United States Department of Labor
Employees' Compensation Appeals Board

N.W., Appellant	)	
and	)	**Docket No. 24-0747**
	)	**Issued: August 28, 2024**
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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On July 8, 2024 appellant, through counsel, filed a timely appeal from a January 25, 2024 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 a permanent impairment of the lungs, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.[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 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 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 usual employment at the employing establishment.

In a June 23, 2011 impairment rating, Dr. Leon H. Waller, an osteopath, discussed 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." On examination Dr. Waller noted 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 48 percent permanent impairment due to pulmonary disease.[4]

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*).[5] 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.

[3] Docket No. 21-0653 (issued September 30, 2021).

[4] Dr. Waller found 47.5 percent permanent impairment, which rounded to 48 percent.

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

On July 20, 2012 OWCP informed appellant that the evidence currently failed 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 of any employment-related permanent impairment.

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 (PFT) showed a forced vital capacity (FVC) of 99.9 percent of predicted, a forced expiratory volume in one second (FEV1) 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 opined 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 a second opinion examination to determine whether she had a permanent impairment due to her accepted pulmonary condition.

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 advised that a PFT showed an FEV1 of 44 percent of predicted, an FEV1/FVC of 92 percent of predicted, and mild restriction of total lung capacity at 77 percent of predicted. He found 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 a September 5, 2018 x-rays revealed prominent dextroscoliosis of the lumbar spine and minimal infiltrate likely due to loss of volume. Dr. Roy diagnosed mild restrictive lung disease most likely due to underlying dextroscoliosis, moderate dextroscoliosis, and a history of pulmonary anthrax. He noted that appellant's dyspnea and restrictive lung disease had been attributed to scarring from her anthrax exposure. Dr. Roy advised that PFTs revealed mild restrictive lung disease that was previously attributed to scarring from pulmonary anthrax. He further found that a review of imaging studies showed the "most likely etiology of her mild restriction lung disease to be her underlying dextroscoliosis." Dr. Roy 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 district medical adviser (DMA), noted that Dr. Roy had found 11 percent whole person impairment due to appellant's preexisting dextroscoliosis rather than the accepted employment injury. Dr. Krohn opined that she had "progressive severe dextroscoliosis of the spine, a well-known and well accepted cause of restrictive lung disease." He reviewed the reports of Dr. Berkowitz and Dr. Roy

and found that appellant's symptoms and mild restriction resulted from dextroscoliosis rather than her anthrax exposure. Dr. Krohn 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 her 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 Dr. Waller and Dr. Roy.

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

Appellant appealed to the Board. By decision dated September 30, 2021, the Board set aside the October 23, 2020 decision.[6] It found that Dr. Roy's opinion was equivocal as he attributed appellant's lung disease to underlying dextroscoliosis and her history of pulmonary anthrax but subsequently found that the cause of her restrictive lung disease was only dextroscoliosis. The Board remanded the case for OWCP to obtain a supplemental report from Dr. Roy regarding whether appellant had sustained a pulmonary impairment due to her accepted pulmonary anthrax.

On November 22, 2021 OWCP was advised that Dr. Roy was no longer accepting workers' compensation cases.

On March 13, 2023 OWCP referred appellant to Dr. Vinod Khanijo, a Board-certified internist and pulmonologist, for a second opinion evaluation.

In a report dated April 13, 2023, Dr. Khanijo discussed the history of injury and provided his review of the evidence of record, including the results of diagnostic studies. He noted that a PFT performed on June 23, 2011 showed moderate restrictive disease and that a PFT performed on October 21, 2019 appeared to show restrictive disease. Dr. Khanijo indicated that appellant resumed full-time work for two years in 2006 until her retirement. He related, "She stated that she also had some muscle weakness, but that too had resolved. She feels her body is completely healed. She feels quite normal at this time." Dr. Khanijo indicated that appellant denied having any current symptoms. On examination he found 98 percent oxygen saturation, good air entry to the chest bilaterally, and no wheezing or rales. Dr. Khanijo opined that appellant had no permanent impairment as a result of pulmonary anthrax, noting that she was asymptomatic with normal findings on examination. He related that "the claimant herself believes she has completely recovered from her illness." Dr. Khanijo advised that she had no impairment and thus no need to apply the A.M.A., *Guides*. He opined that appellant obtained MMI in 2006. He found some scoliosis based on x-rays but determined that she was asymptomatic from the scoliosis.

[6] *Supra* note 3.

On May 24, 2023 Dr. Krohn, the DMA, reviewed the evidence of record, including Dr. Khanijo's April 13, 2023 report. He concurred with the finding by Dr. Khanijo, and the previous findings by Dr. Berkowitz and Dr. Roy, that appellant had no ratable impairment as a result of the accepted condition of anthrax pneumonia.

By decision dated June 2, 2023, OWCP denied appellant's schedule award claim, finding that appellant had not established permanent impairment of a scheduled member or function of the body.

On June 8, 2023 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on October 13, 2023. Counsel asserted that appellant continued to require medical care for shortness of breath and other symptoms and thus disagreed with Dr. Khanijo's finding that appellant was asymptomatic. He maintained that Dr. Khanijo failed to apply the A.M.A., *Guides* but instead merely relied upon appellant's statements.

By decision dated January 25, 2024, OWCP's hearing representative affirmed the June 2, 2023 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,[7] and its implementing federal regulation,[8] 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 of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

No schedule award is payable for a member, function, or organ of the body that is not specified in FECA or in the implementing regulations.[11] The list of schedule members includes the eye, arm, hand, fingers, leg, foot, and toes. Additionally, FECA specifically provides for compensation for loss of hearing and loss of vision.[12] By authority granted under FECA, the Secretary of Labor expanded the list of schedule members to include the breast, kidney, larynx,

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id*. at § 10.404(a).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[11] *J.G.*, Docket No. 16-1533 (issued March 15, 2018); *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

[12] *Supra* note 7 at § 8107(c)(13) and (14).

lung, penis, testicle, tongue, ovary, uterus/cervix and vulva/vagina, and skin.[13] Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.[14] Compensation for total loss of use of a single lung is 156 weeks.[15]

Although FECA does not specifically provide for compensation for whole person impairment, the measurement of lung function warrants special consideration. Table 5-4, Pulmonary Dysfunction, A.M.A., *Guides* page 88, provides whole person impairment ratings based on a designated Class (0-4) of impairment. Depending on the assigned class, the range of whole person impairment due to pulmonary dysfunction is 0 to 65 percent. OWCP procedures provide that lung impairment should be evaluated in accordance with the A.M.A., *Guides* insofar as possible. It further provides that schedule awards are based on the loss of use of both lungs and the percentage for the particular class of whole person respiratory impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable.[16]

The A.M.A., *Guides* provide that most pulmonary impairments should be rated using Table 5-4, Pulmonary Dysfunction. It provides:

> "The examiner should note that throughout this chapter the objective test results are used as the primary or 'key' factor in the impairment rating for the condition, or range of conditions. Well-validated organ-specific functional test measures exist for the pulmonary system that correlate well with levels of impairment. It is therefore appropriate to choose 'objective test results' as the primary determinant of impairment class rating in this chapter."[17]

The A.M.A., *Guides* specifies that in rating pulmonary impairment the examiner should assign an impairment class using the key impairment factor, objective test results, and that "only the key factor can be used to assign the impairment class." It further provides that "[w]hen non-key factors such as history and physical exam[ination] are relevant to the rating, they are each assigned a relative class value, which in turn is used to move the impairment rating up or down in the same class…. Regardless of the discrepancy of impairment classes between the key factor and non-key factors, the impairment rating should never move out of the class to which it was initially assigned, using only the key factor."[18]

[13] *Id*. at § 8107(c)(22); 20 C.F.R. § 10.404(b).

[14] *Id*. at § 8107(c); *Id*. at § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[15] *Id*. at § 10.404(b).

[16] *Supra* note 10 at Chapter 2.808.5c(1); *id*. at Chapter 3.700.4d(1)(c).

[17] A.M.A. *Guides* 87.

[18] *Id*.

ANALYSIS

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

On April 13, 2023 Dr. Khanijo, OWCP's referral physician, reviewed appellant's history of injury and the medical evidence of record. He noted that appellant advised that she felt like she had healed completely and had no current symptoms. On examination Dr. Khanijo found 98 percent oxygen saturation, good bilateral air entry to the chest, and no rales or wheezing. Based on the physical examination and appellant's lack of complaints, he opined that she had no permanent impairment due to her accepted condition of inhalation anthrax. On May 24, 2023 Dr. Krohn reviewed Dr. Khanijo's opinion and concurred with his findings. However, the A.M.A., *Guides* provides that an impairment of the lungs is rated using Table 5-4, and that the key factor in determining the impairment class are objective test results, noting that well-validated functional tests exist for the pulmonary system that demonstrate the level of impairment.[19] Dr. Khanijo failed to perform PFTs, as required by the A.M.A., *Guides* to evaluate impairment of the lungs under Table 5-4. As he did not provide an impairment rating in accordance with the A.M.A., *Guides*, his opinion is insufficient to carry the weight of the medical evidence regarding the nature and extent of appellant's permanent impairment due to her accepted inhalation anthrax.[20]

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.[21] OWCP undertook development of the medical evidence by referring appellant to Dr. Khanijo for a second opinion examination. It therefore has an obligation to secure a report from its referral physician that will resolve the relevant issues in the case.[22] The case will be remanded for OWCP to obtain clarification of Dr. Khanijo's opinion regarding the extent of appellant's permanent impairment of the lungs in accordance with the A.M.A., *Guides*. If OWCP is unable to obtain such clarification, it should refer appellant to another specialist in the appropriate field of medicine, for an examination and opinion on the issue of permanent impairment. After this and any such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

---

[19] *Id*.

[20] *See generally H.C.*, Docket No. 21-0761 (issued May 5, 2022); *L.Y.*, Docket No. 20-0398 (issued February 9, 2021); (finding reports of the impartial medical examiner of little probative value as the opinion failed to confirm to the A.M.A., *Guides*); *see also M.V.*, Docket No. 09-0401 (issued October 2, 2009); *E.H.*, Docket No. 08-1983 (issued March 20, 2009).

[21] *See B.W.*, Docket No. 24-0223 (issued July 17, 2024); *L.F.*, Docket No. 20-0549 (issued January 27, 2021).

[22] *See B.W., id.*; *Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2024 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 28, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board