

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.

On January 19, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated June 11, 2021, OWCP granted appellant a schedule award for 10 percent permanent impairment of the left lower extremity (left ankle). The period of the award ran for 28.8 weeks from September 26, 2019 to April 14, 2020. OWCP accorded the weight of the medical evidence to reports from Dr. Morley Slutsky, Board-certified in occupational medicine serving as an OWCP district medical adviser (DMA), and the September 26, 2019 report from appellant's treating physician, Dr. David Weiss, an osteopath Board-certified in orthopedic surgery.

On June 17, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held October 20, 2021.

In an October 7, 2021 addendum report, Dr. Weiss opined that appellant had 17 percent permanent impairment of the left lower extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).²

By decision dated December 23, 2021, an OWCP hearing representative set aside OWCP's June 11, 2021 decision and remanded the case for the DMA, Dr. Slutsky, to review Dr. Weiss' October 7, 2021 addendum report. The hearing representative noted that Dr. Weiss had provided additional discussion as to how he arrived at the sensory impairment of appellant's left lower extremity.

By decision dated March 4, 2022, OWCP awarded appellant an additional schedule award for 1 percent permanent impairment of the left lower extremity impairment, for a total 11 percent left lower extremity permanent impairment. It accorded the weight of the medical evidence to the February 5, 2022 report of the DMA, Dr. Slutsky, who reviewed the findings in Dr. Weiss October 7, 2021 addendum report.

On March 9, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Following a preliminary review, by decision dated April 11, 2022, an OWCP hearing representative found that the case was not in posture for a hearing as the DMA, Dr. Slutsky, had questioned Dr. Weiss' calculation of a 17 percent permanent impairment of the left lower extremity. The hearing representative remanded the case for OWCP to refer appellant for a second opinion evaluation.

On July 7, 2022 OWCP referred appellant, an April 28, 2022 updated statement of accepted facts (SOAF), the medical record, and a series of questions to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In an August 9, 2022 report, Dr. Didizian related that he had performed a physical examination and utilizing the range of motion (ROM) impairment methodology, appellant had seven percent left lower extremity permanent impairment. He also determined that appellant had

² A.M.A., *Guides* (6th ed. 2009).

a total left lower extremity impairment of 12 percent, utilizing the diagnosis-based impairment (DBI) rating method. Dr. Didizian calculated 10 percent permanent impairment due to the left distal fibular fracture. For the left knee, the diagnosis of nonspecific left knee pain with consistent with 2 percent lower extremity impairment. Dr. Didizian combined the 10 percent impairment of the left distal fibular fracture and the 2 percent impairment for nonspecific left knee pain for the total left lower extremity impairment of 12 percent. He also noted that appellant did not have any objective physical findings of his lower back, which were confirmed by appellant's neurologic records, and that his sensory examination did not have any indication of lumbar nerve involvement. While appellant had complaints of some numbness in the dorsum of the foot toward the big toe, Dr. Didizian explained this did not indicate any physiologic status as the fibular fracture had nothing to do with the dorsum of the foot.

In a September 25, 2022 report, Dr. Slutsky, again serving as a DMA, reviewed the medical record, including Dr. Didizian's August 9, 2022 second opinion report, and noted that appellant's claim was accepted for other fracture of upper and lower end of left fibula, initial encounter for closed fracture. He referred to the A.M.A., *Guides* and explained that the ROM methodology could not be used as a primary impairment method. Dr. Slutsky utilized the DBI rating method to find that appellant had a total left lower extremity impairment of nine percent, comprised of eight percent ankle permanent impairment and one percent permanent knee impairment. He indicated that the medical record was devoid of any evidence of left L5/S1 sensory deficits, which Dr. Weiss reported to have found, and there was no evidence of lower extremity weakness due to lumbar nerve deficits. As there was no sensory or motor loss related to lumbar nerve roots, Dr. Slutsky indicated that there was no basis for a lower extremity impairment under the A.M.A., *Guides Newsletter Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*). He found that the total 9 percent impairment of the left lower extremity was less than the previous accepted 11 percent award.

By decision dated September 28, 2022, OWCP denied the claim for an increased schedule award. OWCP accorded the weight of the medical evidence to the September 25, 2022 opinion of Dr. Slutsky, the DMA.

On June 14, 2023 appellant, through counsel, requested reconsideration. He submitted a May 16, 2023 addendum report by Dr. Weiss in support of his argument that a conflict of medical opinion existed and the case should be resolved by an impartial medical examiner.

In a May 16, 2023 addendum report, Dr. Weiss indicated that he reviewed Dr. Didizian's August 9, 2022 report, the reports of Dr. Slutsky dated August 25, 2022 report, and his September 26, 2019 and October 7, 2021 reports. He noted his agreement with Dr. Didizian's impairment findings of 10 percent for the left ankle and 2 percent for the left knee. Dr. Weiss indicated that Dr. Didizian failed to perform testing to detect abnormal sensation and that Dr. Didizian's finding that appellant had minimal decrease in sensation on the dorsum of the left foot over the big toe and the second toe, was part of the L5 sensory distribution. He thus reiterated his prior opinions that appellant had an impairment due to moderate sensory deficit of the left L5 and left S1 nerve root, which should be combined with the 10 percent left ankle and 2 percent left knee impairment, for a final left lower extremity impairment of 17 percent.

By decision dated July 28, 2023, OWCP denied modification of its September 28, 2022 decision.

The Board has duly considered this matter and finds that the case is not in posture for decision.

In the case of *William A. Couch*,³ the Board held that when adjudicating a claim OWCP is obligated to consider and address all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. As detailed above, OWCP received medical evidence, including a May 16, 2023 addendum report from Dr. Weiss concurring with Dr. Didizian's impairment findings pertaining to the left ankle and left knee. Dr. Weiss also noted that Dr. Didizian found that appellant had minimal decrease in sensation on the dorsum of the left foot over the big toe and the second toe. He indicated that this sensory loss was part of the L5 sensory distribution. OWCP, however, did not review this evidence in its July 28, 2023 merit decision or address counsel's argument regarding a potential conflict in medical opinion. It, thus, failed to follow its procedures by not considering and addressing all of the evidence of record.⁴

As Board decisions are final with regard to the subject matter appealed, it is crucial that OWCP consider and address all evidence received prior to the issuance of its final decision.⁵ On remand OWCP shall review all evidence properly submitted by appellant prior to the issuance of the July 28, 2023 OWCP decision. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision. Accordingly,

³ 41 ECAB 548 (1990); *see also K.B.*, Docket No. 20-1320 (issued February 8, 2021); *R.D.*, Docket No. 17-1818 (issued April 3, 2018).

⁴ OWCP's procedures provide that all evidence submitted should be reviewed and discussed in the decision. Evidence received following development that lacks probative value also should be acknowledged. Whenever possible, the evidence should be referenced by author and date. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5b(2) (November 2012).

⁵ *Order Remanding Case, M.A.*, Docket No. 23-0813 (issued December 11, 2023); *Order Remanding Case, E.D.*, Docket No. 20-0620 (issued November 18, 2020); *Order Remanding Case, L.B.*, Docket No. 21-0140 (issued August 25, 2021); *Order Remanding Case, C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *William A. Couch*, *supra* note 3.

IT IS HEREBY ORDERED THAT the July 28, 2023 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this order of the Board.

Issued: March 1, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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