United States Department of Labor
Employees' Compensation Appeals Board

N.W., Appellant	)	
and	)	**Docket No. 21-0653**
	)	**Issued: September 30, 2021**
U.S. POSTAL SERVICE, TRENTON PROCESSING & DISTRIBUTION CENTER, Trenton, NJ, Employer	)	

Appearances:
Michael D. Overman, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 24, 2021 appellant, through counsel, filed a timely appeal from an October 23, 2020 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 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

On November 7, 2001 appellant, then a 56-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that on October 9, 2001 she inhaled dust particles contaminated with anthrax spores while in the performance of duty. OWCP accepted the claim for inhalation of anthrax. It paid appellant wage-loss compensation on the periodic rolls for total disability beginning June 16, 2002 and for partial disability based on her earnings from private-sector employment beginning February 19, 2006. On August 7, 2006 appellant returned to her regular employment at the employing establishment.

In a June 23, 2011 impairment rating, Dr. Leon H. Waller, an osteopath Board-certified in internal medicine, recounted appellant's history of developing a flu-like illness approximately five weeks after September 11, 2001. He noted that she had been hospitalized for bilateral pneumonia for 18 days and required "the insertion of bilateral chest tubes to drain fluid in both lungs." Dr. Waller advised that appellant had worked since 2008 as a teacher. He discussed her symptoms of shortness of breath, especially on exertion. On examination, Dr. Waller found crackling in the lungs bilaterally, consistent with fibrosis. He diagnosed pulmonary anthrax with bilateral lung involvement and moderate restrictive lung disease due to residual scarring from appellant's employment-related pulmonary anthrax. Dr. Waller opined that she had 47.5 percent permanent impairment due to pulmonary disease.

On November 29, 2011 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On June 25, 2012 Dr. Mitchell Horowitz, a Board-certified internist and pulmonologist, reviewed the medical records at the request of OWCP. He opined that appellant had 28 percent whole person impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] Dr. Horowitz found, however, that she had not reached maximum medical improvement (MMI) as she had not received treatment with bronchodilators or corticosteroids. He recommended reevaluation after appellant had received additional treatment.

On July 20, 2012 OWCP informed appellant that there was no evidence to support that she had reached MMI, and that it was thus unable to determine her entitlement to a schedule award.

On November 21, 2014 OWCP referred appellant to Dr. Leonard B. Berkowitz, a Board-certified internist and pulmonologist, for a second opinion examination to determine the extent and degree of any employment-related permanent impairment.

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

An x-ray of the chest obtained on January 13, 2015 showed severe scoliosis and mild probable atelectasis likely due to scoliosis or mild focal infiltrate.

In a report dated February 20, 2015, Dr. Berkowitz noted that appellant had returned to her usual employment for two years after her injury and had subsequently worked teaching adult education until she retired in August 2014. On examination he found no rales, rhonchi, or wheezes. Dr. Berkowitz advised that pulmonary function testing showed a forced vital capacity (FVC) of 99.9 percent of predicted, a forced expiratory volume in one second (FEV_1) of 105 percent of predicted, and total lung capacity of 94 percent of predicted. He indicated that a chest x-ray showed severe spinal scoliosis that had worsened with time and a retrocardiac density that was either atelectasis or minimal infiltrate. Dr. Berkowitz found that appellant had no pulmonary impairment based on her normal lung examination and test results.

On October 8, 2019 OWCP referred appellant to Dr. Nicholas E. Roy, an osteopath, for another second opinion examination regarding the extent and degree of appellant's permanent impairment.

In a report dated October 21, 2019, Dr. Roy discussed appellant's complaints of dyspnea after walking more than one or two blocks. On examination, he found diffusely diminished lung volume with no rales, rhonchi, or wheezing. Dr. Roy performed a six-minute walk test that was 76 percent of the distance predicted. He advised that a pulmonary function study showed an FEV_1 of 44 percent of predicted, an FEV_1/FVC of 92 percent of predicted, and mild restriction of total lung capacity at 77 percent of predicted. Dr. Roy advised that February 8, 2007 x-rays demonstrated mild hyperexpansion of the lungs, showing possible chronic obstructive pulmonary disease; a September 12, 2016 x-ray showed moderate dextroscoliosis; and September 5, 2018 x-rays revealed prominent dextroscoliosis of the lumbar spine and minimal infiltrate, likely due to loss of volume. He diagnosed mild restrictive lung disease most likely due to underlying dextroscoliosis, moderate dextroscoliosis, and a history of pulmonary anthrax. Dr. Roy discussed appellant's history of dyspnea subsequent to her hospitalization for anthrax and pleural effusions that required drainage with chest tubes. He noted that her dyspnea and restrictive lung disease had been attributed to scarring from her anthrax exposure. Dr. Roy related that the most likely cause of appellant's restrictive lung disease and dyspnea was dextroscoliosis, noting that he found no interstitial scarring on imaging studies. He advised that her exercise capacity after a six-minute walk was on the lower limit of normal, and that pulmonary function studies revealed mild restrictive lung disease that was previously found due to scarring from pulmonary anthrax. Dr. Roy related that he had "a difficult time attributing [appellant's] restrictive lung disease and subsequent complaints of 'residual scarring' given [the] lack of roentgenographic evidence of any interstitial scarring or fibrosis. Review of available imaging does, however, reveal the most likely etiology of her mild restriction lung disease to be her underlying dextroscoliosis." He found that appellant had 11 percent whole person impairment due to her restrictive lung disease.

On March 13, 2020 Dr. David I. Krohn, a Board-certified internist serving as a DMA, noted that Dr. Roy had found 11 percent whole person impairment due to appellant's preexisting dextroscoliosis rather than the accepted employment injury. He found that she had "progressive severe dextroscoliosis of the spine, a well-known and well accepted cause of restrictive lung disease." Dr. Krohn reviewed the reports of Dr. Berkowitz and Dr. Roy and opined that appellant's symptoms and mild restriction was due to dextroscoliosis rather than her anthrax

exposure. He noted that Dr. Waller had found extreme scarring on x-ray, which was contradicted by Dr. Roy's interpretation of the x-ray. Dr. Krohn related, "In my opinion, [Dr. Roy's] evaluation of the claimant demonstrated a disputed interpretation of the chest x-ray, lacked the benefit of results of the [six]-minute walk test, and did not consider the physiologic effect of the claimant's scoliosis." He found that appellant had no ratable impairment due to employment-related anthrax pneumonia, noting that her symptoms, the x-ray findings, and pulmonary testing were "likely due to [appellant's] preexisting and progressive dextroscoliosis…."

By decision dated April 10, 2020, OWCP denied appellant's schedule award claim.

On April 18, 2020 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on August 13, 2020. Counsel argued that a conflict existed between Drs. Waller and Roy.

By decision dated October 23, 2020, OWCP's hearing representative affirmed the April 10, 2020 decision.

LEGAL PRECEDENT

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proof to establish permanent impairment of a scheduled member or function as a result of an employment injury.[4]

The schedule award provisions of FECA,[5] and its implementing federal regulations,[6] 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. FECA, however, 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 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.[7] The Board has approved the use by

[4] *G.C.*, Docket No. 20-0238 (issued February 17, 2021); *B.S.*, Docket No. 19-1717 (issued August 11, 2020); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[5] *Supra* note 2.

[6] 20 C.F.R. § 10.404.

[7] 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 Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Chapter 3.700, Exhibit 1 (January 2010).

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.[8]

ANALYSIS

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

OWCP referred appellant to Dr. Roy for a second opinion examination to determine whether she had a permanent impairment due to her accepted pulmonary anthrax. On October 21, 2019 Dr. Roy advised that pulmonary testing had showed an FEV_1 of 44 percent of predicted, an FEV_1/FVC of 92 percent of predicted, and mild restriction of total lung capacity at 77 percent of predicted. He further noted that a six-minute walk test had yielded findings on the lower end of normal. Dr. Roy interpreted the latest x-ray as showing significant dextroscoliosis of the lumbar spine and minimal infiltrate probably due to volume loss. He advised that imaging showed no interstitial scarring or chronic interstitial process. Dr. Roy opined that, due to the lack of evidence of interstitial scarring or fibrosis, he believed that the most likely etiology of appellant's restrictive lung disease was her dextroscoliosis. He opined that she had 11 percent whole person impairment due to her restrictive lung disease. However, Dr. Roy's opinion is equivocal. First, he stated that appellant's restrictive lung disease was most likely due to underlying dextroscoliosis, moderate dextroscoliosis, and a history of pulmonary anthrax. Dr. Roy then later stated that the most likely cause of her restrictive lung disease and dyspnea was only dextroscoliosis, noting that he found no interstitial scarring on imaging studies. The Board has held that medical opinions that are speculative or equivocal in nature are of diminished probative value.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation, but OWCP shares responsibility in the development of the evidence to see that justice is done.[9] Once it undertakes development of the record, OWCP must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[10] If the opinion is vague, speculative, incomplete, or not rationalized, it has the responsibility to secure a supplemental report to correct the defect.[11] As further clarification is required with regard to Dr. Roy's opinion, the case must be remanded to OWCP.

On remand, OWCP shall request a supplemental report from Dr. Roy regarding whether appellant sustained a permanent impairment due to her accepted pulmonary anthrax. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

[8] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[9] *See L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

[10] *Id.*; *see also S.A.*, Docket No. 18-1024 (issued March 12, 2020).

[11] *T.C.*, Docket No. 17-1906 (issued May 25, 2018).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2020 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 30, 2021
Washington, DC

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

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

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