United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 17-0890**
	)	**Issued: October 18, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Detroit, MI, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 16, 2017 appellant, through counsel, filed a timely appeal from a January 25, 2017 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 in 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 is entitled to the augmented compensation rate for a dependent when being compensated for a 31 percent schedule award received due to her left lower extremity.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On April 21, 2008 appellant, then a 43-year-old letter carrier, filed an occupational disease claim (Form CA-2), alleging that she developed bilateral knee osteoarthritis as a result of work duties, which included prolonged standing, squatting, and stair climbing.[4] On August 3, 2009 OWCP accepted permanent aggravation of right knee osteoarthritis. It later expanded the claim to include generalized osteoarthrosis, multiple sites, and bilateral localized primary osteoarthritis in the legs. OWCP authorized a total right knee replacement, which was performed on June 20, 2008. Appellant did not stop work, but returned to a light-duty position. She was granted disability retirement, effective February 19, 2010. Appellant had an authorized total left knee replacement on September 9, 2013.

On June 3, 2010 appellant filed a claim for a schedule award (Form CA-7).

In a decision dated March 30, 2011, OWCP granted appellant a schedule award for 31 percent permanent impairment of the right lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] The period of the award was from August 18, 2009 to May 4, 2011.

On September 9, 2013 Dr. Ronald Little, a Board-certified orthopedic surgeon, performed a left total knee arthroplasty and diagnosed osteoarthritis of the left knee. On September 3, 2014 Dr. Carla E. Morton, a Board certified physiatrist, noted that appellant had reached maximum medical improvement for her bilateral knee pain.

On September 24, 2014 appellant filed a claim for an additional schedule award (Form CA-7).

[3] Docket No. 16-0815 (issued October 25, 2016).

[4] Appellant had previously filed a claim on February 25, 2005 which was accepted for sprains and strains of the right knee and leg under OWCP File No. xxxxxx126. On March 3, 2009 OWCP administratively combined File No. xxxxxx126 and the current claim before the Board, File No. xxxxxx939 with the former claim serving as the master file.

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

In an April 1, 2015 report, an OWCP medical adviser reviewed the medical records and opined that appellant sustained 31 percent permanent impairment of the right and left lower extremity based on a finding of fair results for the right and left arthroplasties.

In a decision dated April 8, 2015, OWCP denied appellant's claim for an additional schedule award for the right lower extremity. Appellant requested an oral hearing before an OWCP hearing representative.

In a decision dated January 11, 2016, OWCP's hearing representative affirmed the April 8, 2015 decision denying appellant's claim for an additional schedule award for the right lower extremity. He further instructed OWCP to issue a decision on appellant's entitlement to a schedule award for the left lower extremity. On March 15, 2016 appellant appealed the January 11, 2016 decision regarding the right lower extremity to the Board.

By decision dated March 17, 2016, OWCP granted appellant a schedule award for 31 percent impairment of the left lower extremity. The period of the award was from October 23, 2014 to July 8, 2016. OWCP paid the schedule award at the basic compensation rate of 66 2/3 percent. On March 23, 2016 appellant requested an oral hearing before an OWCP hearing representative. Appellant, through counsel, indicated that she did not disagree with the 31 percent impairment rating but disagreed with the basic compensation rate and asserted that she was entitled to an augmented compensation rate based on a qualified dependent.

In support of her request for augmented compensation appellant submitted a notice from the employing establishment personnel processing specialist dated December 2, 2009 regarding the Federal Health Benefits Team Health Alliance Plan. The notice indicated that appellant's son, T.B., who was covered under his parent's self and family health benefits enrollment was determined to be incapable of self-support and the incapacity existed before age 22.[6]

Appellant submitted psychosocial assessments of her son T.B. performed by a social worker dated June 7, 2010, June 3, 2011, May 30 and June 12, 2012 from the Neighborhood Service Organization. The social worker diagnosed borderline intellectual functioning and unspecified intellectual disabilities.

Appellant submitted letters from the Social Security Administration (SSA) Retirement, Survivors and Disability Insurance dated January 20, 2011 which noted that she was chosen to be T.B.'s representative payee. The letter provided that the payee will receive payments each month in the amount of $944.20 to be used for T.B.'s needs. Appellant submitted a letter from the SSA dated January 29, 2011 which indicated that T.B.'s SSA disability claim was reviewed and his disability was continuing. The letter noted that T.B. worked eight months of the trial work period but he was unable to continue working. Appellant submitted a letter from SSA dated June 2, 2016 which noted that her son T.B. currently received disability benefits.

In an October 25, 2016 decision, the Board affirmed OWCP's January 11, 2016 decision finding that appellant had no more than 31 percent permanent impairment of the right lower

[6] The record indicates that T.B. was born on April 21, 1986.

extremity for which she previously received a schedule award. Docket No. 16-0815 (issued October 25, 2016).

A telephonic oral hearing was held on November 15, 2016. Appellant testified that her son T.B. was born on April 21, 1986 and was not able to care for himself due to mental retardation. She indicated that he had tried to live on his own, but he was unable to do so and ultimately returned home. Appellant testified that her son lived in his own apartment briefly and had stayed with his grandmother from 2009 to 2010. She testified that her son received approximately $1,000.00 a month from SSA as a result of his disability and his deceased father. Appellant advised that she cared for her son and explained that he also had other health conditions. Counsel argued that appellant provided for the majority of her son's expenses and therefore he should meet the definition of a dependent entitling appellant to an augmented compensation rate.

On December 1, 2016 appellant, through counsel, indicated that appellant had a disabled child living with her and was entitled to augmented compensation. Appellant submitted an undated notarized statement from her son, T.B., who stated:

> "My name is [T.B.] and I am 30 years old and I need you to know that my mom has taken care of me 90% of the my life. Once I went to Warthorn at 4 years old and stayed until 6 years old and then I went to go stay with my brother that is in the military, and I moved to Arizona for 2 years from 1998 to 2000 of December until I got sick and had to come home to my mom. When I graduated high school, my mom tried to get me to go to independent living and I refused, after I refused. I kept begging to get my own place finally my mom agreed that lasted for four months. I got into some trouble and I left in December of 2008 to stay with my uncle James ... my mom sent money for my care each month that lasted four months, by then I was ready to come home, so my mom sent for and I came home in May of 2009 and been here ever since living with my mom. I can't cook, my mom cooks, washes my clothes makes clean my room."

In a decision dated January 25, 2017, OWCP's hearing representative affirmed the March 17, 2016 decision. She determined that appellant had failed to establish through medical evidence that her 30-year-old son met the criteria of a dependent based on his mental disability which made him incapable of self-support.

LEGAL PRECEDENT

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[7] If the disability is total, the United States shall pay the employee during the disability monthly

[7] 5 U.S.C. § 8102(a).

monetary compensation equal to 66 2/3 percent of her monthly pay, which is known as basic compensation for total disability.[8]

Under section 8110[9] of FECA, an employee is entitled to compensation at the augmented rate of three-quarters of his or her weekly pay if he or she has one or more dependents. (a) For the purpose of this section, "dependent" means -- (3) an unmarried child, while living with the employee or receiving regular contributions from the employee toward his support, and who is-- (A) under 18 years of age; or (B) over 18 years of age and incapable of self-support because of physical or mental disability; and (4) a parent, while wholly dependent on and supported by the employee.

The accompanying regulation 20 C.F.R. § 10.405 provides: "Who is considered a dependent in a claim based on disability or impairment? (a) Dependents include a wife or husband; an unmarried child under 18 years of age; an unmarried child over 18 who is incapable of self-support; a student, until he or she reaches 23 years of age or completes four years of school beyond the high school level; or a wholly dependent parent. (b) Augmented compensation payable for an unmarried child, which would otherwise terminate when the child reached the age of 18, may be continued while the child is a student as defined in 5 U.S.C. § 8101 (17)."[10]

OWCP's procedures provide that the compensation rate is the percentage of pay to which a claimant is entitled for periods of disability and medical treatment. There are two compensation rates when calculating claims for time loss. The basic compensation rate is 66 2/3 percent of the claimant's wages. The augmented rate is 75 percent of the claimant's wages and is based on whether the claimant has one or more eligible dependents as defined in section 8110 of FECA.[11]

For children, OWCP's procedures specify in part:

> "Section 8110 of the FECA provides that a claimant is entitled to the 75 percent augmented compensation rate for one or more child (see 20 C.F.R. §10.405) who is: (1) *Not married*; and (2) *Living with the employee or receiving regular* contributions from the employee toward his/her support, as long as the child is under 18 years of age or over 18 years of age but incapable of self-support due to a physical or mental disability. The claimant's eligibility for augmented compensation for a dependent child terminates on the date of the child's marriage. Where only one dependent is claimed and that person is a child over the age of 18, the [claims examiner] must ensure that entitlement exists. See sections d and e, below."

[8] *Id*. at § 8105(a).

[9] 5 U.S.C. § 8110.

[10] 20 C.F.R. § 10.405.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Claims*, Chapter 2.901.12 (February 2013).

* * *

"e. *Children Over 18 Incapable of Self-Support*. When augmented compensation is claimed based on a child who is over 18 years old but physically or mentally incapable of self-support, the CE must investigate the extent and expected duration of the illness involved.

"(1) *To be entitled to benefits*, the child over 18 years old must be incapable of self-support by reason of a mental or physical disability. Augmented compensation is not payable for a child over 18 years old who is unable to obtain employment due to economic conditions, lack of job skills, etc.

"(2) *A child is incapable of self-support* if his or her physical or mental condition renders him or her unable to obtain and/or retain a job, or engage in self-employment that would provide a sustained living wage. This determination must be based on medical evidence. When medical evidence demonstrates incapacity for self-support, this determination will stand unless refuted by sustained work performance.

"A medical report covering the child's past and present condition must be submitted for review to determine whether it establishes incapacity for self-support. A physician's opinion must be based on sufficient findings and rationale to establish lack of employability. If the CE needs assistance with review of the medical condition or report, the case may be referred to the district medical adviser (DMA)."[12]

ANALYSIS

Appellant does not challenge OWCP's finding of 31 percent permanent impairment of the left leg. Rather, she disagrees with the compensation rate and asserts that she is entitled to an augmented compensation rate based on a qualified dependent. In a decision dated January 25, 2017, OWCP's hearing representative affirmed the March 17, 2016 schedule award decision. She denied augmented compensation as appellant had not established evidence of a qualified dependent for the purposes of receiving augmented compensation. The record supports the hearing representative's decision.

Appellant's son T.B. was born on April 21, 1986. Appellant testified that her son was a dependent as he was not able to care for himself due to mental retardation. She indicated that he had tried to live in his own apartment briefly and he stayed with his grandmother from 2009 to 2010 but ultimately returned home. Appellant testified that her son receives approximately $1,000.00 a month from social security as a result of his disability and because of his deceased father. She stated that she cares for her son and explained he also had other health conditions. In an undated notarized statement, T.B. indicated that he was 30 years old and appellant has taken care of him for most of his life. He noted intermittently living outside his mother's home but he

[12] *Id.* at Chapter 2.901(12)(e)(1)-(2) (February 2013).

permanently returned home in May 2009 to live with appellant. T.B. noted that his mother cooks and cleans for him.

As noted, for the purposes of augmented compensation for dependents, section 8110,[13] provides that a claimant is entitled to the 75 percent augmented compensation rate for one or more children who is an unmarried child over 18, who is incapable of self-support because of physical or mental disability. OWCP's procedures provide that this determination must be based on medical evidence based on the child's past and present condition and the physician's opinion must be based on sufficient findings and rationale to establish lack of employability.[14]

In support of her claim, appellant submitted psychosocial assessment reports performed by a social worker dated June 7, 2010, June 3, 2011, May 30 and June 12, 2012 which diagnosed borderline intellectual functioning and unspecified intellectual disabilities. The Board has held that treatment notes signed by a social worker are not considered medical evidence as these providers are not physicians under FECA[15] and are not competent to render a medical opinion under FECA. Thus, this evidence is not sufficient to meet appellant's burden of proof.[16]

Appellant submitted a notice dated December 2, 2009 regarding the Federal Health Benefits Team Health Alliance Plan which determined appellant's son to be incapable of self-support, a letter from SSA dated January 29, 2011 regarding continuing disability benefits, a letter from SSA dated June 2, 2016 confirming that T.B. currently received disability benefits, and letters from SSA Retirement, Survivors and Disability Insurance dated January 20, 2011 which noted that appellant was T.B.'s representative payee. However, this evidence lacks probative value as to whether her son was incapable of self-support because of physical or mental disability. That is a medical issue which must be addressed by relevant medical evidence. Appellant has submitted no medical evidence.[17] Therefore the Board finds that OWCP properly denied appellant's claim for augmented compensation.

CONCLUSION

The Board finds that appellant was not entitled to the augmented compensation rate for a dependent.

[13] 5 U.S.C. § 8110.

[14] *See supra* note 12.

[15] *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law). *See also N.L.*, Docket No. 17-1202 (issued August 25, 2017) (social workers are not physicians under FECA).

[16] *Id. See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

[17] Furthermore, the Board notes that it has held that the determination of an employee's rights or remedies under other statutory authority does not establish entitlement to benefits under FECA. *Dianna L. Smith*, 56 ECAB 524 (2005).

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 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