including Dr. Sotolongo's reports, and noted that pursuant to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501 of the sixth edition of the A.M.A., *Guides*, appellant's diagnostic criteria (including contusions) fell under class 0 for the class of diagnosis (CDX) which corresponded to zero percent permanent impairment of each lower extremity.⁸

OWCP requested that Dr. Sotolongo review the DMA's August 8, 2017 report and comment on his opinion that appellant had zero percent permanent impairment of each lower extremity. It also requested that she submit a report which contained an impairment rating calculated in accordance with the standards of the sixth edition of the A.M.A., *Guides*. In a letter dated October 3, 2017, Dr. Sotolongo indicated that she would not be changing her opinion with regard to the impairment rating provided for appellant.

On November 27, 2017 OWCP referred appellant to Dr. Daniel P. Dare, a Board-certified orthopedic surgeon, for a second opinion evaluation. It requested that he examine appellant and provide an opinion on permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In a January 8, 2018 report, Dr. Dare discussed appellant's factual and medical history, including the nature of her employment injury and the history of her medical treatment. He noted

⁶ Dr. Sotolongo attached a copy of a May 18, 2017 report in which this score was calculated. The report actually lists appellant's score as 56.7, rather than 55.67.

⁷ Appellant also submitted incomplete and unsigned reports, dated October 21, 2014 and December 12, 2016, which contained Dr. Sotolongo's name in their headings.

⁸ The DMA indicated that appellant reached MMI on June 23, 2017 and that he disagreed with the comments of Dr. Sotolongo regarding the extent of appellant's permanent impairment.

findings on physical examination of normal gait, normal stride length, no antalgic gait, slight swelling over the sinus tarsi area of both feet without tenderness, minimal swelling in both feet, decreased two-point discrimination of the feet, and decreased sensation of the feet and fingers. Range of motion (ROM) testing of the ankles revealed, on a bilateral basis, 30 degrees of plantar flexion, 0 degrees of dorsiflexion, 5 degrees of eversion, and 5 degrees of inversion. Dr. Dare diagnosed history of arthritis in both feet (stable), diffuse peripheral neuropathy, rheumatoid arthritis principally involving the hands, degenerative arthritis (generalized), hypertension, and glaucoma.⁹ He rated appellant under the diagnosis-based impairment (DBI) rating method for bilateral foot arthritis noting that many of her problems related to nonaccepted conditions of rheumatoid arthritis, degenerative arthritis other than in the feet, peripheral neuropathy, and spinal problems. Dr. Dare advised that, utilizing Table 16-2 beginning on page 501 of the sixth edition of the A.M.A., *Guides*, consideration of appellant's diagnostic criteria showed that she fell under class 0 for CDX on a bilateral basis, a finding which corresponded to zero percent permanent impairment of each lower extremity. He opined that the five percent permanent impairment rating provided by Dr. Sotolongo was for conditions not accepted as work related.

OWCP again referred the case to the DMA and requested that he provide an opinion on permanent impairment after reviewing Dr. Dare's January 8, 2018 report. On February 20, 2018 the DMA reviewed the relevant medical evidence of record and noted that, pursuant to Table 16-2 beginning on page 501 of the sixth edition of the A.M.A., *Guides*, appellant's diagnostic criteria (including contusions) fell under class 0 for the CDX which corresponded to zero percent permanent impairment for each lower extremity. He indicated that he disagreed with the comments of Dr. Sotolongo regarding permanent impairment. The DMA concurred with Dr. Dare's impairment rating of zero percent permanent impairment of each lower extremity pursuant to the sixth edition of the A.M.A., *Guides*.¹⁰

By decision dated March 16, 2018, OWCP denied appellant's claim for a schedule award. It found that the opinions of Dr. Dare and the DMA established that she had no permanent impairment of a scheduled member or function of the body, warranting a schedule award.

On March 27, 2018 appellant, through counsel, requested a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review. During a hearing held on July 23, 2018, counsel argued that the medical evidence of record established that appellant had permanent impairment of her lower extremities due to the accepted condition of arthritis of both feet.

By decision dated September 4, 2018, OWCP's hearing representative affirmed the March 16, 2018 decision.

⁹ Dr. Dare noted that appellant reached MMI on June 23, 2017.

¹⁰ The DMA indicated that appellant reached MMI on June 23, 2017.

LEGAL PRECEDENT

The schedule award provisions of FECA,¹¹ and its implementing federal regulations,¹² 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 impairment 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.¹³ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁴

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).¹⁵ Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition as CDX, which is then adjusted by grade modifiers based on the grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS).¹⁶ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹⁷ Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹⁸

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

In a January 8, 2018 report, second opinion physician Dr. Dare reported the findings of the physical examination he conducted on that date. He diagnosed history of arthritis in both feet (stable), diffuse peripheral neuropathy, rheumatoid arthritis principally involving the hands, degenerative arthritis (generalized), hypertension, and glaucoma. Dr. Dare rated appellant under

¹¹ 5 U.S.C. § 8107.

¹² 20 C.F.R. § 10.404.

¹³ *Id.*; see *V.J.*, Docket No. 1789 (issued April 8, 2020); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 4 (January 2010).

¹⁵ A.M.A., *Guides* (6th ed. 2009), page 3, Section 1.3, The International Classification of Functioning, Disability, and Health (ICF): A Contemporary Model of Disablement.

¹⁶ *Id.* at 497-522.

¹⁷ *Id.* at 521.

¹⁸ *Id.* at 23-28.

the DBI rating method for bilateral foot arthritis and properly noted that many of her problems related to nonaccepted conditions of rheumatoid arthritis, degenerative arthritis other than in the feet, peripheral neuropathy, and spinal problems. He correctly advised, utilizing Table 16-2 beginning on page 501 of the sixth edition of the A.M.A., *Guides*, that consideration of appellant's diagnostic criteria showed that she fell under class 0 for CDX on a bilateral basis, a finding which corresponded to zero percent permanent impairment of each lower extremity.¹⁹ Dr. Dare correctly determined that there was no ratable permanent impairment related to the accepted conditions. He further opined that the five percent permanent impairment rating provided by Dr. Sotolongo was for conditions not accepted as work related.²⁰ The Board has found that where a claimant does not demonstrate permanent impairment caused by the accepted employment injury, the claim is not ripe for consideration of any nonoccupational or preexisting impairment.²¹

In a February 20, 2018 report, the DMA reviewed the evidence of record, including the January 8, 2018 report of Dr. Dare, and conducted a permanent impairment evaluation under the DBI rating method of the sixth edition of the A.M.A., *Guides*. Utilizing Table 16-2, he determined that appellant's foot condition for each lower extremity fell under class 0 for the CDX, which in turn corresponded to zero percent permanent impairment of each lower extremity. The DMA advised that he agreed with the rating method of Dr. Dare, as delineated in his January 8, 2018 report, and with his conclusion that appellant had zero percent permanent impairment of her lower extremities. He also noted that he disagreed with the comments of Dr. Sotolongo regarding permanent impairment. The Board finds that the DMA also properly determined that there was no ratable permanent impairment related to the accepted conditions.

There is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, which establishes that appellant has permanent impairment of a scheduled member or function of the body. Both Dr. Dare and the DMA properly applied the standards of the sixth edition of the A.M.A., *Guides* while Dr. Sotolongo did not provide an opinion in accordance with the sixth edition of the A.M.A., *Guides*.²² Thus, the Board finds that the opinions of Dr. Dare and the DMA represent the weight of medical opinion evidence. OWCP correctly relied on their assessments that appellant did not sustain permanent impairment of a scheduled member or function of the body warranting a schedule award.²³

¹⁹ *Id.* at 501-08, Table 16-2.

²⁰ In a June 23, 2017 report, Dr. Sotolongo indicated that appellant's arthralgia and pain from stenosis was "determined to be a permanent impairment of the lower legs" and she noted, "It has been determined that she has a five percent impairment rating." Appellant also submitted one page of an incomplete and undated report in which Dr. Sotolongo noted in the diagnosis section of the report, "Permanent impairment -- diagnosis nerve injury (five percent) to lower extremity impairment."

²¹ *See C.T.*, Docket No. 18-0544 (issued May 22, 2019); *Thomas P. Lavin*, 57 ECAB 353 (2006).

²² The Board notes that Dr. Sotolongo made no reference to the A.M.A., *Guides* in providing her impairment rating and therefore her opinion is of little probative value. *See A.C.*, Docket No. 18-1306 (issued October 18, 2019); *Paul R. Evans, Jr.*, 44 ECAB 646 (1993); *John Constantin*, 39 ECAB 1090 (1988) (finding that medical reports not explaining how the A.M.A., *Guides* are utilized are of little probative value).

²³ *See M.T.*, Docket No. 11-1244 (issued January 3, 2012).

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 a scheduled member or function of the body, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board