United States Department of Labor
Employees' Compensation Appeals Board

C.O., Appellant	)	
and	)	**Docket No. 24-0240**
	)	**Issued: May 29, 2024**
U.S. POSTAL SERVICE, PALATINE PROCESSING & DISTRIBUTION CENTER, Palatine, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 8, 2024 appellant, through counsel, filed a timely appeal from a December 18, 2023 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 to consider 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 greater than 10 percent permanent impairment of the right lower extremity or greater than 10 percent permanent impairment of the left lower extremity for which she previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances as set forth in the Board's prior decisions are incorporated hereby by reference.[3] The relevant facts are as follows.

On July 21, 2003 appellant, then a 39-year-old mail processor clerk, filed an occupational disease claim (Form CA-2) alleging that she developed severe foot pain due to factors of her federal employment, including walking and standing on a concrete floor. She noted that she first became aware of her condition on May 31, 2003 and realized its relation to her federal employment on July 3, 2003. OWCP accepted the claim for mild plantar fasciitis of the right foot.[4]

By decision dated June 28, 2005, OWCP granted appellant a schedule award for six percent permanent impairment of the right lower extremity. The period of the award ran for 17.28 weeks from May 20 through September 17, 2004.

Appellant appealed to the Board. By decision dated July 23, 2007,[5] the Board set aside the June 28, 2005 decision, finding a conflict of medical opinion. The Board remanded the case for an impartial medical examination.

Following further development, by decision dated November 7, 2007, OWCP denied appellant's increased schedule award claim, finding that the medical evidence of record was insufficient to establish greater than six percent permanent impairment of the right lower extremity.

Appellant appealed to the Board. By decision dated June 5, 2008, the Board affirmed the November 7, 2007 decision, finding that appellant did not have greater than six percent permanent impairment of her right lower extremity for which she had previously received a schedule award.[6]

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[3] Docket No. 08-0404 (issued June 5, 2008); Docket No. 07-0804 (issued July 23, 2007).

[4] OWCP assigned the present claim OWCP File No. xxxxxx386. Appellant subsequently filed a traumatic injury claim, which OWCP accepted for neck sprain, lumbar sprain, and protruding lumbar disc at L5-S1 under OWCP File No. xxxxxx498. OWCP has administratively combined OWCP File Nos. xxxxxx498 and xxxxxx386, with the latter serving as the master file.

[5] *Supra* note 2.

[6] *Id.*

On March 24, 2011 appellant underwent an OWCP-authorized right tarsal tunnel release. OWCP expanded its acceptance of the claim to include bilateral plantar fascial fibromatosis and right tarsal tunnel syndrome on February 19, 2019. It also authorized surgery for decompression of the tibia nerve. On March 28, 2019 appellant underwent OWCP-authorized left ankle tarsal tunnel release. On December 17, 2019 OWCP expanded acceptance of the claim to include left tarsal tunnel syndrome.

On December 4, 2019 appellant filed a claim for compensation (Form CA-7) for an increased schedule award.

In a December 17, 2019 development letter, OWCP requested that appellant submit a permanent impairment evaluation from her treating physician addressing whether she had reached maximum medical improvement (MMI) and, if so, the extent of any permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairmen*t (A.M.A., *Guides*).[7] It afforded her 30 days to submit the necessary evidence. Appellant did not respond.

By decision dated May 26, 2020, OWCP denied the schedule award claim. On June 1, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a September 16, 2020 impairment evaluation, Dr. John Mazzarella, a podiatrist, recounted appellant's history of injury and medical treatment. He noted that range of motion (ROM) testing demonstrated flexion of 20 degrees, extension of 10 degrees, inversion of 20 degrees and eversion of 10 degrees bilaterally. Dr. Mazzarella indicated that he utilized the tables for upper extremity impairment to apply the diagnosis-based impairment (DBI) rating method of the sixth edition of the A.M.A., *Guides* to appellant's lower extremity impairments. He determined that appellant had 8 percent permanent impairment of the whole person and 36 percent permanent impairment of the right and left lower extremities. Dr. Mazzarella reported a date of MMI of September 16, 2020.

A hearing was held on September 18, 2020. By decision dated October 29, 2020, OWCP's hearing representative vacated the May 26, 2020 OWCP decision and remanded for review of Dr. Mazzarella's September 16, 2020 report by a district medical adviser (DMA).

In a December 28, 2020 report, Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as a DMA, reviewed the medical record, including Dr. Mazzarella's September 16, 2020 report, and noted that appellant's claim was accepted for plantar fasciitis and tarsal tunnel syndrome, bilaterally. He found that Dr. Mazzarella's whole person impairment rating was not in conformance with FECA, and that only one ROM measurement was provided. Dr. Fellars also determined that there was no documentation regarding appellant's functional history, physical examination, or clinical studies, and therefore recommended a second opinion examination.

On November 16, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF), the case record, and a series of questions to Dr. Shirley A. Conibear, a Board-

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

certified occupational and preventative medicine specialist, to determine the extent of appellant's permanent impairment for schedule award purposes.

In a December 7, 2021 report, Dr. Conibear noted her examination of appellant on December 7, 2021. She recounted appellant's history of injury, reviewed the medical record, and set forth her examination findings. Dr. Conibear related that appellant continued to have pain and numbness in both plantar aspects of her feet when walking and standing. She diagnosed bilateral tarsal tunnel syndrome, and applied Table 13-12, Station and Gait Disorders, page 336 of the A.M.A., *Guides*, finding 20 percent whole person impairment.

In a February 10, 2022 report, Dr. Fellars, OWCP's DMA, reviewed Dr. Conibear's December 7, 2021 report, and found that she had not properly applied the A.M.A., *Guides*. He diagnosed tarsal tunnel syndrome and plantar fasciitis. Dr. Fellars found that in accordance with Table 16-22, Ankle Motion Impairments, page 549, appellant had seven percent bilateral lower extremity permanent impairment based on previously documented motion loss. He applied Table 16-12, Peripheral Nerve Impairment, page 534, and found a significant sensory deficit of 10 percent permanent impairment bilaterally. Dr. Fellars assigned a grade modifier for functional history (GMFH) of 2 and a grade modifier for physical examination (GMPE) of 2. He found that a grade modifier for clinical studies (GMCS) was not applicable. Dr. Fellars calculated that appellant had +2 adjustment, which resulted in 10 percent permanent impairment of the bilateral lower extremities. He found that she had reached MMI as of December 7, 2021, the date of Dr. Conibear's report. Dr. Fellars concluded that DBI estimates were greater, and that appellant was therefore entitled to an additional 4 percent permanent impairment of the right lower extremity and 10 percent permanent impairment of the left lower extremity.

By decision dated March 4, 2022, OWCP granted appellant a schedule award for an additional 4 percent of the right lower extremity and 10 percent of the left lower extremity. The award ran for 40.32 weeks from March 3 through December 7, 2022.

On March 30, 2022 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

Following preliminary review, by decision dated June 24, 2022, the hearing representative set aside the March 4, 2022 decision, and remanded the claim for further development.

On August 9, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF), the case record, and a series of questions with Dr. John J. Koehler, a Board-certified occupational and preventative medicine specialist, to determine the extent of appellant's permanent impairment for schedule award purposes.

In his September 9, 2022 report, Dr. Koehler recounted the history of injury, reviewed the medical record and set forth his examination findings. He related that appellant continued to have mild pain on palpitation in the plantar fascia, and palpable fibromatosis on the left which was exquisitely tender to palpation. Dr. Koehler conducted three measurements of range of motion and listed 60 degrees of plantar flexion bilaterally, 95 degrees of dorsiflexion bilaterally, 30 degrees of inversion bilaterally, and 15 degrees of eversion bilaterally. He determined that

there were no range of motion deficits. He utilized the DBI rating method to find that, under Table 16-2 (Foot and Ankle Regional Grid), page 501, the class of diagnosis (CDX) for plantar fibromatosis resulted in a Class 1 impairment with a default value of one percent permanent impairment. Dr. Koehler assigned a GMFH of 1, due to an antalgic limp corrected by orthotics, and GMPE of 2 based on palpatory findings of fibromatosis with tender plantar fascia with nodularity present which was exquisitely tender. He found that GMCS was 1, with arthritis noted on x-ray. Dr. Koehler utilized the net adjustment formula, (GMFH – CDX) + (GMPE – CDX) = (1-1) + (2 -1) = +1, which resulted in a grade D or two percent bilateral lower extremity permanent impairment. He then evaluated appellant's peripheral nerve impairments in accordance with Table 16-12, page 536 finding a class 1, medial plantar nerve neuropraxia with sensory and motor severity of 1 in accordance with Table 16-11, page 533 and a moderate sensory deficit, with a default value of 2 due to nerve pain very tender to palpation on the plantar surface. Dr. Koehler applied a GMCS of 1 due to arthritis, a GMFH of 1 based on an antalgic gait, and found that a GMPE was not applicable. He again applied the net adjustment formula (1-2) + (1-2) = -2, which resulted in grade A or 2 percent permanent impairment of the lower extremities. He determined that appellant's permanent impairment of the lower extremities was four percent. Dr. Koehler found that appellant reached MMI on September 9, 2022.

OWCP then referred the case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as OWCP's DMA. On October 25, 2022 Dr. Harris reviewed Dr. Koehler's calculations and concluded that he had correctly determined impairment due to plantar fibromatosis. However, he found impaired sensation of the tibial nerve resulting in two percent permanent impairment, Table 16-12, page 536. Dr. Harris concurred that appellant had four percent permanent impairment of each lower extremity reaching MMI on September 9, 2022. He noted that the range of motion methodology was inappropriate.

By decision dated December 13, 2022, OWCP denied appellant's claim for an increased schedule award, finding that she had no greater impairment of the bilateral lower extremities than 10 percent previously awarded.

On December 20, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following preliminary review, in a decision dated May 5, 2023, OWCP's hearing representative set aside the December 13, 2023 decision and remanded for further development of the medical evidence.

On June 13, 2023 OWCP requested an additional report from Dr. Harris.

In a June 15 and 26, 2023 supplemental reports, Dr. Harris reviewed the medical record, and applied the net adjustment formula of the A.M.A., *Guides* to reach two percent permanent impairment of the bilateral lower extremities due to plantar fibromatosis, and two percent permanent impairment of the bilateral lower extremities due to tarsal tunnels syndrome.

By decision dated July 7, 2023, OWCP denied appellant's claim for an increased schedule award finding that she had no greater than the 10 percent permanent impairment of the bilateral lower extremities previously awarded.[8]

On July 11, 2023 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on November 6, 2023.

By decision dated December 18, 2023, the hearing representative affirmed the July 7, 2023 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations 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.[9] 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 to 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. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[10] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[11]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the foot, the relevant portion of the leg for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid -- Lower Extremity Impairments) beginning on page 501.[12] After the CDX is determined from the Foot and Ankle Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[13] Evaluators are directed to provide reasons for their

[8] The July 7, 2023 decision notes that appellant as previously paid a schedule award for 10 percent left upper extremity permanent impairment; however, this appears to be a typographical error as the medical evidence of record, attached to the July 7, 2023 decision, establishes that appellant was previously award 10 percent permanent impairment of the bilateral lower extremities.

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404; *B.C.*, Docket No. 21-0702 (issued March 25, 2022); *E.S.*, Docket No. 20-0559 (issued October 29, 2020); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[11] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *see also* Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a. (March 2017).

[12] *Supra* note 6 at 501-08.

[13] *Id.* at 515-22.

impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[14]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.[15]

ANALYSIS

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

Appellant has not provided medical evidence comporting with FECA and the sixth edition of the A.M.A., *Guides* in support of her request for an increased schedule award. The Board also notes that while Dr. Mazzarella, in his September 16, 2020 report, evaluated appellant's whole body permanent impairment, neither FECA nor its regulations provide for the payment of a schedule award for the body as a whole.[16]

In a September 9, 2022 report, Dr. Koehler, OWCP's second opinion physician, reviewed the SOAF and appellant's history of medical treatment. He found that appellant had reached MMI on September 9, 2022 the date of his impairment evaluation. Dr. Koehler applied the A.M.A., *Guides*, Table 16-2 to the accepted plantar fibromatosis, and found that appellant had two percent permanent impairment of the lower extremities for this diagnosis. He also applied the DBI rating method to the impairment of the plantar nerve to reach two percent permanent impairment of the lower extremities for this diagnosis.

In his October 25, 2022 and June 15 and 26, 2023 reports, Dr. Harris, the DMA, discussed appellant's factual and medical history with respect to her accepted lower extremity conditions. He reviewed Dr. Koehler's report and agreed with his impairment ratings, but noted that the affected peripheral nerve was the tibial nerve not the plantar nerve. Dr. Harris concluded that appellant had four percent permanent impairment of the bilateral lower extremities.

The Board finds that Dr. Harris properly explained how he arrived at appellant's rating of permanent impairment by listing the specific table in the A.M.A., *Guides*. The Board also finds that he properly interpreted and applied the standards of the sixth edition of the A.M.A., *Guides* to conclude that appellant had four percent permanent impairment of each lower extremity. The opinion of the DMA therefore represents the weight of the medical evidence and supports that she has not established greater than 10 percent permanent impairment of the right lower

[14] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[15] S*upra* note 10 at Chapter 2.808.6f (March 2017); *S.H.*, Docket No. 23-0216 (issued December 7, 2023); *B.B.*, Docket No. 18-0782 (issued January 11, 2019).

[16] *Supra* note 2 at § 8107(c); *see J.P.*, Docket No. 23-0442 (issued August 29, 2023).

extremity nor greater than 10 percent permanent impairment of the left lower extremity for which she previously received schedule award compensation.

As appellant has not established greater than the 10 percent permanent impairment of the right lower extremity or 10 percent permanent impairment of the left lower extremity for which she previously received schedule award compensation, the Board finds that she 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 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 10 percent permanent impairment of the right lower extremity or greater than 10 percent permanent impairment of the left lower extremity for which she previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 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