

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

L.T., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Dearborn Heights, MI, Employer)

Docket No. 18-1405
Issued: April 8, 2019

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 12, 2018 appellant, through counsel, filed a timely appeal from a May 11, 2018 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.³

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.*

³ The Board notes that following the May 11, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a permanent impairment of her right upper or right lower extremity, entitling her to a schedule award.

FACTUAL HISTORY

On February 12, 2010 appellant, then a 28-year-old carrier/transitional employee, filed a traumatic injury claim (Form CA-1) alleging that she sustained injury to her right elbow, shoulder, and knee when she slipped and fell on an icy sidewalk while in the performance of duty. OWCP accepted the claim for right elbow, shoulder, and upper arm sprain, cervical sprain, and right knee sprain. Appellant stopped work on February 12, 2010. OWCP paid her wage-loss compensation on the supplemental rolls as of March 3, 2010 and on the periodic rolls as of July 4, 2010.

By decision dated April 9, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day. Determinative weight was accorded to the November 12, 2014 report of Dr. Robert D. Travis, a Board-certified orthopedic surgeon and OWCP referral physician, who opined that appellant had no residuals of the accepted conditions, or any additional conditions which had been caused or aggravated by the accepted February 12, 2010 employment injury.

On March 31, 2017 appellant filed a claim for a schedule award (Form CA-7). No evidence was submitted in support of her claim.

By development letter dated April 7, 2017, OWCP requested that appellant submit a permanent impairment evaluation from her attending physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ No additional evidence was received.

By decision dated May 24, 2017, OWCP denied appellant's claim for a schedule award as there was no evidence to establish that she sustained permanent impairment of a scheduled member or function of the body.

By letter dated June 1, 2017, appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held on November 13, 2017 and counsel indicated that new medical evidence established that appellant was at maximum medical improvement, but he had been unable to obtain a permanent impairment evaluation.

After the hearing OWCP received a March 21, 2017 report from Dr. William Sharp, Board-certified in internal medicine, which advised that appellant had reached MMI.⁵

By decision dated January 26, 2018, an OWCP hearing representative affirmed the May 24, 2017 decision denying appellant's schedule award claim. She found that Dr. Sharp's

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ In a November 13, 2017 letter, counsel indicated that he wished to withdraw his request for reconsideration of OWCP's May 24, 2017 decision.

March 21, 2017 statement only advised that appellant had reached MMI, but did not otherwise address permanent impairment.

On February 14, 2018 appellant, through counsel, requested reconsideration.

In a January 17, 2018 report, Dr. Sami E. Moufawad, Board-certified in physical medicine and rehabilitation, reviewed appellant's medical history and provided findings on physical examination. He also reviewed diagnostic testing which revealed evidence of right carpal tunnel syndrome without denervation, disc displacements at several levels in the cervical spine and thoracic spine, straightening of normal lordosis of cervical spine, tendon tear, bursitis, and moderate adhesive capsulitis of right shoulder. Dr. Moufawad opined that appellant had reached MMI on November 7, 2017. Utilizing the A.M.A., *Guides*, he opined that appellant had 2 percent permanent impairment of the right upper extremity under the diagnosis-based impairment (DBI) methodology for rating right shoulder partial thickness tear, but when utilizing the range of motion (ROM) methodology she had 12 percent permanent impairment of the right shoulder. Dr. Moufawad concluded that appellant was entitled to the highest impairment rating, and therefore had 12 percent permanent impairment of the right upper extremity. For the right lower extremity, he opined that appellant had seven percent permanent impairment for knee sprain with mild motion deficits, utilizing the DBI methodology. Dr. Moufawad provided his impairment calculations and worksheets.

On March 31, 2017 appellant refiled her claim for a schedule award (Form CA-7).

By letter dated April 19, 2018, OWCP requested that Dr. Moufawad provide a well-rationalized opinion supported by objective findings explaining how appellant's examination findings were causally related to the accepted employment injury. It noted that Dr. Travis had previously opined on November 12, 2014 that appellant no longer had residuals of her accepted conditions. OWCP provided a copy of Dr. Travis' November 12, 2014 report and afforded Dr. Moufawad an opportunity to respond. In a note to claimant at the bottom of the letter, appellant was advised that while OWCP had written directly to her attending physician in an effort to assist in obtaining the required information, it remained her responsibility to ensure the submission of the necessary evidence. OWCP afforded appellant 20 days to submit the requested evidence. No response was received.

By decision dated May 11, 2018, OWCP denied modification of its January 26, 2018 decision. It found that Dr. Moufawad's report was of diminished probative value because he had not addressed how appellant's permanent impairment was causally related to conditions that had previously resolved. OWCP concluded that the evidence of record was insufficient to establish a permanent impairment resulting from the accepted February 12, 2010 employment injury.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations 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.⁶ However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the

⁶ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁷

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.⁸ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁹

OWCP procedures and Board precedent provide that termination of a claim for all benefits due to a finding of no residuals of the accepted condition does not bar a subsequent schedule award. Rather, the claims examiner should consider the schedule award matter separately from the termination of benefits.¹⁰ This is because a claimant may have an employment-related condition that results in a permanent impairment under the A.M.A., *Guides* without a disability for work or the need for continuing medical treatment.¹¹ If a claimant applies for a schedule award after termination of compensation benefits and submits sufficient medical evidence reflecting a permanent impairment as a result of the work-related injury exposure, the claims examiner should further develop the claim.¹²

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.¹³ For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.¹⁴

ANALYSIS

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

On March 31, 2017 appellant filed a claim for a schedule award which OWCP denied by decision dated May 24, 2017. Appellant, through counsel, requested a telephonic hearing which was held on November 13, 2017. By decision dated January 26, 2018, an OWCP hearing representative affirmed the May 24, 2017 decision denying appellant's schedule award claim. Appellant, through counsel, requested reconsideration and submitted a January 17, 2018 report by

⁷ *Supra* note 4 at § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

⁹ See *S.J.*, Docket No. 18-0010 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ *R.H.*, Docket No. 17-1017 (issued December 4, 2018).

¹¹ See *B.K.*, 59 ECAB 228 (2007); *supra* note 8 at Chapter 2.808.11 (February 2013).

¹² *Id.*

¹³ *Veronica Williams*, 56 ECAB 367 (2005).

¹⁴ *F.E.*, Docket No. 17-0584 (issued December 18, 2017).

Dr. Moufawad which opined that appellant sustained 12 percent permanent impairment of her right upper extremity and 7 percent permanent impairment of her right lower extremity. On March 31, 2017 appellant refiled her claim for a schedule award. Following the submission of the January 17, 2018 report, OWCP wrote to Dr. Moufawad on April 19, 2018 and posed a series of questions, including an explanation as to how he had assigned permanent impairment in light of the opinion of Dr. Travis who opined that she had no residuals of her accepted conditions and the subsequent termination of her wage-loss compensation and medical benefits. He did not timely respond. By decision dated May 11, 2018, OWCP denied modification of its January 26, 2018 decision denying schedule award compensation.

As noted above, if a claimant requests a schedule award after termination of wage-loss compensation and submits sufficient medical evidence of permanent impairment as a result of the work-related injury, OWCP shall develop the claim further despite the prior finding of no residuals.¹⁵

The Board finds that OWCP has not properly developed the issue of permanent impairment following the submission of the report of Dr. Moufawad. Pursuant to its procedures, OWCP should have routed the case record, including the report of Dr. Moufawad, to a district medical adviser (DMA) for an opinion concerning the nature and extent of permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified, if any.¹⁶ As this was not done, the case must be remanded for referral to a DMA.¹⁷

On remand OWCP shall further develop the medical evidence of record by obtaining an opinion from a DMA regarding the nature and extent of appellant's permanent impairment, if any, for her accepted conditions. Following this, and such further development as may be deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's schedule award claim.

CONCLUSION

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

¹⁵ *Supra* note 11.

¹⁶ *See supra* note 8 at Chapter 2.808.6(f) (February 2013).

¹⁷ *Supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: April 8, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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