United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
and	)	**Docket No. 22-0311**
	)	**Issued: September 21, 2022**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Hazelwood, MO, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 28, 2021 appellant, through counsel, filed a timely appeal from a November 4, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).

ISSUE

This issue is whether appellant has reached maximum medical improvement (MMI), for schedule award purposes.

[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.

FACTUAL HISTORY

On March 22, 2017 appellant, then a 44-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she developed cervical radiculopathy, and left arm tendinitis due to factors of her federal employment. She stopped work on March 17, 2017.

By decision dated July 5, 2017, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis causally related to the accepted employment factors. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On July 14, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

On November 21, 2017 Dr. Mark E. Belew, a Board-certified orthopedic surgeon, diagnosed full-thickness rotator cuff tear and noted that appellant's pain began due to repetitive lifting of heavy boxes.

By decision dated March 29, 2018, an OWCP hearing representative found that Dr. Belew's opinion was sufficient to require further development of the record. He set aside the July 5, 2017 decision and remanded the case for further development. On remand, the hearing representative instructed OWCP to refer appellant for a second opinion evaluation.

On May 8, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), the medical record, and list of questions, to Dr. Charles Mannis, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated June 4, 2018, Dr. Mannis noted appellant's physical examination findings and diagnosed status post left shoulder rotator cuff repair, probable left biceps tenodesis, and cervical radiculopathy. He related that it appeared her complaints were due to repetitive heavy lifting and might have been increased by lifting heavy boxes.

By decision dated November 30, 2018, OWCP accepted the claim for cervical radiculopathy.

On January 22, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In an April 19, 2019 report, Dr. Neil Allen, a Board-certified internist and neurologist, provided appellant's physical examination findings. He referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[2] and utilized the diagnosis-based impairment (DBI) rating method under *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) to rate appellant's permanent impairment. Dr. Allen opined that appellant

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

had nine percent permanent impairment of the right upper extremity, due to motor loss from her C6 peripheral nerve impairment.

In a July 11, 2019 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), concurred with Dr. Allen's permanent impairment rating. He found April 9, 2019, the date appellant was evaluated by Dr. Allen, was the date of MMI.

By decision dated September 16, 2019, OWCP granted appellant a schedule award for nine percent permanent impairment of the right upper extremity. The award ran for 28.08 weeks during the period April 9 to October 22, 2019.

On September 23, 2019 appellant, through counsel requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated December 4, 2019, OWCP's hearing representative set aside the September 16, 2019 schedule award decision, finding that the opinion of Dr. Mannis required clarification regarding which diagnosed conditions were causally related to the accepted employment injury. The hearing representative explained that Dr. Mannis suggested that appellant's left shoulder rotator cuff tear was causally related to the accepted employment injury. In addition, he found the evidence unclear as to how OWCP determined that appellant had nine percent permanent impairment of her right upper extremity due to the accepted factors of her federal employment. On remand, OWCP's hearing representative instructed OWCP to provide an updated statement of accepted facts and augmented medical record to Dr. Mannis for a rationalized opinion regarding which conditions were causally related to appellant's accepted employment injury and whether these conditions caused permanent impairment.

OWCP noted on July 21, 2020 that Dr. Mannis had retired. On July 29, 2020 it referred appellant to Dr. Michael H. Ralph, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In an August 14, 2020 report, Dr. Ralph diagnosed severe cervical stenosis, which he opined was a congenital condition.

On March 20, 2021 OWCP referred appellant to Dr. Eddie W. Runde, a Board-certified occupational medicine physician, for second opinion evaluation and assessment of her work-related condition and any resulting permanent impairment. In an April 16, 2021 report, Dr. Runde diagnosed left rotator cuff tear with impingement, possible right shoulder strain, status post left shoulder open acromioplasty with subacromial decompression, status post left shoulder rotator cuff repair, severe disc/endplate degenerative changes at multiple levels, moderate-to-severe C3-4 to C6-7, cervical myelopathy, and bilateral upper extremity pain. He found that appellant had 3 percent permanent impairment of the upper extremities due to employment-related shoulder conditions and 25 percent whole person permanent impairment due to her cervical radiculopathy/myelopathy. Dr. Runde opined that appellant's degenerative conditions are not considered work related as they were chronic conditions associated with aging. With respect to the left shoulder rotator cuff tear, he opined that it could have occurred due to a work injury on or after August 11, 2017, that a right shoulder strain could be employment related, but should have

resolved, and that he could not state with certainty that appellant's cervical radiculopathy was due to her work duties.

In a report dated July 2, 2021, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as the DMA, advised that the date of MMI was undetermined pending further information. He recommended that appellant be referred for another second opinion evaluation with a Board-certified physiatrist, or a Board-certified orthopedic surgeon.

On July 23, 2021 OWCP referred appellant back to Dr. Ralph for a supplemental opinion. Dr. Ralph, in an August 17, 2021 report, noted that he had previously addressed the diagnoses causally related to the accepted employment injury, and opined that appellant had 13 percent permanent impairment of the whole body. He related that he could not address the date of MMI without additional medical information.

On October 27, 2021 Dr. Katz again found the date of MMI undetermined and recommended that appellant be referred for another second opinion evaluation with a Board-certified physiatrist, or a Board-certified orthopedic surgeon.

By decision dated November 4, 2021, OWCP found that no additional action could be taken regarding appellant's schedule award claim as the evidence of record was insufficient to establish that she had reached MMI.

LEGAL PRECEDENT

Permanent impairment is to be rated according to the A.M.A., *Guides*, and only after the status of MMI is determined. Before a schedule award can be awarded, it must be medically determined that no further improvement can be anticipated and the impairment must reach a fixed and permanent state, which is known as MMI.[3] MMI means that the physical condition of the injured member of the body has stabilized and will not improve further.[4]

Impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur. This will depend on the nature of underlying pathology, as the optimal duration for recovery may vary considerably. The clinical findings must indicate that the medical condition is static and well stabilized for the person to have reached MMI.[5]

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

[3] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3a(1) (January 2010); *see also J.D.*, Docket No. 19-0032 (issued June 10, 2021); *C.R.*, Docket No. 17-1872 (issued March 8, 2018); *P.L.*, Docket No. 13-1340 (issued October 28, 2013).

[4] *J.D., id.*; *C.R., id.*; *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

[5] A.M.A., *Guides* 24 (6th ed. 2009); *see Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until MMI -- meaning that the physical condition of the injured member of the body has stabilized and will not improve further -- has been reached); *see J.D., id.*; *R.I.*, Docket No. 09-1559 (issued August 23, 2010).

made in each case upon the basis of the medical evidence in that case.[6] The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.[7]

The Board has also noted a reluctance to find a date of MMI which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of MMI if OWCP selects a retroactive date.[8] The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician, which is accepted as definitive by OWCP.[9]

ANALYSIS

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

By decision dated December 4, 2019, OWCP's hearing representative remanded the case for OWCP to obtain clarification from Dr. Mannis as to the conditions causally related to appellant's accepted employment injury and whether she had any additional permanent impairment. Since Dr. Mannis had retired, OWCP referred her to Dr. Ralph. In an August 14, 2020 report, Dr. Ralph diagnosed severe cervical stenosis, which he concluded was unrelated to her work factors. OWCP thereafter referred appellant to Dr. Runde. In an April 16, 2021 report, Dr. Runde opined that appellant's degenerative conditions were not work related, her left shoulder rotator cuff tear and right shoulder strain might be work related, and that he was uncertain as to whether her cervical radiculopathy was work related. OWCP then referred appellant back to Dr. Ralph. In an August 17, 2021 report, Dr. Ralph opined that appellant had 13 percent permanent impairment of the whole body. He also related that he could not address the date of MMI without additional medical information. Dr. Katz, the DMA, on October 27, 2021 reviewed the medical record and recommended that OWCP refer appellant for a second opinion with a Board-certified physiatrist or an orthopedic surgeon, to address her work-related conditions, whether they caused permanent impairment, and if so the date of MMI. OWCP, however, did not carry out this recommendation.

The Board notes that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[10] Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case. While it undertook development of the evidence, it failed to refer appellant for another second opinion evaluation in

[6] *J.D., id.*; *C.H.*, Docket No. 19-1639 (issued April 3, 2020); *Peter C. Belkind*, 56 ECAB 580 (2005); *Marie J. Born*, 27 ECAB 623 (1976).

[7] *Supra* note 3 at Chapter 3.700.3 (January 2010).

[8] *J.D., supra* note 3; *C.H., supra* note 6; *C.W.*, Docket No. 13-1501 (issued November 15, 2013).

[9] *J.D., id.*; *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *C.H., id.*

[10] *See T.C.*, Docket No. 19-0771 (issued March 17, 2021); *E.W.*, Docket No. 17-0707 (issued September 18, 2017).

accordance with the recommendation of Dr. Katz, the DMA, regarding any additional diagnoses that should be accepted in this case, whether they caused permanent impairment, and whether and when appellant reached MMI. Therefore, OWCP failed to resolve the underlying issues in this case.[11] On remand OWCP shall secure another second opinion evaluation as recommended by Dr. Katz, the DMA. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision on appellant's claim for a schedule award.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2021 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: September 21, 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

[11] *T.C.*, *id.*; *X.Y.*, Docket No. 19-1290 (issued January 24, 2020); *K.G.*, Docket No. 17-0821 (issued May 9, 2018).