United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 22-0625**
	)	**Issued: October 27, 2022**
DEPARTMENT OF VETERANS AFFAIRS, SEPULVEDA VA MEDICAL CENTER, Sepulveda, CA, Employer	)	

Appearances:
Brett E. Blumstein, 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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 24, 2022 appellant, through counsel, filed a timely appeal from a December 14, 2021 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.

[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 his burden of proof to establish permanent impairment of his right lower extremity, warranting a schedule award.

FACTUAL HISTORY

On January 25, 2016 appellant, then a 42-year-old housekeeping aid, filed an occupational disease claim (Form CA-2) alleging that he developed two broken sesamoid bones in his right foot due to factors of his federal employment. He noted that he first became aware of his condition and realized its relation to his federal employment on September 5, 2015. Appellant stopped work on January 20, 2016 and returned to full-time modified duty on February 8, 2016. OWCP accepted his claim for right foot fracture and unspecified complications due to medical care. By decision dated June 18, 2019, it expanded the acceptance of appellant's claim to include right foot metatarsalgia.

On September 24, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

OWCP received an August 19, 2020 report by Dr. Dawn Quashie, a Board-certified family medicine specialist, who noted that appellant had reached maximum medical improvement (MMI). Dr. Quashie indicated that appellant was involved in a work-related accident and currently complained of an increase in symptoms, including right foot pain. On examination of appellant's right ankle, she observed reduced range of motion in all ranges due to pain. Dr. Quashie diagnosed right foot metatarsalgia and complex regional pain syndrome (CRPS) of the right lower extremity. She referenced the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*)[3] and utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 16-15, (Complex Regional Pain Syndrome -- Lower Extremity Impairments), page 541, appellant had a class of diagnosis (CDX) of 1, which resulted in a default value of seven percent, based on objective criteria points greater than four points. Dr. Quashie assigned a grade modifier for functional history (GMFH) of 2 for gait derangement, a grade modifier for physical examination (GMPE) of 2 for range of motion, and a grade modifier for clinical studies (GMCS) of 1 for nerve conduction testing, which resulted in a grade E, for a final impairment of 13 percent permanent impairment of the right lower extremity.

In an October 2, 2020 development letter, OWCP requested that appellant submit an impairment rating report, which applied the standards of the sixth edition of the A.M.A., *Guides*. It afforded him 30 days to submit the requested evidence.

On December 2, 2020 OWCP forwarded Dr. Quashie's August 19, 2020 report to Dr. James W. Butler, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and opinion on whether appellant sustained a permanent impairment of his right lower extremity under the A.M.A., *Guides*. In a report dated December 12, 2020, Dr. Butler indicated that he was unable to provide an impairment rating based on Dr. Quashie's examination findings. He reported that there was no evidence of nerve conduction testing and no

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

examination by Dr. Quashie to assess how she determined that appellant had four points or more for a CRPS condition.

OWCP received a March 28, 2019 electromyography (EMG) and nerve conduction velocity (NCV) studies, which demonstrated mild findings of distal slowing across multiple lower extremity nerves, consistent with mild demyelinating peripheral polyneuropathy without evidence of axonal loss.

In an April 19, 2021 addendum report, the DMA, noted that he had reviewed the March 29, 2019 EMG/NCV studies report, but was unable to assign an impairment rating based on the evidence of record. He indicated that the best diagnosis that he could support was possibly metatarsalgia, but there were no examination findings of appellant's foot, other than range of motion. Dr. Butler recommended a referee examination by someone familiar with foot impairment ratings under the A.M.A., *Guides*.

On August 12, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Seth L. Jaffe, an osteopath specializing in orthopedic surgery, for a second opinion examination in order to determine whether he had sustained permanent impairment of a scheduled member or function of the body due to his accepted right lower extremity condition in accordance with the A.M.A., *Guides*. In a report dated September 8, 2021, Dr. Jaffe noted his review of the case record and indicated that appellant's claim was accepted for pathological fracture of the right foot and metatarsalgia. On examination of appellant's right foot, he observed mild tenderness under the first metatarsal phalangeal (MTP) joint and normal range of motion. Sensory examination revealed intact sensation to light touch. Dr. Jaffe reported that examination of appellant's right ankle revealed no tenderness or swelling and normal range of motion. He diagnosed complex regional pain syndrome, type 1, of the right lower extremity and sesamoiditis. Dr. Jaffe noted that appellant had reached MMI as of that date. He explained that he would provide an impairment rating based on CRPS because all the other conditions had resolved. Dr. Jaffe referenced Table 16-13, Table 16-14, and Table16-15 of the A.M.A., *Guides* and determined that appellant was a class 1 due to lack of objective findings for a default value of one percent permanent impairment.

On September 29, 2021 OWCP requested that Dr. Butler, the DMA, review Dr. Jaffe's September 8, 2021 second opinion report and provide an addendum report with his opinion and comments.

In a November 1, 2021 amended report, Dr. Butler indicated that he had reviewed Dr. Jaffe's September 8, 2021 report and disagreed with his impairment rating. He explained that the examination by Dr. Jaffe did not confirm the presence of CRPS under Table 16-13, Table 16-14, and Table 16-15. Dr. Butler reported that there were no consistent examination findings to support the condition of CRPS in the right lower extremity. He determined that appellant had no ratable, permanent impairment warranting a schedule award.

By decision dated November 30, 2021, OWCP denied appellant's schedule award claim, finding that the weight of the medical opinion evidence regarding right lower extremity permanent impairment rested with the opinion of Dr. Jaffe, the DMA.

The November 30, 2021 OWCP decision was returned as undeliverable.

On December 14, 2021 OWCP reissued a decision denying appellant's schedule award claim based on the opinion of Dr. Jaffe, the DMA.[4]

LEGAL PRECEDENT

The schedule award provisions of FECA[5] and its implementing regulations[6] 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 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.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[8]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the foot, the relevant portion of the leg for the present case, reference is made to Table 16-2 (Foot and Ankle Grid) beginning on page 501.[9] After the CDX is determined from the Foot and Ankle Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using GMFH, GMPE, and GMCS. The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[11]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and

[4] The decision was sent to appellant's current address of record.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

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

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

[9] *See* A.M.A., *Guides* (6th ed. 2009) 501-08, Table 16-2.

[10] *Id.* at 515-22.

[11] *Id.* at 23-28.

percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.[12]

ANALYSIS

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

By decision dated December 14, 2021, OWCP denied appellant's schedule award claim, finding that the weight of the medical opinion evidence rested with the November 1, 2021 report of Dr. Butler, the DMA, who determined that appellant had no ratable permanent impairment of the right lower extremity for the condition of complex regional pain syndrome. In the September 29, 2021 memorandum to the DMA, OWCP noted the accepted condition of right foot metatarsalgia. In his reports dated December 12, 2020, April 19 and November 1, 2021; however, Dr. Butler only provided a permanent impairment addressing permanent impairment for CRPS, not the accepted right foot metatarsalgia condition.[13]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[14] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[15] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve all of the relevant issues in the case.[16]

The Board, therefore, finds that the case must be remanded for OWCP to seek clarification or obtain a supplemental report from Dr. Butler regarding whether appellant sustained a permanent impairment due to his accepted right foot conditions. On remand OWCP should request that Dr. Butler provide an impairment rating based on appellant's accepted right foot conditions and support his conclusion with medical rationale. 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.

[12] *Supra* note 8 at Chapter 2.808.6(f) (March 2017).

[13] *See J.D.*, Docket No. 21-0425 (issued January 24, 2022).

[14] *See R.R.*, Docket No. 18-0914 (issued February 24, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

[15] *C.T.*, Docket No. 20-0043 (issued April 20, 2021); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[16] *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2021 merit 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: October 27, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board