

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

M.S., Appellant)	
)	
and)	Docket No. 20-0276
)	Issued: September 15, 2021
U.S. POSTAL SERVICE, BERKELEY)	
HEIGHTS POST OFFICE, Berkeley Heights, NJ,)	
Employer)	
)	

Appearances:
Russell T. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 18, 2019 appellant, through counsel, filed a timely appeal from a May 22, 2019 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.

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 has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board on a separate issue.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 28, 2003 appellant, then a 42-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 18, 2003 she was injured when a heavy mail flat struck her right knee while in the performance of duty. She stopped work on June 26, 2003. A June 26, 2003 magnetic resonance imaging (MRI) scan demonstrated intrasubstance tear in the posterior horn of the medial meniscus. On July 29, 2003 OWCP accepted the claim for internal derangement of the right knee (posterior horn of the right medial meniscus).

On December 15, 2003 appellant underwent arthroscopy including medial femoral chondroplasty, but there was no tear of the medial or lateral meniscus. An osteochondral fracture of the medial femoral condyle and partial tear of the anterior cruciate ligament was revealed. OWCP expanded its acceptance of appellant's claim to include closed fracture of right femoral condyle and other internal derangement of the right knee. It paid her wage-loss compensation on the periodic rolls.

On December 6, 2012 OWCP referred appellant to Dr. Arthur T. Canario, a Board-certified orthopedic surgeon, for an impartial evaluation, to resolve a conflict of medical opinion regarding her diagnosed employment-related conditions and whether there was any continuing disability due to the accepted work injury.

In a January 7, 2013 report, Dr. Canario noted the history of injury, and recounted appellant's complaint of neck and back pain that radiated into her arms and legs, as well as pain in the right knee. He advised that her lumbar condition and left knee complaints were neither secondary to the employment injury nor due to any alteration of gait, noting that these could not be substantiated by clinical, objective findings. Dr. Canario noted that appellant did not have a meniscal tear, but instead a cruciate ligament tear, that she had been vastly over-treated, and had little in the way of pathology. He opined that she should have returned to work approximately six

³ Docket No. 15-0494 (issued September 26, 2016).

weeks after the right knee arthroscopic procedure. Dr. Canario concluded that appellant could return to regular duty without restriction.⁴

OWCP continued to receive evidence. In a February 6, 2017 report, Dr. Arthur Becan, an orthopedic surgeon, noted appellant's history of injury on June 18, 2003, her accepted right knee injuries, and authorized right knee surgery. He also reviewed her electrodiagnostic studies of the lumbar spine and right knee through June 7, 2014. Dr. Becan provided findings on physical examination including range of motion of the right knee at 5 degrees of extension and 120 degrees of flexion after three attempts. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*)⁵ and *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*), he found appellant had a combined right lower extremity permanent impairment of 35 percent.

On October 3, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On November 29, 2017 OWCP referred the case record to Dr. Jovito Estaris, a physician Board-certified in occupational medicine serving as an OWCP district medical adviser (DMA), to review and provide an opinion regarding her permanent impairment rating. In his December 2, 2017 report, Dr. Estaris reviewed Dr. Becan's February 6, 2017 report and noted that appellant's claim had not been accepted for a lumbosacral condition. He further noted that Dr. Becan provided an impairment rating of the right knee based on loss of range of motion, but did not provide measurements of the left knee. Dr. Estaris found that Dr. Becan's findings were markedly different from the other findings of record. He recommended a second opinion evaluation and range of motion measurements in keeping with the A.M.A., *Guides*.

In an April 20, 2018 addendum report, Dr. Becan opined that appellant's left knee was normal with no left knee injury or MRI scan of the left knee.

On July 13, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions for an impartial medical examination with Dr. Dean Carlson, a Board-certified orthopedic surgeon, to determine her diagnosis and her employment-related permanent impairment for schedule award purposes.

⁴ By decision dated August 1, 2013, OWCP found that the special weight of the medical evidence rested with the opinion of Dr. Canario and finalized the termination of wage-loss compensation and medical benefits. Appellant, through counsel, filed a timely request for a hearing before a representative of OWCP's Branch of Hearings and Review. In a January 15, 2014 decision, an OWCP hearing representative affirmed the August 1, 2013 decision. He found Dr. Canario's evaluation was well rationalized and entitled to the special weight of an impartial specialist. On May 16, 2014 appellant, through counsel, requested reconsideration. By decision dated September 12, 2014, OWCP denied modification of the prior decisions. Appellant appealed this decision to the Board. In its September 26, 2016 decision, the Board found that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 1, 2013, and that she did not establish that she had any continuing employment-related disability after that date causally related to the June 18, 2003 employment injury. *Supra* note 3.

⁵ A.M.A., *Guides* (6th ed. 2009).

In his October 4, 2018 report, Dr. Carlson noted that there was a conflict of medical opinion between Drs. Canario and Becan. He reviewed the SOAF and appellant's medical treatment. Dr. Carlson provided findings on physical examination and disagreed with the SOAF. He suggested that the accepted conditions should consist of osteochondral fracture medial femoral condyle right knee, contusion and sprain right knee, and herniated nucleus pulposus L4-5 left and L5-S1 central. Dr. Carlson determined that appellant had reached maximum medical improvement (MMI). He found no evidence of permanent impairment, specifically noting that appellant had no permanent impairment due to osteochondral fracture of the right medial femoral condyle and no objective findings for right L5-S1 lumbosacral radiculopathy resulting in permanent impairment.

On November 28, 2018 Dr. Michael M. Katz, a Board-certified internist and DMA, reviewed the medical records for schedule award purposes. He asserted that the conflict of medical opinion evidence resulted from disagreement between Drs. Becan and Estaris regarding right lower extremity impairment. Dr. Katz agreed with Dr. Carlson's opinion and found that appellant had no permanent impairment of the right lower extremity warranting a schedule award.

By decision dated December 10, 2018, OWCP denied appellant's schedule award claim, finding that she had not established permanent impairment of a scheduled member or function of the body due to her June 18, 2003 employment injury.

On December 17, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In an April 4, 2019 report, Dr. Becan reviewed the medical evidence, including the reports from Drs. Estaris and Katz, serving as DMAs, and Dr. Carlson. He disagreed with the findings on examination by Dr. Carlson, specifically noting that he failed to utilize Semmes-Weinstein Monofilament as recommended by the A.M.A., *Guides*.

A hearing was held on April 11, 2019. By decision dated May 22, 2019, OWCP's hearing representative found that appellant had not met her burden of proof to establish permanent impairment causally related to her accepted employment injuries. She found that Dr. Carlson's opinion was entitled to the special weight of the medical evidence and established that appellant had no permanent impairment of a scheduled member or function of the body warranting a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁶ and its implementing federal regulations,⁷ 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. However, FECA does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a 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

⁶ *Supra* note 1.

⁷ 20 C.F.R. § 10.404.

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*, published in 2009.⁸ 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

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.¹⁰ OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence, which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred, describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.¹¹

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.¹² Furthermore, the back is specifically excluded from the definition of organ under FECA.¹³ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.¹⁴ The Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.¹⁵

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the

⁸ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁹ *K.J.*, Docket No. 19-1492 (issued February 26, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹¹ *Supra* note 5. *B.J.*, Docket No. 19-0960 (issued October 7, 2019).

¹² *K.Y.*, Docket No. 18-0730 (issued August 21, 2019); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹³ 5 U.S.C. § 8101(19); *G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁴ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁵ *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

Secretary shall appoint a third physician who shall make an examination.”¹⁶ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently rationalized and based upon a proper factual background, must be given special weight.¹⁷

ANALYSIS

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

Preliminarily, the Board notes that findings made in its prior decision are *res judicata* absent further review by OWCP under section 8128 of FECA and, therefore, the prior evidence need not be addressed again in this decision.¹⁸

The Board finds that OWCP improperly referred appellant to Dr. Carlson for an impartial medical evaluation on the degree of permanent impairment due to her accepted employment-related injuries. Dr. Carlson noted in his October 4, 2018 report that there was a conflict in medical opinion between Drs. Canario and Becan. However, Dr. Canario’s January 7, 2013 report contained stale findings on examination and did not address permanent impairment. Furthermore, the Board has held that termination of benefits due to a finding of no residuals of the accepted conditions does not bar a subsequent schedule award; rather, the claims examiner should consider the schedule award matter separately from the termination of benefits.¹⁹ Therefore, Dr. Canario’s report was insufficient to create a conflict in the medical opinion evidence with regard to appellant’s schedule award claim.²⁰

As a proper conflict did not exist in the medical opinion evidence at the time appellant was referred to Dr. Carlson, his report is not entitled to the special weight accorded to an impartial medical specialist. His report, however, should be considered for its own intrinsic value.²¹

The Board further finds that there remains an unresolved conflict in the medical evidence between Dr. Becan, appellant’s treating physician, and Dr. Carlson, properly designated as OWCP’s second opinion physician, regarding whether appellant has established permanent impairment of the right lower extremity. Dr. Becan found that appellant had 35 percent permanent impairment of her right lower extremity. Dr. Carlson found that appellant had no permanent impairment due to her accepted employment injuries. As there remains an unresolved conflict in the medical evidence, the case must be remanded to OWCP for referral to an impartial medical

¹⁶ 5 U.S.C. § 8123(a).

¹⁷ *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁸ *G.W.*, Docket No. 19-1281 (issued December 4, 2019).

¹⁹ *D.D.*, Docket No. 16-0558 (issued August 5, 2016); *supra* note 8 at Chapter 2.808.11 (February 2013).

²⁰ *Supra* notes 18 and 19.

²¹ *A.M.*, Docket No. 16-0816 (issued November 2, 2016); *M.R.*, Docket No. 11-1419 (issued May 21, 2012).

examiner for resolution of the conflict in accordance with 5 U.S.C. § 8123(a).²² On remand, OWCP shall refer appellant, along with the case file, and an updated SOAF, to a specialist in the appropriate field of medicine for an impartial medical examination and a report including detailed findings and proper application of the A.M.A., *Guides*. After this and other such further development as deemed necessary, it 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.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 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: September 15, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

²² *M.K.*, Docket No. 18-1614 (issued March 25, 2019).