

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

C.K., Appellant)	
)	
and)	Docket No. 20-0680
)	Issued: July 5, 2022
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Rosemont, IL, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 7, 2020 appellant, through counsel, filed a timely appeal from a January 7, 2020 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 OWCP properly determined the dates of maximum medical improvement (MMI) as August 7, 2017 and March 7, 2018 for schedule award purposes.

FACTUAL HISTORY

On November 2, 2014 appellant, then a 53-year-old supervisory transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on October 31, 2014 she twisted her left ankle and knee when she tripped on uneven pavement and a small hole in the ground as she attempted to board an employing establishment shuttle bus while in the performance of duty. She did not stop work. OWCP accepted appellant's claim for sprain of the left shoulder rotator cuff and arm and other tear of the medial meniscus of the left knee, current. It paid appellant wage-loss compensation on the supplemental rolls as of December 16, 2014. Appellant underwent OWCP-authorized left knee arthroscopic surgery on February 12, 2015 and total left knee arthroplasty on February 18, 2016, both performed by Dr. David J. Smith, an attending Board-certified orthopedic surgeon. OWCP paid appellant wage-loss compensation on the periodic rolls, commencing February 8, 2015.

By letter dated November 2, 2016, Dr. Smith advised that appellant had reached MMI regarding her accepted left knee condition.

On November 22, 2016 appellant filed a claim for compensation (Form CA-7) for a schedule award.

OWCP, by development letter dated December 19, 2016, requested that Dr. Smith provide an opinion addressing appellant's date of MMI and providing a rating of her permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ It also requested that Dr. Smith respond within 30 days. Dr. Smith did not respond within the allotted time.

OWCP, by decision dated June 1, 2017, denied appellant's claim for a schedule award as the evidence of record was insufficient to establish that she sustained permanent impairment to a member or function of the body.

On June 8, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Thereafter, OWCP received an April 10, 2017 report by Dr. Smith who indicated that the range of motion (ROM) of appellant's left knee was 0 to 120 degrees and advised that she had a stable knee.

OWCP also received an August 7, 2017 report by Dr. Neil Allen, a Board-certified internist and neurologist. Dr. Allen rated permanent impairment of appellant's left upper extremity under ROM in the sixth edition of the A.M.A., *Guides*, and opined that she had eight percent permanent

³ A.M.A., *Guides* (6th ed. 2009).

impairment of the left upper extremity. He rated permanent impairment of her left lower extremity under the diagnosis-based impairment (DBI) rating method and opined that she had 37 percent permanent impairment of the left lower extremity. Dr. Allen noted that appellant reached MMI as of the date of his impairment evaluation.

By decision dated October 5, 2017, OWCP's hearing representative set aside the June 1, 2017 decision and remanded the case for further development. She instructed OWCP to refer the case record, including Dr. Allen's August 7, 2017 impairment ratings, to an OWCP district medical adviser (DMA) for review, pursuant to the sixth edition of the A.M.A., *Guides*.

On January 5, 2018 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, reviewed a statement of accepted facts (SOAF) and the medical record, including Dr. Allen's August 7, 2017 report. He agreed with Dr. Allen's eight percent ROM impairment rating for the left upper extremity. The DMA utilized the DBI rating method and found that appellant had four percent permanent impairment of the left upper extremity. He advised that, since the ROM impairment rating was greater than the DBI impairment rating, the ROM impairment rating should be used. The DMA determined that appellant reached MMI on August 7, 2017, the date of Dr. Allen's impairment evaluation. He advised that he could not provide an impairment rating for the left lower extremity as Dr. Allen's ROM findings conflicted with those of Dr. Smith. The DMA recommended a second opinion evaluation by a Board-certified physiatrist or orthopedic surgeon with regard to the nature and extent of appellant's permanent impairment.

On February 14, 2018 OWCP referred appellant, together with a SOAF, the case record, and a series of questions, to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion evaluation and an opinion on permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In a March 7, 2018 report, Dr. Dinenberg utilized the DBI rating method under the sixth edition of the A.M.A., *Guides*, and determined that appellant had 25 percent permanent impairment of the left lower extremity. He determined that she had three percent permanent impairment of the left upper extremity under the DBI method. Alternatively, Dr. Dinenberg found that appellant had six percent permanent impairment of the left upper extremity under the ROM rating method. He advised that she reached MMI on the date of his impairment evaluation.

On March 15, 2018 the DMA, Dr. Katz, reviewed Dr. Dinenberg's March 7, 2018 findings. He agreed with Dr. Dinenberg's finding that appellant had 25 percent permanent impairment of the left lower extremity and that she had reached MMI on March 7, 2018. Additionally, the DMA advised that his prior agreement with Dr. Allen's eight percent left upper extremity permanent impairment rating remained unchanged. He noted that the difference between Dr. Allen's left upper extremity ROM impairment rating was reasonably close to Dr. Dinenberg's six percent ROM left upper extremity impairment.

On May 9, 2018 OWCP referred appellant to Dr. Jorge A. Rodriguez, a Board-certified orthopedic surgeon, for an impartial medical examination, to resolve a conflict in medical opinion regarding her work capacity. In a June 18, 2018 report, Dr. Rodriguez reviewed the SOAF and medical records and discussed examination findings. He did not address the extent of appellant's

permanent impairment, but he agreed with Dr. Dinenberg's finding that she had reached MMI regarding her employment-related left shoulder and left knee conditions and authorized left knee surgery. Dr. Rodriguez opined that appellant could return to work with restrictions. In response to OWCP's September 4, 2018 request for a supplement report, Dr. Rodriguez, in a September 27, 2018 letter, advised that appellant could perform primarily sedentary limited-duty work after undergoing vocational rehabilitation.

By decision dated July 22, 2019, OWCP granted appellant a schedule award for eight percent permanent impairment of the left upper extremity based on Dr. Allen's August 7, 2017 report and Dr. Katz' January 8, 2018 report. The period of the award ran for 174.72 weeks from August 7, 2017 through January 28, 2018. OWCP also granted appellant a schedule award for 25 percent permanent impairment of the left lower extremity based on Dr. Dinenberg's March 7, 2018 report and the DMA, Dr. Katz', March 16, 2018 report. The period of the award ran for 504 weeks from March 7, 2018 through July 23, 2019.⁴

On July 23, 2019 appellant filed a Form CA-7 for an additional schedule award.

On August 13, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review regarding the July 22, 2019 decision.

By decision dated January 7, 2020, OWCP's hearing representative affirmed in part the July 22, 2019 decision regarding the commencement dates of appellant's schedule award, but set aside in part the decision and remanded the case to OWCP for appropriate calculation of the retroactive period of the schedule award based on monetary values and appropriate notification to appellant regarding her right to receive OPM benefits during the periods covered by the schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing regulations⁶ 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 shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁷ As of May 1, 2009, schedule awards are determined in

⁴ In a form dated May 7, 2019, appellant elected to receive OPM retirement benefits, effective August 6, 2019.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

accordance with the sixth edition of the A.M.A., *Guides* (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

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.¹⁰ The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.¹¹

A claimant may not receive compensation for temporary total disability based on his or her loss of wage-earning capacity and a schedule award covering the same period of time.¹²

ANALYSIS

The Board finds that OWCP properly determined the dates of MMI as August 7, 2017 and March 7, 2018 for schedule award purposes.

The DMA, Dr. Katz, found in his January 8, 2018 report that appellant reached MMI regarding her left upper extremity on August 7, 2017, the date of the impairment evaluation conducted by her physician, Dr. Allen. Dr. Rodriguez, the IME, determined in his June 18, 2018 report that appellant had reached MMI regarding her left lower extremity on March 7, 2018, the date of the impairment evaluation performed by OWCP's referral physician, Dr. Dinenberg. As noted above, the date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.¹³ Based on the probative medical evidence of record, the July 22, 2019 schedule award properly included the dates of MMI as August 7, 2017 and March 7, 2018.¹⁴ As the schedule award for the left upper extremity commenced on August 7, 2017 and covered 174.72 weeks of compensation, the end date was on January 28, 2018.

⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *supra* note 3 at Chapter 2.808.5a (March 2017).

⁹ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ *C.H.*, Docket No. 19-1639 (issued April 3, 2020); *K.J.*, Docket No. 19-0901 (issued December 6, 2019); *E.M.*, Docket No. 14-1075 (issued November 3, 2014); *C.W.*, Docket No. 13-1501 (issued November 15, 2013); *Peter C. Belkind*, 56 ECAB 580 (2005); *Marie J. Born*, 27 ECAB 623 (1976), *petition for recon. denied*, 28 ECAB 89 (1976).

¹¹ See *supra* note 8 at Chapter 3.700.3 (January 2010); see *C.W., id.*; *Richard Larry Enders*, 48 ECAB 184 (1996) (the date of MMI was the date of the audiologic examination used as the basis of the schedule award).

¹² See *E.M.*, *supra* note 10; *A.H.*, Docket No. 07-2101 (issued August 7, 2008); *James A. Earle*, 51 ECAB 567 (2000); *Eugenia L. Smith*, 41 ECAB 409 (1990); *Marie J. Born*, *supra* note 10.

¹³ *Supra* note 11.

¹⁴ *Id.*

Additionally, as the schedule award for the left lower extremity began on March 7, 2018 and covered 504 weeks of compensation, the end date was on July 23, 2019.

The Board, therefore, finds that OWCP properly determined that appellant's date of MMI was August 7, 2017 regarding her left upper extremity and March 7, 2018 regarding her left lower extremity.

CONCLUSION

The Board finds that OWCP properly determined the dates of MMI as August 7, 2017 and March 7, 2018 for schedule award purposes.

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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