

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

V.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Greensboro, NC, Employer)

Docket No. 23-0874
Issued: November 30, 2023

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 June 15, 2023 appellant, through counsel, filed a timely appeal from a February 2, 2023 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.

ISSUE

The issue is whether appellant has established that his date of maximum medical improvement (MMI) for schedule award purposes predated OWCP's May 1, 2016 termination of

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.*

his wage-loss compensation and entitlement to a schedule award for refusal of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On January 17, 2013 appellant, then a 49-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained lower back, hip, and elbow injuries when he was struck by a postal container (postcon). He stopped work on January 17, 2013 and returned to modified work on January 22, 2013. OWCP accepted the claim for lumbar sprain, and subsequently expanded the acceptance of the claim to include lumbar intervertebral disc displacement without myelopathy, and L3-4, L4-5, and L5-S1 herniated discs. Appellant underwent authorized left-sided microdiscectomy with decompression of the left L4 and 5 nerve roots on May 12, 2014. OWCP paid him wage-loss compensation on the supplemental rolls commencing March 27, 2013, and on the periodic rolls commencing September 22, 2013.

In a second opinion report dated March 24, 2015, Dr. Seth L. Jaffe, an osteopathic physician Board-certified in orthopedic surgery, related appellant's history of medical treatment, and opined that appellant's lumbar sprain had resolved, that appellant's L4-5 and L5-S1 conditions had resolved following lumbar discectomy, and that appellant still had a bulging disc at L3-4. He concluded that appellant had reached MMI, although he was uncertain of the exact date, but that it was sometime after his final surgery, probably no later than in 2014.

In a letter dated February 18, 2016, OWCP informed appellant that the employing establishment had provided him with a suitable position as a modified mail processing clerk. It related that he had 30 days to accept the position and was advised that, under section 8106(c)(2) of FECA (5 U.S.C. § 8106(c)(2)), if he refused a suitable work position, his compensation benefits for wage loss or a schedule award would be terminated. OWCP, in a letter dated March 31, 2016, found the medical evidence and reasons given for refusing the offered position were not valid. It informed appellant that he had 15 days to accept the position and advised that, under section 8106(c)(2) of FECA, if he refused a suitable position, his wage-loss compensation and entitlement to a schedule award would be terminated.

By decision dated April 25, 2016, OWCP terminated appellant's wage-loss compensation benefits and entitlement to a schedule award, effective May 1, 2016, pursuant to 5 U.S.C. § 8106(c)(2) for refusal of suitable work.

On May 23, 2016 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated February 28, 2017, OWCP's hearing representative affirmed the April 25, 2016 termination decision.

On December 13, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

OWCP received a February 28, 2018 permanent impairment rating from Dr. Joshua B. Macht, a Board-certified internist. Using *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), which was a

supplemental publication of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ Dr. Macht found that appellant had 16 percent right lower extremity permanent impairment and 11 percent left lower extremity permanent impairment for motor and sensory loss from the bilateral lumbar radiculopathy caused by the accepted January 17, 2013 employment injury. He found appellant had reached MMI as of February 23, 2018, the date of his evaluation.

On March 25, 2018 Dr. Jovito Estaris, a Board-certified orthopedic surgeon, in his capacity as OWCP's district medical adviser (DMA), recommended that appellant be referred to a second opinion physician to provide an impairment rating using *The Guides Newsletter*.

In a report dated April 20, 2018, Dr. Chason Hayes, a Board-certified orthopedic surgeon and OWCP referral physician, concluded that appellant had zero percent permanent impairment using the sixth edition of the A.M.A., *Guides*. He found September 1, 2014 as the date of MMI as this was the last date appellant had received medical treatment for his back condition.

On May 29, 2018 the DMA, Dr. Estaris, reviewed the medical evidence including the April 20, 2018 report from Dr. Hayes. Using *The Guides Newsletter* and Dr. Hayes' examination findings, he found that appellant had zero percent bilateral lower extremity permanent impairment. Dr. Estaris found the date of MMI to be April 20, 2018, the date of Dr. Hayes' examination and impairment rating. He noted that there was no medical report dated September 1, 2014 and Dr. Macht found the date of MMI to be February 23, 2018. Dr. Estaris explained that April 20, 2018 was a more appropriate MMI date because a medical examination was conducted that day and an impairment rating was provided.

By decision dated June 8, 2018, OWCP denied appellant's claim for a schedule award, finding that he had not established permanent impairment of a scheduled member or function of the body due to his accepted employment injury.

On June 14, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. Following a preliminary review, by decision dated October 4, 2018, OWCP's hearing representative found a conflict in the medical opinion evidence between Dr. Macht, appellant's examining physician, and Dr. Hayes, OWCP's second opinion physician, regarding appellant's permanent impairment rating and the date of MMI. She remanded the case for OWCP to refer appellant for an impartial medical examination to resolve the conflict in the medical opinion evidence.

On July 13, 2021 OWCP referred appellant, together with a statement of accepted facts (SOAF) and medical record, to Dr. Jaffe, for a second opinion evaluation to determine whether he sustained a permanent impairment due to his accepted employment injury and the date of MMI.

In a report dated August 3, 2021, Dr. Jaffe found nine percent permanent impairment of the lumbar spine under Table 17-4, pages 570 to 574 of the A.M.A. *Guides*, and no permanent impairment under *The Guides Newsletter*, as appellant's complaints were subjective. He noted that

³ A.M.A., *Guides* (6th ed. 2009).

he had previously examined appellant in 2015 and had concluded that appellant reached MMI probably no later than 2014.

In a report dated August 26, 2021, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP DMA, reviewed the SOAF and medical evidence including the August 3, 2021 report from Dr. Jaffe. He found that appellant had zero percent bilateral lower extremity permanent impairment pursuant to *The Guides Newsletter* as he did not have a neurologic deficit. Dr. Harris found the date of MMI to be August 3, 2021, the date appellant was seen by Dr. Jaffe.

By decision dated October 14, 2021, OWCP denied appellant's schedule award claim, finding he had not established permanent impairment of a scheduled member or function of the body due to his accepted employment injury.

On October 20, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated January 7, 2022, OWCP's Branch of Hearings and Review found that further development of the evidence was warranted due to the conflict in the medical opinion evidence between appellant's examining physician, Dr. Macht, and OWCP's referral physicians, Drs. Hayes and Jaffe, regarding the rating of his permanent impairment. It remanded the case for OWCP to refer appellant for an impartial medical examination to resolve the conflict in the medical opinion evidence.

On February 17, 2022 OWCP referred appellant, together with a SOAF and medical record, to Dr. Jonathan Paul, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence.

In a report dated May 9, 2022, Dr. Paul, serving as the impartial medical examiner (IME), provided a permanent impairment rating based upon a review of the medical records and appellant's physical examination. Using the sixth edition of the A.M.A., *Guides* and Table 17-2, Table 17-3, and Table 17-4, he found that appellant had 15 percent whole person permanent impairment. He found the date of MMI to be "May 12, 2015."

By decision dated February 2, 2023, OWCP denied appellant's schedule award claim. It explained that he was not entitled to a schedule award as the date of MMI was February 23, 2018, which was subsequent to May 1, 2016, the date his compensation had been terminated for refusing an offer of suitable work.

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ and its implementing regulations⁵ 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

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

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.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

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.⁸ Furthermore, the back is specifically excluded from the definition of an organ under FECA.⁹ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that the July/August 2009 edition of *The Guides Newsletter* is to be applied.¹⁰

The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the employment injury. MMI means that the physical condition of the injured member of the body has stabilized and will not improve further.¹¹ The determination of the date of MMI depends primarily on the medical evidence.¹² The date of MMI is usually considered to be the date of the evaluation accepted as definitive by OWCP.¹³

OWCP's regulations provide that, following a termination of compensation under section 8106(c) of FECA, a claimant has no further entitlement to compensation under sections 8105, 8106, and 8107 of FECA, which includes payment of compensation for permanent impairment of a scheduled member.¹⁴ However, if MMI was obtained prior to invoking the section 8106(c)

⁶ *Id.* at § 10.404(a); *see also F.A.*, Docket No. 22-0167 (issued December 16, 2022); *J.C.*, Docket No. 21-0288 (issued July 1, 2021); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see F.A., id.; J.C., id.; N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

⁹ *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁰ *Supra* note 7 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹¹ *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

¹² *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

¹³ *Supra* note 7.

¹⁴ *See* 20 C.F.R. § 10.517.

sanction, then the claimant would be entitled to schedule award payments from the date of MMI through the date of the section 8106(c) sanction decision.¹⁵

Section 8123(a) of FECA provides that, 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.¹⁶ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA (5 U.S.C. § 8123(a)), to resolve the conflict in the medical evidence.¹⁷ Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹⁸

ANALYSIS

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

In his February 28, 2018 permanent impairment rating, Dr. Macht, appellant's treating physician, found that appellant had reached MMI as of February 23, 2018, the date of his evaluation, which was after the May 1, 2016 termination of appellant's entitlement to a schedule award. In March 24, 2015 and August 3, 2021 reports, OWCP's second opinion physician, Dr. Jaffe, noted that he had previously examined appellant in 2015 and had concluded that appellant reached maximum medical improvement probably no later than 2014. In a report dated April 20, 2018, second opinion physician Dr. Hayes, a Board-certified orthopedic surgeon and OWCP referral physician, found September 1, 2014 as the date of MMI. The Board, therefore, finds that OWCP properly found a conflict in the medical opinion evidence between Dr. Macht and Drs. Jaffe and Hayes. OWCP, therefore, referred appellant to Dr. Paul, the IME.

Dr. Paul, in his May 9, 2022 IME report, found that appellant reached MMI on "May 12, 2015." The Board notes that appellant underwent authorized left-sided microdiscectomy with decompression of the left L4 and L5 nerve roots on May 12, 2014, not 2015. Furthermore, Dr. Paul did not provide rationale explaining how he reached his conclusion, or why his opinion regarding MMI differed from those of Drs. Jaffe and Hayes.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁹ Once

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 8123(a). See *D.C.*, Docket Nos. 22-0020 and 22-0279 (issued April 25, 2023); *R.C.*, Docket No. 18-0463 (issued February 7, 2020); see also *G.B.*, Docket No. 16-0996 (issued September 14, 2016).

¹⁷ See *D.C.*, *id.*; *M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

¹⁸ *D.C.*, *id.*; *V.H.*, Docket No. 20-0012 (issued November 5, 2020).

¹⁹ See *D.C.*, *id.*; *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.²⁰

The case must, therefore, be remanded for clarification from IME Dr. Paul with regard to whether appellant's date of MMI preceded the May 1, 2016 termination of appellant's entitlement to a schedule award. On remand, OWCP shall request that Dr. Paul provide a supplemental opinion which explains, with rationale, how he determined appellant's date of MMI and why it differs from the date of MMI determined by Dr. Jaffe. 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 February 2, 2023 decision of the Office of Workers' Compensation Programs (OWCP) is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 30, 2023
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

²⁰ *Id.*; see also *S.A.*, Docket No. 18-1024 (issued March 12, 2020).