

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

_____)	
S.S., Appellant)	
)	
and)	Docket No. 16-1792
)	Issued: January 27, 2017
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Huntington, WV, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
 COLLEEN DUFFY KIKO, Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 9, 2016 appellant filed a timely appeal from an April 5, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

¹ In her September 9, 2016 appeal to the Board, appellant also requested an appeal of a February 3, 2015 decision in File No. xxxxxx822. The February 3, 2015 decision granted appellant a schedule award for one percent impairment of her left leg. One hundred eighty days from February 3, 2015 was August 2, 2015. As this fell on a Sunday, the appeal would have been due the next business day, Monday, August 3, 2015. As appellant did not file an appeal with the Board until September 9, 2016, the Board does not have jurisdiction to consider that decision on appeal. 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member, warranting a schedule award.

FACTUAL HISTORY

On January 9, 2006 appellant, then a 45-year-old practical nurse, filed an occupational disease claim (Form CA-2) alleging that she developed plantar fasciitis in both feet with third and fourth metatarsal stress fractures due to her employment duties of walking and running on the inpatient care units for eight hours or longer a day.

Dr. Elizabeth Marilynn Feltner, a podiatrist, examined appellant beginning on September 22, 2004. On December 30, 2005 she diagnosed left plantar fasciitis as well as stress fractures of the third and fourth metatarsals of the left foot. Dr. Feltner noted that as a nurse, appellant stood on concrete for up to 12 hours a day which constantly stressed her plantar fascia.

Appellant completed a statement on January 23, 2006 and alleged that she walked up to three miles in the performance of her duties in a single work shift. She began experiencing right foot pain in September 2004 and eventually developed bilateral plantar fasciitis.

Dr. Feltner completed a report on February 3, 2006 and described appellant's initial treatment on September 8, 2004 for right heel pain. On November 15, 2004 appellant described left heel pain. She sought treatment on March 21, 2005 for bilateral heel pain and on August 9, 2005 for left foot pain. Appellant returned for further treatment on December 16, 2005 due to bilateral foot pain. On December 30, 2005 x-rays demonstrated mild periostitis of the third and fourth metatarsals on the left. Dr. Feltner opined that appellant's job contributed to her foot conditions and recommended surgery.

OWCP accepted appellant's claim for bilateral plantar fasciitis on February 13, 2006. Thereafter, the claim was essentially dormant until 2011.

In notes dated September 1 and October 4, 2011, Dr. Patrick J. Nunan, a podiatrist, diagnosed stress fracture in the second metatarsal of appellant's left foot and recommended light duty.

On June 28, 2013 appellant filed a claim for a schedule award (Form CA-7). In a letter dated July 24, 2013, OWCP requested that she provide additional medical evidence in support of her claimed permanent impairment. It allowed 30 days for a response.

Appellant requested a change in physicians on July 30, 2013. On August 1, 2013 OWCP noted that Dr. Kevin D. Brown, a podiatrist, was now considered her treating physician.

On August 28, 2013 Dr. Brown examined appellant and diagnosed plantar fasciitis. He reviewed her x-rays and found infracalcaneal spurring, but no acute process. Dr. Brown found that appellant had reached maximum medical improvement (MMI) and recommended an evaluation to determine her permanent impairment.

By decision dated September 9, 2013, OWCP denied appellant's claim for a schedule award, finding that she failed to submit medical opinion evidence sufficient to establish the extent of her permanent impairment for schedule award purposes.

Appellant filed another claim for a schedule award (Form CA-7) on February 9, 2016.

By decision dated April 5, 2016, OWCP denied appellant's claim for a schedule award. It noted that it had advised her of the evidence needed to support her claim for a schedule award in a letter dated July 24, 2013.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing regulations⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁵

OWCP's procedures provide that specific medical evidence is required to support a schedule award including: competent medical evidence which shows that the impairment has reached a permanent and fixed state or MMI; medical evidence which describes the impairment in sufficient detail for the claims examiner to visualize the character and degree of disability; and medical evidence which gives a percentage of impairment based on a specific diagnosis.⁶ If a claimant requests a schedule award but has not submitted the necessary medical evidence, OWCP should request this medical evidence.⁷

If the claimant submits factual evidence, medical evidence, or both, but OWCP determines that this evidence is not sufficient to meet the burden of proof, OWCP will inform the claimant of the additional evidence needed. The claimant will be allowed at least 30 days to submit the evidence required.⁸ Proceedings under FECA are not adversarial in nature and

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ Effective May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); and Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁶ Federal (FECA) Procedure Manual, Part 2, *id.* at Chapter 2.808.5 (February 2013).

⁷ *Id.* at Chapter 2.808.6a.

⁸ 20 C.F.R. § 10.121.

OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.⁹ The nonadversarial policy of proceedings under FECA is reflected in the regulations at section 10.121.¹⁰

ANALYSIS

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

Appellant filed a claim for a schedule award on February 9, 2016. OWCP did not provide appellant with a request for the specific medical evidence necessary to establish her schedule award claim in accordance with section 10.121 of its regulations.¹¹ It is well established that proceedings under FECA are not adversarial in nature and that, while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. OWCP has an obligation to see that justice is done.¹² Instead of providing appellant with the required notification and 30 days for a response, it noted in the April 5, 2016 decision that it previously provided appellant with a request for information on July 24, 2013. The Board, however, finds that this does not comply with OWCP's regulations.¹³

On remand, OWCP should comply with the requirements of its regulations in developing appellant's claim for permanent impairment of her lower extremities due to her accepted condition of bilateral plantar fasciitis. Following any necessary further development, it shall issue a *de novo* decision.

CONCLUSION

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

⁹ *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹⁰ 20 C.F.R. § 10.121.

¹¹ *Id.*

¹² *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

¹³ *Supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2016 merit decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this opinion of the Board.

Issued: January 27, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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