

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

A.E., Appellant)	
)	
and)	Docket No. 22-0344
)	Issued: July 29, 2024
U.S. POSTAL SERVICE, POST OFFICE,)	
Cleveland, OH, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 7, 2022 appellant, through counsel, filed a timely appeal from an August 25, 2021 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 record contains a November 24, 2021 nonmerit decision; however, as counsel for appellant did not appeal this decision, it is not presently before the Board. *See* 20 C.F.R. § 501.3.

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.⁴

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than two percent permanent impairment of the left lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.⁵ 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 April 26, 2005 appellant, then a 45-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that she sustained left heel and ankle pain while in the performance of duty. She stopped work on April 26, 2005 and returned to full-duty work with restrictions on February 21, 2006. On September 15, 2005 OWCP accepted appellant's claim for left ankle tendinitis and aggravation of calcaneal heel spur, left foot.

On July 5, 2011 appellant, through counsel, requested a schedule award and submitted medical evidence. Following extensive development, OWCP denied appellant's schedule award claim.

On May 22, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In support thereof, appellant submitted an April 26, 2018 report, wherein Dr. Sami E. Moufawad, a physician Board-certified in pain medicine, explained that while the range of motion (ROM) methodology could not be used for calculation of appellant's permanent impairment under the sixth edition of the A.M.A., *Guides to the Evaluation of Permanent Impairment* (A.M.A., Guides),⁶ based upon her accepted lower extremity diagnoses, her loss of ROM could be used as a grade modifier in conjunction with the diagnosis-based impairment (DBI) methodology for rating permanent impairment. Dr. Moufawad opined that applying the DBI methodology she had five percent left lower extremity permanent impairment due to tendinitis of the left Achilles tendon and one percent permanent impairment for plantar fasciitis. He explained that appellant's

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the August 25, 2021 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.*

⁵ Docket No. 15-0496 (issued May 23, 2016).

⁶ A.M.A., *Guides* (6th ed. 2009).

tendinitis was a Class 1 impairment as appellant had mild motion deficit. He applied a grade modifier for functional history (GMFH) of 2 as she walked with a limp; a grade modifier for physical examination (GMPE) of 1, and a grade modifier for clinical studies (GMCS) of zero. After applying the net adjustment formula, Dr. Moufawad concluded that she had five percent permanent impairment of the left lower extremity based upon the diagnosis of tendinitis. He concluded that this diagnosis resulted in the highest impairment value.

OWCP subsequently referred the case record, along with a statement of accepted facts (SOAF), to a district medical adviser (DMA) for an opinion regarding the extent of appellant's permanent impairment.

In a June 28, 2018 report, Dr. Jovito Estaris, a physician Board-certified in occupational medicine serving as a district medical adviser (DMA), noted that Dr. Moufawad based his opinion on tendinitis of the left Achilles tendon; however, a question remained as to whether the tendinitis had resolved. He recommended a second opinion examination.

On October 26, 2018 OWCP referred appellant, along with the case record and a SOAF, to Dr. William Bohl, a Board-certified orthopedist, for a second opinion examination.

In a December 12, 2018 report, Dr. Bohl noted examination findings of tenderness to palpation, mild ankle instability, and no motion deficit. For the diagnosis of tendinitis, he referred to the A.M.A., *Guides*, Table 16-2, Foot and Ankle Regional Grid, Lower Extremity Impairments, at page 501, and opined that appellant had a Class 1, grade C impairment, with a GMFH of 1 for mild palpatory findings, a GMPE of 1 for mild instability, and a GMCS of 0 for a net adjustment of minus 1, grade B, or one percent permanent impairment referable to her Achilles tendinitis. For the diagnosis of plantar fasciitis, Dr. Bohl also referred to Table 16-2, for soft tissue which encompasses plantar fasciitis, and opined that appellant had a Class 1, grade C impairment, with a GMFH of 1 for mild instability, a GMPE of 1 for use of orthotics, and a GMCS of 1 for x-rays showing calcaneal spur, resulting in a net adjustment of zero for a final grade C, or one percent impairment referable to plantar fasciitis. He opined that the combined ratings yielded a total of two percent left lower extremity impairment. Dr. Bohl also noted that appellant had zero percent impairment based on the ROM method and that the DBI method was selected as the higher rating. He opined that she reached MMI on December 12, 2018, the date of his examination.

In a January 1, 2019 report, the DMA, Dr. Estaris, concurred with Dr. Bohl that appellant had two percent left lower extremity permanent impairment.

By decision dated January 16, 2019, OWCP granted appellant a schedule award for two percent left lower extremity permanent impairment, based on the opinions of the second opinion physician, Dr. Bohl, and the DMA, Dr. Estaris. The period of the award ran for 5.76 weeks from December 12, 2018 to January 21, 2019.

On January 28, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated August 21, 2019, OWCP's hearing representative vacated the January 16, 2019 decision, finding that a conflict existed between the opinions of Dr. Bohl, the

second opinion physician, and Dr. Moufawad, appellant's treating physician, and that an impartial medical examination was required to resolve the conflict.

On September 13, 2019 OWCP referred appellant to Dr. Tim Nice, a Board-certified orthopedic surgeon, for an IME. In an October 7, 2019 report, Dr. Nice referred to the A.M.A., *Guides*, Table 16-2, Foot and Ankle Regional Grid, at page 501, and found that appellant had a one percent impairment of the left lower extremity based on her diagnosis of left foot/ankle tendinitis, and one percent impairment for plantar fasciitis. He explained his rating noting that, most of the physicians of record had found some palpable findings related to plantar fasciitis and calcaneal spur, making this diagnosis a CDX of 1. Dr. Nice related that, as appellant wore orthotics, her GMFH was 1, her GMPE was 2 due to tenderness about the tendons and the plantar fascia. Appellant's GMCS was 1 due to her heel spur. Dr. Nice combined the ratings and opined that she had two percent permanent impairment of the left lower extremity.

In a November 7, 2019 addendum report, Dr. Nice noted that he agreed with Dr. Bohl that appellant's MMI occurred on December 12, 2018 and that she had two percent left lower extremity permanent impairment.

On November 26, 2019 OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity, based on the October 7 and November 7, 2019 reports from Dr. Nice, the most recent IME. The award ran for 5.76 weeks for the period December 12, 2018 to January 21, 2019.

On December 2, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 10, 2020.

By decision dated May 22, 2020, OWCP vacated the November 26, 2019 decision, finding that the conflict was not resolved between the opinions of Dr. Bohl, the second opinion physician, and Dr. Moufawad, appellant's treating physician.

On June 1, 2020 OWCP requested that Dr. Nice, the IME, provide an addendum to address the conflict between Dr. Moufawad, who found a mild motion deficit, and Dr. Bohl, who found no motion deficit.

In a July 13, 2020 report, Dr. Nice explained that "tend[i]nitis and plantar fasciitis are not appropriate conditions to be measured in the foot by the [ROM] method." He noted that "this patient suffers from obesity and bilateral, that is both feet, being flattened, or in another term, the medical term of *pes planus*." Dr. Nice explained, "for this patient, her motion on the asymptomatic right side showed 0 [degrees] of extension, the same as the symptomatic ankle on the left side. Normal for this patient was 0 [degrees] of extension." In a July 27, 2020 addendum, Dr. Nice explained that the date of MMI was December 12, 2016, the date of examination by Dr. Bohl, as his findings were unchanged from those of Dr. Bohl.

By decision dated August 7, 2020, OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity, based on the July 13 and 27, 2020 reports from Dr. Nice. The period of the award ran for 5.76 weeks from December 12, 2018 to January 21, 2019.

On August 13, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 5, 2020.

By decision dated December 29, 2020, OWCP vacated the August 7, 2020 decision, finding that clarification from the IME was required regarding motion loss due to tendinitis. The hearing representative instructed that OWCP request a supplemental opinion from Dr. Nice regarding: "(1) the grade modifier for functional history including [ROM] loss; (2) total impairment referable to ankle tend[i]nitis based on Table 16-2 of the *Guides*; and (3) total (combined) left lower extremity permanent impairment."

On January 4, 2021 OWCP requested clarification from Dr. Nice regarding an impairment rating based on motion loss.

In a February 16, 2021 report, Dr. Nice noted that, "this patient has an unfortunate pathology that she has had all her life, *i.e.*, *pes planus*. He reiterated his opinion that, "Based on the diagnosis of planar fasciitis and posterior tibial tendinitis, the [ROM] findings do not fit this diagnosis and that is the reason they resulted in a 0 impairment."

By decision dated March 24, 2021, OWCP denied appellant's claim for an additional schedule award. The decision was based on the October 16, 2019 report from the IME, Dr. Nice, and his supplemental reports dated November 7, 2019, July 12 and 27, 2020, and February 16, 2021.

On March 30, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 7, 2021.

In an August 16, 2021 report, Dr. Moufawad reiterated his opinion that appellant was entitled to five percent permanent impairment rating based on her DBI of tendinitis with mild motion deficits, and one percent permanent impairment due to her DBI of plantar fasciitis. He again concluded that she had a combined six percent left lower extremity permanent impairment.

By decision dated August 25, 2021, OWCP's hearing representative affirmed the March 24, 2021 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁷ and its implementing regulations⁸ 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 of loss of a member 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 and the Board has concurred in such

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

adoption.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹¹ This is called an IME and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹² When there exists 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 well rationalized and based upon a proper factual background, must be given special weight.¹³

When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence, and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹⁴ If the referral physician fails to respond or does not provide an adequate response, OWCP should refer appellant for a new IME examination.¹⁵

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than two percent permanent impairment of the left lower extremity, for which she previously received a schedule award.

By decision dated August 21, 2019, OWCP's hearing representative properly determined that a conflict existed between the opinion of Dr. Bohl, the second opinion physician, and Dr. Moufawad, a treating physician with regard to the extent of appellant's permanent impairment. Pursuant to 5 U.S.C. § 8123(a), OWCP referred appellant for an impartial medical examination to resolve the conflict in medical opinion.

⁹ *Id.* at § 10.404(a); *see R.D.*, Docket No. 20-1052 (issued January 5, 2022); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

¹¹ 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹² 20 C.F.R. § 10.321.

¹³ *B.M.*, Docket No. 19-1069 (issued November 21, 2019); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁴ *W.H.*, Docket No. 16-0806 (issued December 15, 2016); *supra* note 10 at Chapter 2.810.11(e) (September 2010).

¹⁵ *Id.*; *see also R.W.*, Docket No. 18-1457 (issued February 1, 2019).

In an October 7, 2019 report, Dr. Nice, the IME, referred to the A.M.A., *Guides*, Table 16-2, Foot and Ankle Regional Grid, at page 501, and found that appellant had a 1 percent impairment of the left lower extremity based on her diagnosis of left foot/ankle tendinitis, and 1 percent impairment for plantar fasciitis. He explained his rating noting that, most of the physicians of record had found some palpable findings related to plantar fasciitis and calcaneal spur, making this diagnosis a CDX of 1. Dr. Nice related that, as appellant wore orthotics her GMFH was 1, her GMPE was 2 due to tenderness about the tendons and the plantar fascia. Appellant's GMCS was 1 due to her heel spur. Dr. Nice combined the ratings and opined that she had two percent permanent impairment of the left lower extremity. In a November 7, 2019 addendum, he agreed with Dr. Bohl that appellant's MMI occurred on December 12, 2018.

On November 26, 2019 OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity, based on the October 7 and November 7, 2019 IME reports. However, by decision dated May 22, 2020, the OWCP hearing representative vacated that decision, finding that the conflict between Dr. Bohl and Dr. Moufawad remained unresolved, as the IME did not adequately address the use of the ROM method by Dr. Moufawad to arrive at his impairment rating of five percent.

Accordingly, OWCP requested a supplemental report from the IME, Dr. Nice, to discuss the motion deficit found by Dr. Moufawad. In a July 13, 2020 report, Dr. Nice explained that "tend[i]nitis and plantar fasciitis are not appropriate conditions to be measured in the foot by the range of motion method." He noted that appellant had flat feet, or in medical terms *pes planus*. Dr. Nice explained, "for this patient, her motion on the asymptomatic right side showed 0 [degrees] of extension, the same as the symptomatic ankle on the left side. Normal for this patient was 0 [degrees] of extension." In a July 27, 2020 addendum, Dr. Nice reiterated his opinion that, "Based on the diagnosis of planar fasciitis and posterior tibial tend[i]nitis, the range of motion findings do not fit this diagnosis and that is the reason they resulted in a 0 impairment." He again reiterated in his February 16, 2021 report that appellant's tendinitis and plantar fasciitis were not properly rated for loss of ROM as appellant had flat feet and 0 degrees of extension was normal for appellant.

As noted above, when a case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.

The Board finds that the reports from Dr. Nice, the IME, are entitled to special weight and establish that appellant had no more than a two percent left lower extremity permanent impairment. The IME's opinion was based on a proper factual and medical history and his findings on examination. Dr. Nice provided a well-rationalized opinion and explained why appellant was entitled to a two percent impairment rating based on the DBI method, and why the rating of five percent based on the ROM method was incorrect. He properly noted that the diagnoses of planar fasciitis and posterior tibial tendinitis upon which the permanent impairment rating was based were

not properly rated under the ROM methodology,¹⁶ and that appellant had no ratable ROM loss as a grade modifier as she had *pes planus*. Accordingly, OWCP properly accorded special weight to Dr. Nice's reports.

As the medical evidence of record is insufficient to establish greater than the two percent permanent impairment of the left lower extremity previously awarded, the Board finds that appellant has not met her burden of proof. Appellant may request a schedule award or increased schedule award at any time based on evidence of new exposure, or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish greater than two percent permanent impairment of the left lower extremity, for which she previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 29, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁶ The A.M.A., *Guides* 543 explain that some of the diagnosis-based grids refer to the ROM section when that is the most appropriate mechanism for grading the impairment. This section is to be used as a stand-alone rating when other grids refer to this section or no other diagnosis-based sections of the chapter are applicable for impairment rating of a condition.