

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

D.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pasadena, CA, Employer**

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**Docket No. 20-0017
Issued: August 31, 2021**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 2, 2019 appellant, through counsel, filed a timely appeal from a June 19, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 The Board notes that following the June 19, 2019 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.*

Federal Employees' Compensation Act³ (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 met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On February 24, 2016 appellant, then a 57-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he developed lower back pain with severe pain radiating down into his left foot due to factors of his federal employment. He noted that he first became aware of his condition and its relationship to his federal employment on April 23, 2015. Appellant did not stop work. On May 13, 2016 OWCP accepted appellant's claim for aggravation of intervertebral disc degeneration and aggravation of plantar fascial fibromatosis. Appellant stopped work on June 12, 2016 and OWCP paid him wage-loss compensation.⁴

In a September 1, 2016 form report, Dr. Christopher P. DeCarlo, a Board-certified physiatrist, diagnosed cumulative trauma of the lumbar disc, lumbar radiculopathy, left foot plantar fasciitis, and first metatarsophalangeal foot pain.

On November 15, 2016 appellant returned to light-duty work. He again stopped work on April 7, 2017.

On May 25, 2017 OWCP referred appellant, a SOAF, and a series of questions for a second opinion evaluation with Dr. Ghol Bahman Ha`eri-Gharavi, an orthopedic surgeon, to provide an opinion regarding the nature and extent of any disability, work restrictions, and treatment due to the accepted conditions.

In a report dated June 16, 2017, Dr. DeCarlo diagnosed severe left hip osteoarthritis, acetabular labral tearing of the left hip, degenerative changes at the pubic symphysis, and left hamstring tendinosis. He opined that appellant required a total left hip arthroplasty due to degenerative disease in his left hip and could not be expected to return to full or part-time work.

³ 5 U.S.C. § 8101 *et seq.*

⁴ On October 4, 2016 appellant filed a separate Form CA-2 alleging that he developed pain in his left hip and groin area due to factors of his federal employment including repetitive standing, turning, mounting, and dismounting his mail truck. He noted that he first became aware of his condition and first realized its relationship to his federal employment on June 23, 2016. OWCP assigned that claim xxxxxx490 and on January 9, 2017 accepted it for left hip sprain. It subsequently expanded the acceptance of that claim to include primary osteoarthritis of the left hip. Appellant also has a claim for a September 11, 2017 traumatic injury, alleging injury to his lower back and neck after he fell when his chair collapsed. OWCP assigned that claim OWCP File No. xxxxxx595 and accepted it for contusions of the lower back and pelvis, left hip, left shoulder, and left foot, and lumbar radiculopathy. OWCP has administratively combined OWCP File Nos. xxxxxx852, xxxxxx490, and xxxxxx595, with OWCP File No. xxxxxx595 serving as the master file.

In a June 21, 2017 report, Dr. Ha`eri-Gharavi, found that appellant's accepted conditions of aggravation of lumbar intervertebral disc degeneration and aggravation of bilateral plantar fascial fibromatosis had resolved. He further noted appellant's accepted claim under OWCP File No. xxxxxx490 for left hip sprain and diagnosed bilateral hip osteoarthritis, worse on the left. Dr. Ha`eri-Gharavi found that any work restrictions were due to appellant's preexisting back and hip conditions.⁵

By decision dated April 10, 2018, OWCP's hearing representative affirmed the October 2, 2017 decision.

On June 26, 2018 appellant filed a schedule award claim (Form CA-7). He provided a February 24, 2016 electromyogram and nerve conduction velocity (EMG/NCV) study of the lower extremities.

In a letter dated June 29, 2018, counsel requested that OWCP refer appellant for a permanent impairment evaluation for schedule award purposes.

In a July 17, 2018 development letter, OWCP noted that appellant had not provided medical evidence of permanent impairment in support of his schedule award claim. It requested a detailed narrative medical report addressing whether his accepted conditions had reached maximum medical improvement and whether he had any permanent impairment of a scheduled member in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶

In an August 7, 2018 letter, counsel again requested that OWCP refer appellant for an impairment rating evaluation. On August 20, 2018 OWCP again requested that appellant respond in accordance with its July 17, 2018 development letter.

On August 31, September 27, and November 15, 2018 counsel requested a medical evaluation or a decision denying appellant's claim for schedule award compensation.

By decision dated December 18, 2018, OWCP denied appellant's claim for a schedule award, finding that there was no medical evidence to establish that he sustained permanent impairment to a scheduled member or function of the body.

On December 26, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on April 16, 2019.

⁵ On August 31, 2017 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits finding that he had no ongoing disability or medical residuals due to his accepted employment injuries. It afforded appellant 30 days to respond, if he disagreed with the proposed termination. By decision dated October 2, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date.

⁶ A.M.A., *Guides* (6th ed. 2009).

By decision dated June 19, 2019, the hearing representative affirmed OWCP's December 18, 2018 decision.

LEGAL PRECEDENT

Section 8107 of FECA⁷ and section 10.404 of the implementing federal regulations,⁸ provide for payment for permanent impairment of specified members, functions, and organs of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides*, has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁹ For decisions issued after May 1, 2009 OWCP uses the sixth edition of the A.M.A., *Guides*.¹⁰

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.¹¹ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹² The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.¹³ For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures provide that *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) is to be applied.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

⁷ *Supra* note 3 at § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *F.S.*, Docket No. 18-0383 (issued August 22, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹¹ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *F.S.*, *supra* note 9; *W.D.*, Docket No. 10-0274 (issued September 3, 2010); *Ernest P. Govednick*, 27 ECAB 77 (1975).

¹² *W.D.*, *id.*; *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹³ *Supra* note 10 at Chapter 2.808.5(c)(3).

¹⁴ *Supra* note 10 at Chapter 3.700, at Exhibit 4.

OWCP accepted that appellant sustained aggravation of intervertebral disc degeneration and aggravation of plantar fascial fibromatosis due to factors of his federal employment. On June 26, 2018 appellant filed a schedule award claim (Form CA-7).

OWCP, on July 17, 2018, requested that appellant submit an impairment evaluation from his physician addressing the extent of any employment-related permanent impairment using the A.M.A., *Guides*. Appellant did not, however, submit an impairment evaluation or other medical evidence establishing permanent impairment. As noted, he must submit an evaluation from a physician that includes a description of impairment in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.¹⁵ Appellant has not submitted any medical evidence establishing a permanent impairment due to his accepted conditions and thus has not met his burden of proof.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.¹⁶

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

¹⁵ See *B.V.*, Docket No. 17-0656 (issued March 13, 2018); *C.B.*, Docket No. 16-0060 (issued February 2, 2016); *P.L.*, Docket No. 13-1592 (issued January 7, 2014).

¹⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 19, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 31, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board