United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 20-0552**
	)	**Issued: May 14, 2021**
U.S. POSTAL SERVICE, ELMIRA POST OFFICE, Elmira, NY, 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
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On January 13, 2020 appellant, through counsel, filed a timely appeal from a November 12, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.

[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.*

FACTUAL HISTORY

On August 8, 2011 appellant, then a 42-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her left ankle when she stepped into a hole covered with grass while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that she stopped work on August 8, 2011 and did not return. OWCP accepted the claim for left ankle sprain.

A December 10, 2011 x-ray of appellant's left foot was interpreted by Dr. John Chotkowski, a Board-certified radiologist, as normal.

A January 28, 2012 magnetic resonance imaging (MRI) scan of appellant's left ankle revealed a mild sprain of the talofibular ligament, mild tendinopathy of the peroneus longus and brevis tendon without a tear with associated edema in the overlying peroneal retinaculum, and sequela of mild inversion-type injury.

In a June 27, 2012 report, Dr. Beth Dollinger, a Board-certified orthopedic surgeon, indicated that appellant injured her ankle at work on August 8, 2011. Appellant presented with left ankle pain and swelling. Dr. Dollinger conducted a physical examination and diagnosed peroneal tendinitis. She opined that appellant's peroneal tendinitis was causing pain and prevented appellant from returning to work, which required ascending and descending stairs, and walking on uneven ground.

On September 21, 2012 appellant filed a schedule award claim (Form CA-7).

In a December 17, 2012 narrative report Dr. Karen Garvey, Board-certified in preventive and occupational medicine, indicated that she reviewed appellant's medical records and history of injury. Appellant presented with left ankle pain, swelling, and weakness and indicated that she could not perform everyday activities. Physical examination of her left ankle revealed a restricted range of motion (ROM), decreased sensation, and tenderness upon palpation. Using the diagnosis-based impairment method (DBI) of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] Dr. Garvey indicated that she used the ankle sprain diagnosis and assigned a class of diagnosis (CDX) of 3, a grade modifier for functional history (GMFH) of 1, a grade modifier for physical examination (GMPE) of 0, and a grade modifier for clinical studies (GMCS) of 1, finding 14 percent permanent impairment of appellant's left ankle. Using the ROM method, she indicated that appellant's mild plantar flexion impairment correlated with 7 percent impairment and appellant's mild extension impairment correlated with 7 percent impairment, totaling 14 percent permanent impairment. Dr. Garvey also calculated a sural periphery nerve impairment of 3 percent, and calculated a total of 17 percent left lower extremity permanent impairment. She indicated that appellant reached maximum medical improvement (MMI) on February 9, 2012.

In a July 31, 2013 report, Dr. Henry Magliato, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA), reviewed appellant's history of injury and medical

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

records. He indicated that she reached MMI on December 17, 2012 and sustained 14 percent left lower extremity impairment based on Dr. Garvey's calculations.

On March 4, 2014 OWCP requested that Dr. Magliato clarify his report as he had indicated that appellant sustained 14 percent left lower extremity impairment, but had not explained the discrepancy with Dr. Garvey's calculation that she sustained 17 percent left lower extremity permanent impairment.

In a March 10, 2014 letter, Dr. Andrew Merola, a Board-certified orthopedic surgeon serving as a DMA, indicated that Dr. Magliato failed to take into consideration Dr. Garvey's three percent sural peripheral nerve impairment rating. He stated that he reviewed appellant's file, and that, within a reasonable degree of medical certainty, Dr. Garvey's calculations were correct and appellant sustained 17 percent left lower extremity permanent impairment.

In a development letter dated December 9, 2015, OWCP informed appellant that additional evidence was needed to establish her schedule award claim. It advised her of the type of additional medical evidence needed to establish her claim.

By decision dated June 16, 2016, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On June 24, 2016 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated January 9, 2017, the hearing representative vacated OWCP's June 16, 2016 decision and instructed OWCP to refer a statement of accepted facts (SOAF) and appellant's medical records to another DMA to determine if her left lower extremity permanent impairment was causally related to her accepted left ankle sprain and to clarify whether a second opinion examination was needed to determine if her left lower extremity permanent impairment was causally related to her accepted left ankle sprain.

In a February 12, 2017 report, Dr. Jovito Estaris, a Board-certified occupational medicine physician serving as OWCP's DMA, indicated that he reviewed appellant's medical records and SOAF. He reviewed her history of injury and indicated that her condition was accepted for a left ankle sprain. Dr. Estaris opined that Dr. Garvey incorrectly applied the A.M.A., *Guides* to calculate appellant's permanent impairment rating. Utilizing the DBI method of the A.M.A., *Guides*, he used her diagnosis of an ankle strain and peroneal tendinitis and assigned a CDX of 1 and the default value of 5 because she had mild motion deficits. Dr. Estaris assigned a GMFH of 1, a GMPE of 1, and he calculated a total five percent permanent impairment of appellant's ankle. In a separate calculation he used the diagnosis of medial or lateral plantar peripheral nerve impairment and assigned CDX 1 due to mild sensory deficit, a GMFH of 1 due to pain with strenuous activity, a GMPE of 1 due to decreased sensation, and a GMCS of zero due to no clinical studies supporting sensory deficit. Dr. Estaris calculated a one percent peripheral nerve permanent impairment and then calculated a total of six percent permanent impairment of appellant's left lower extremity. He indicated that the ROM method was not available for her diagnosis.

On March 8, 2017 OWCP requested clarification from Dr. Estaris regarding whether appellant's permanent impairment was due to her accepted ankle sprain or due to peroneal tendinitis and whether a second opinion examination was needed. It specifically asked him to review Dr. Dollinger's June 27, 2012 report.

In a March 28, 2017 report, Dr. Estaris reviewed appellant's history of injury including Dr. Dollinger's report and indicated that appellant was initially diagnosed with peroneal tendinitis on March 1, 2012 based on persistent symptoms of pain, swelling, and tenderness over the peroneal tendon. He indicated that the diagnosis was supported by appellant's January 28, 2012 left ankle MRI scan which showed peroneal tendinopathy. Dr. Estaris stated that the typical duration of a mild ankle sprain was four to six weeks when appropriately treated, and peroneal tendinitis was added to explain persistent symptoms. He indicated that, since he provided an impairment rating for the unaccepted conditions of tendinitis of peroneal tendons and plantar peripheral nerve impairment, a reevaluation by an independent medical examiner (IME) was indicated.

In an August 5, 2017 DMA report, Dr. Estaris indicated that he reviewed Dr. Shuler's June 8, 2017 medical report. He explained that appellant's injury started as an ankle sprain, however, her pain persisted, and when pain persists over six weeks, there is a complicating condition like tendinitis or ankle instability. Dr. Estaris opined that her resulting tendinitis was causally related to her accepted ankle sprain.

In a November 24, 2017 letter, OWCP sought clarification from Dr. Garvey. It requested that Dr. Garvey review the reports by Dr. Estaris and Dr. Shuler and provide comments on areas of agreement and disagreement.

On December 8, 2017 counsel asserted that Dr. Garvey had retired and would be unable to provide additional information. He requested that OWCP proceed with a schedule award decision.

By decision dated December 13, 2017, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On December 19, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on June 4, 2018.

By decision dated July 25, 2018, the hearing representative vacated OWCP's December 13, 2017 decision. He expanded acceptance of appellant's claim to include tendinitis and instructed OWCP to return her case to the second opinion examiner to determine if she sustained a permanent impairment of her left lower extremity due to her newly accepted condition. The hearing representative noted that Dr. Shuler's second opinion examination stated that a SOAF referred to medical records that he was unable to review, and it instructed for OWCP to provide him with appellant's medical records, including DMA opinions, impairment ratings, and diagnostic studies. On August 24, 2018 OWCP officially updated her list of accepted conditions to include left ankle tendinitis.

On February 15, 2019 OWCP requested an addendum report from Dr. Shuler. It informed him that appellant's claim had additionally been accepted for left ankle tendinitis and requested

that he determine whether she sustained a permanent impairment due to her newly accepted condition.

In a supplemental report dated February 25, 2019, Dr. Shuler indicated that he did not reexamine appellant. He stated that additional documents reviewed included OWCP's February 15, 2019 SOAF and Dr. Estaris' February 12, March 28, and August 5, 2017 medical reports. Dr. Shuler indicated that the acceptance of the additional condition of tendinitis did not change his previous assessment that appellant sustained zero percent permanent impairment based on his physical examination from his June 8, 2017 report that indicated that she had no significant abnormal findings of a muscle or tendon injury at MMI. He stated that, if there was a need for further objective evaluation of her, an additional examination by a qualified examiner would be appropriate.

In an April 7, 2019 report, DMA Dr. Estaris indicated that he reviewed the SOAF and appellant's medical records. He reviewed her history of injury and using the DBI method of the A.M.A., *Guides*, he referred to Table 16-2 on page 501 and assigned the diagnosis of ankle sprain with tendinitis. Dr. Estaris assigned CDX zero due to no significant abnormalities at MMI, and he stated that appellant's pain questionnaire answers were inconsistent with physical findings. He calculated a zero percent left lower extremity permanent impairment. Using the ROM method, Dr. Estaris stated that Dr. Shuler's physical findings indicated that appellant's ankle ROM were symmetric, and therefore she had zero percent left lower extremity permanent impairment. He indicated that she reached MMI on June 8, 2017.

By decision dated May 9, 2019, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish a permanent impairment of a scheduled member or function of the body.

On May 15, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on August 26, 2019.

By decision dated November 12, 2019, an OWCP hearing representative affirmed OWCP's May 9, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[4] and its implementing regulations[5] 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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

adoption.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[7]

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).[8] 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 net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grids and calculations of modifier scores.[10]

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*.[11]

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[12] For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.[13] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[14]

ANALYSIS

The Board finds that this case is not in posture for decision as there remains an unresolved conflict in medical opinion with regard to the nature and extent of appellant's left lower extremity impairment.

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

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *id*. at Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] A.M.A., *Guides*, page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[9] *Id*. at 494-531

[10] *Supra* note 7; *see R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[11] *Supra* note 7 at Chapter 2.808.6(f) (March 2017); *B.B.*, Docket No. 18-0782 (issued January 11, 2019).

[12] 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321; *see also C.B.*, Docket No. 19-0464 (issued May 22, 2020); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[13] *R.N.*, Docket No. 19-1685 (issued February 26, 2020); *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[14] *Y.I.*, Docket No. 20-0263 (issued November 30, 2020); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

Section 8123(a) of FECA provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[15] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[16] Where a case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[17]

In a December 17, 2012 narrative report, Dr. Garvey, noted that appellant presented with left ankle pain, swelling, and weakness and indicated that appellant could not perform everyday activities. A physical examination of her left ankle revealed a restricted ROM, decreased sensation, and tenderness upon palpation. Using the DBI of the sixth edition of the A.M.A., *Guides*, Dr. Garvey indicated that appellant used the ankle sprain diagnosis and assigned a CDX of 3, a GMFH of 1, a GMPE of 0, and a GMCS of 1, finding 14 percent permanent impairment of appellant's left ankle. Using the ROM method, she indicated that appellant's mild plantar flexion impairment correlated with 7 percent impairment rating and appellant's mild extension impairment correlated with 7 percent impairment rating, for a total of 14 percent permanent impairment. Dr. Garvey also calculated a sural periphery nerve impairment of 3 percent, for a total of 17 percent left lower extremity permanent impairment.

Dr. Shuler, OWCP's referral physician, in a June 8, 2017 report, noted that he conducted a physical examination which revealed nonantalgic gait, full strength, and no swelling in the left ankle, and symmetrical ankle ROM and reflexes. He indicated that appellant did not have peroneal tendinitis of the left ankle, and he stated that he found no objective findings of ongoing symptoms related to her accepted August 8, 2011 employment injury. Dr. Shuler opined that her accepted condition of an ankle sprain was no longer existent, and noted that her pain disability questionnaire results were inconsistent with his objective findings. Using the DBI method of the A.M.A., *Guides*, he utilized the ligament section of the Foot and Ankle Regional Grid and assigned a CDX of 0 due to no significant objective abnormal findings of the muscle or tendon injury at MMI. Dr. Shuler stated that appellant's functional history was considered invalid because it grossly deviated from his observable objective findings and her history. He further indicated that there was no need for a GMFH, GMCS, and GMPE and, therefore, she sustained zero percent permanent impairment of her left lower extremity. Dr. Shuler additionally noted that there was no evidence of peripheral nerve impairment. He further noted that, according to the ROM method, appellant also sustained zero percent left lower extremity permanent impairment. In a supplemental report dated February 25, 2019, Dr. Shuler noted that the acceptance of the additional condition of the left lower extremity did not change his previous assessment that she sustained zero percent permanent impairment based on his physical examination from his June 8, 2017 report that indicated that she had no significant abnormal findings of a muscle or tendon injury at MMI. He

[15] 5 U.S.C. § 8123(a).

[16] *T.J.*, Docket No. 20-0721 (issued November 17, 2020).

[17] *Id*.

stated that, if there was a need for further objective evaluation of appellant, an additional examination by a qualified examiner would be appropriate.

The Board, therefore, finds that there is a conflict in the medical opinions between Drs. Garvey and Shuler as to the extent of appellant's left lower extremity permanent impairment. As there is a conflict in the medical evidence as to the extent of disability, the case must be remanded to OWCP for referral to an IME for resolution of the conflict in accordance with 5 U.S.C. § 8123(a).[18]

On remand, OWCP shall refer appellant, along with the case file and an SOAF, to an appropriate specialist for an impartial medical evaluation and a report including a rationalized opinion as to whether she sustained permanent impairment of her left lower extremity, warranting a schedule award. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 12, 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: May 14, 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

[18] *Supra* note 12-13; *see also R.K.*, Docket No. 19-0247 (issued August 1, 2019).