

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

S.L., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF PRISONS, Lompoc, CA, Employer**

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**Docket No. 20-0188
Issued: July 27, 2021**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On October 31, 2019 appellant filed a timely appeal from an October 22, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant has met his burden of proof to establish that he reached maximum medical improvement (MMI) for schedule award purposes.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the October 22, 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.*

FACTUAL HISTORY

On August 3, 2018 appellant, then a 46-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained left thigh and knee injuries when running to respond to a call for assistance. He felt a pop in his left thigh and leg which buckled, causing him to fall while in the performance of duty. Appellant accepted an August 22, 2018 modified job offer and returned to work on August 24, 2018. OWCP accepted the claim for left thigh fascia and tendon strain, and lumbar ligament sprain.

In an October 5, 2018 report, Dr. James C. Kasper, a Board-certified orthopedic surgeon, noted appellant's history of injury. He reported that appellant's physical examination revealed some tenderness on palpation about the middle third to distal third anteriorly, muscle atrophy throughout the thigh, and pain on flexion. Dr. Kasper concluded that appellant had after effects of a severe muscle strain of his rectus femoris quadriceps muscle. He recommended physical therapy.

In an October 31, 2018 report, Dr. John W. Gainor, a Board-certified orthopedic surgeon, noted appellant's history of injury. He reported that appellant had been diagnosed with a left quadriceps muscle tear, and that appellant had been participating in physical therapy, which was allowing his injury to heal spontaneously. Dr. Gainor noted that appellant felt stronger, no longer had a limp, and wanted to return to his regular work duties.

In a November 28, 2018 report, Dr. Gainor provided examination findings and diagnosed left quadriceps muscle tear. He noted that appellant had returned to his regular job and that his left leg got tired sooner than his right leg. Dr. Gainor also noted that, while appellant did not have an immediate problem, he would have a long-term problem with weakness. Dr. Gainor referred appellant for a permanent impairment rating and determination of whether he had reached MMI.

On February 12, 2019 Dr. Steven Dosch, a Board-certified occupational medicine physician, noted appellant's history of injury and medical treatment, and reviewed appellant's prior medical records, magnetic resonance imaging scans as well as Dr. Gainor's October 31 and November 28, 2018 reports. He reported that appellant had completed left thigh muscle tear treatment although he continued to have mild-to-moderate left thigh pain. Dr. Dosch diagnosed healed minor lumbar sprain and torn rectus femoris tendon of the left thigh quadriceps complex. He noted that, if appellant had flare-ups, he should be allowed to return to Dr. Gainor for treatment. Based on Dr. Gainor's November 28, 2018 report, he determined that appellant had reached MMI and on February 12, 2019 he provided a permanent impairment rating of three percent of the left lower extremity.

In a report dated February 14, 2019, Dr. Gainor reviewed and concurred with the February 12, 2019 permanent impairment rating provided by Dr. Dosch.

On April 1, 2019 appellant filed a claim for a schedule award (Form CA-7).

On April 8, 2019 OWCP referred appellant's case to Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). It requested that he review the medical evidence of record, including Dr. Dosch's February 12, 2019

impairment rating report, and provide an opinion as to the extent of appellant's permanent impairment.

In an April 14, 2019 report, the DMA noted that he had reviewed the medical evidence provided and determined that it was unclear whether appellant had reached MMI³ and, thus, a permanent impairment rating for a schedule award was premature. He noted that Dr. Gainor's reports were not included for his review and there was no documentation regarding appellant's gait or muscle strength in his left versus right thigh. The DMA recommended authorization of physical therapy and noted that, once physical therapy was completed, appellant should undergo a new permanent impairment evaluation.

By decision dated May 21, 2019, OWCP denied appellant's schedule award claim, finding that the evidence of record, as represented by the DMA's report, was insufficient to establish that he had reached MMI.

Following the denial of his schedule award claim, appellant submitted a May 17, 2019 report from Dr. Dosch. In this report, Dr. Dosch reviewed and addressed the issues identified by the DMA in his April 14, 2019 report. Appellant's physical examination findings revealed a normal gait, left mid-thigh circumference measured 44 cm, right mid-thigh circumference measured 47 centimeters, left quadriceps 4/5 weakness and right quadriceps 5/5. Dr. Dosch advised that appellant had completed a course of physical therapy, while under Dr. Gainor's care, and that his February 12, 2019 report remained unchanged.

On July 26, 2019 appellant requested reconsideration. He argued that he had filed his schedule award claim after his physicians indicated that he had reached MMI. Appellant noted that he had undergone physical therapy, as recommended by Dr. Gainor, and that his gait was now normal, but he had 4/5 weakness in his left quadriceps from his accepted employment injury.

By decision dated October 22, 2019, OWCP denied modification, finding that the medical evidence of record was insufficient to establish that appellant had reached MMI.

LEGAL PRECEDENT

FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs, or functions of the body.⁴ Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵

³ The DMA erroneously identified Dr. Chen as the author of the February 12, 2019 impairment rating when the author of the document was in fact Dr. Dosch.

⁴ *Supra* note 1 at 8107.

⁵ 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017).

The Board has explained that permanent impairment may only be rated according to the A.M.A., *Guides* after MMI has been achieved.⁶ An impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur.

The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the injury. The question of when MMI has been reached is a factual one that depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.⁷ The date of MMI is usually considered to be the date of the medical examination that determined the extent of the permanent impairment.⁸

ANALYSIS

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

On April 1, 2019 appellant filed a claim for a schedule award and submitted a report from Dr. Dosch dated February 12, 2019. Dr. Dosch opined that appellant's condition was permanent and stationary as of Dr. Gainor's November 28, 2018 report. Therefore, appellant was found to be at MMI. Dr. Dosch then provided a permanent impairment rating of appellant's left lower extremity, under the A.M.A., *Guides*. He concluded that appellant had three percent permanent impairment of the left lower extremity pursuant to the A.M.A., *Guides*.

On February 14, 2019 Dr. Gainor reviewed Dr. Dosch's impairment rating and concurred with his findings. The Board finds that these reports are not contradicted by substantial evidence of record.⁹ While the DMA in his April 14, 2019 found the evidence insufficient to establish MMI, his opinion was not based upon a complete review of the medical record. Furthermore, while the DMA related that appellant should undergo physical therapy prior to an MMI determination, Dr. Dosch explained that appellant had completed his course of physical therapy.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹⁰ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the

⁶ See *M.J.*, Docket No. 18-0425 (issued September 7, 2018); *A.D.*, Docket No. 17-1996 (issued March 5, 2018); see *B.C.*, Docket No. 16-2062 (issued November 18, 2016).

⁷ *S.M.*, Docket No. 18-0837 (issued January 11, 2019); see *D.S.*, Docket No. 15-1244 (issued August 24, 2015).

⁸ See *A.D.*, *supra* note 6; *W.S.*, Docket No. 16-0344 (issued April 4, 2016).

⁹ See *D.B.*, Docket No. 19-0504 (issued July 22, 2020); *S.T.*, Docket No. 17-1292 (issued February 8, 2018); *E.J.*, Docket No. 20-1482 (issued February 19, 2010).

¹⁰ *B.W.*, Docket No. 19-0965 (issued December 3, 2019); *Vanessa Young*, 55 ECAB 575 (2004).

obligation to see that justice is done.¹¹ Once OWCP undertakes development of the record, it must procure medical evidence that will resolve the relevant issues in the case.¹²

Therefore, the Board finds that the evidence of record establishes that appellant reached MMI based upon the reports of his treating physicians. This case must be remanded to OWCP for further development regarding the degree of appellant's permanent impairment of the left lower extremity. On remand OWCP should refer appellant, together with the case record and a statement of accepted facts, to an appropriate specialist for an examination to determine the extent and degree of appellant's left lower extremity permanent impairment and his entitlement to a schedule award pursuant to 5 U.S.C. § 8107.

After such further development as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹¹ *B.W., id.*; *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹² *B.W., id.*; *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2019 decision of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 27, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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