

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

G.C., Appellant)	
)	
and)	
)	Docket No. 20-0238
)	Issued: February 17, 2021
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE, SHENANDOAH)	
NATIONAL PARK, Luray, VA, Employer)	

Appearances:
Allen J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 11, 2019 appellant, through counsel, filed a timely appeal from an August 14, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (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.

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of a scheduled member or function of the body causally related to his accepted Lyme disease.

FACTUAL HISTORY

On February 27, 2015 appellant, then a 53-year-old maintenance worker, filed an occupational disease claim (Form CA-2) alleging that he contracted Lyme disease due to factors of his federal employment, which required that he work outside in an environment where ticks carrying Lyme disease were present. He did not stop work. OWCP accepted the claim for Lyme disease.

In a February 24, 2017 report, Dr. Robert W. Macht, a general surgeon, described appellant's history of injury and diagnosed status post Lyme disease with extremities sequelae. He noted that appellant had a prior history of back and right knee injury, and surgery to his right ankle. Appellant's physical examination was reported as revealing shoulder, wrist, and left thumb pain; nontender arm and legs; slight pain with bilateral ankle motion; and pain with bilateral hip motion. Citing to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),² Dr. Macht referenced the Shoulder Regional Grid, Table 15-5, page 401 and assigned a class 1 for nonspecific shoulder pain. He, using Table 15-3, page 395, determined that appellant had a class of diagnosis (CDX) of one for both wrists due to a soft tissue injury. Without specific reference to grade modifiers, Dr. Macht found one percent permanent impairment of each lower extremity using Table 16-4, page 512 for soft bilateral hip issue lesion. Using Table 16-2, page 501, he found one percent permanent impairment of each ankle due to bilateral ankle soft tissue problem. Lastly, Dr. Macht combined the impairments to find two percent right upper extremity permanent impairment, two percent left upper extremity permanent impairment, two percent right lower extremity permanent impairment, and two percent left lower extremity permanent impairment. He attributed appellant's bilateral upper and lower extremity permanent impairments to Lyme disease and opined that appellant had reached maximum medical improvement (MMI) on February 17, 2017.

On December 22, 2017 appellant filed a claim for a schedule award (Form CA-7).

On January 31, 2018 OWCP referred the medical record, including Dr. Macht's report, and a statement of accepted facts (SOAF) to Dr. Morley Slutsky, a Board-certified occupational medical physician serving as a district medical adviser (DMA), for review. In a February 15, 2018 report, the DMA opined that Dr. Macht's report could not be accepted as probative because it documented only limited objective findings and did not note valid range of motion measurements. He recommended a second opinion evaluation to determine the extent of appellant's employment-related permanent impairment.

² A.M.A., *Guides* (6th ed. 2009).

By decision dated February 21, 2018, OWCP denied appellant's schedule award claim based on the DMA's report.

On March 2, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on July 12, 2018.

In a July 18, 2018 report, Dr. Macht reviewed the DMA's report and noted that his interpretation of the A.M.A., *Guides* was incorrect. He noted that there were many conditions in the A.M.A., *Guides*, which were only ratable based on subjective factors, such as headache disorders. Dr. Macht concluded that his impairment rating should be used to grant appellant a schedule award. He opined that a new physical examination was unnecessary.

By decision dated August 22, 2018, OWCP's hearing representative vacated the February 21, 2018 decision denying a schedule award and remanded for referral to a second opinion physician, as recommended by the DMA.

On September 7, 2018 OWCP referred appellant, together with a SOAF and the medical records, to Dr. D. Burke Haskins, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether appellant had a ratable permanent impairment pursuant to the A.M.A., *Guides*, due to appellant's accepted Lyme disease.

In a September 25, 2018 report, Dr. Haskins reviewed appellant's medical history and noted diagnoses of history of Lyme exposure, history of atypical chest pain, osteoarthritis, probable bilateral rotator cuff pathology and supraspinatus syndrome, and history of reactive arthritis. He determined that appellant had no ratable permanent impairment due to the accepted Lyme disease and that appellant reached MMI as of September 25, 2018. Physical examination findings were detailed including range of motion findings for the shoulders, elbow, wrists, hands, cervical spine, lumbar spine, hips, knees, and ankles. Dr. Haskins noted appellant's back and neck complaints were nonspecific and, thus, not a ratable impairment under the A.M.A., *Guides*. Additionally, no spinal nerve impairment or complaints were noted and the shoulder complaints were nonspecific and likely due to rotator cuff pathology and not to Lyme disease. Dr. Haskins attributed appellant's hip complaints to osteoarthritis, the knee complaints to a prior injury and multiple surgeries, and right ankle complaints to a prior fracture and surgery. He opined that the exact etiology of appellant's left ankle and knee complaints was unclear, but that they were unrelated to the accepted Lyme disease due to the lack of objective findings and type of symptoms.

By decision dated October 4, 2018, OWCP denied appellant's claim for a schedule award, finding the weight of the medical opinion evidence rested with Dr. Haskins' report.

In a letter dated October 11, 2018, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 27, 2018, an OWCP hearing representative set aside the October 4, 2018 decision as OWCP had failed to forward a copy of Dr. Haskins' report to a DMA for review prior to issuing its schedule award decision.

On January 7 and 28, 2019 OWCP referred Dr. Haskins' report to a DMA, Dr. Slutsky, for review. In a February 13, 2019 report, the DMA concurred with Dr. Haskins' opinion of no ratable permanent impairment due to appellant's accepted Lyme disease. He noted that, while nonspecific symptoms without objective physical findings may result from Lyme disease, Dr. Haskins had performed a thorough examination, finding no specific objective residual findings related to Lyme disease and, thus, there was no basis for a permanent impairment rating.

By decision dated February 13, 2019, OWCP denied appellant's schedule award claim.

On February 21, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on June 11, 2019.

In a June 12, 2019 report, Dr. Macht noted that there was no definitive test for Lyme disease sequelae. He opined that the fact that appellant had underlying hip arthritis, nonspecific back and neck complaints, and shoulder rotator cuff pathology did not prelude a finding that appellant's complaints were causally related to his Lyme disease. Dr. Macht noted that there may be more than one reason for neck, shoulder, back, and hip pain.

By decision dated August 14, 2019, OWCP's hearing representative affirmed the February 13, 2019 decision denying appellant's schedule award claim.

LEGAL PRECEDENT

A schedule award can only be paid for a condition causally related to an employment injury. It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function as a result of an employment injury.³

The schedule award provisions of FECA,⁴ and its implementing federal regulations,⁵ 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 2009.⁶ The Board has approved the use by

³ *B.S.*, Docket No. 19-1717 (issued August 11, 2020); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a); *S.C.*, Docket No. 19-1177 (issued August 27, 2020); *see also Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

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.⁷

No schedule award is payable for a member, function, or organ of the body that is not specified in FECA or the implementing regulations.⁸ The list of scheduled members includes the eye, arm, hand, fingers, leg, foot, and toes.⁹ Additionally, FECA specifically provides for compensation for loss of hearing and loss of vision.¹⁰ By authority granted under FECA, the Secretary of Labor expanded the list of scheduled members to include the breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix, vulva/vagina, and skin.¹¹

In 1966, amendments to FECA modified the schedule award provision to provide for an award for permanent impairment of a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member.¹²

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹³ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical examiner (IME), pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁴ Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹⁵

ANALYSIS

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

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ *D.L.*, Docket No. 20-0059 (issued July 8, 2020); *W.C.*, 59 ECAB 374 (2008); *Anna V. Burke*, 57 ECAB 521 (2006).

⁹ 5 U.S.C. § 8107(c).

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.404(b).

¹² *D.L.*, *supra* note 8; *see T.O.*, Docket No. 16-1328 (issued March 13, 2017); *see also George E. Williams*, 44 ECAB 530 (1993).

¹³ 5 U.S.C. § 8123(a). *See R.C.*, Docket No. 18-0463 (issued February 7, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016).

¹⁴ *See M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

¹⁵ *V.H.*, Docket No. 20-0012 (issued November 5, 2020).

OWCP accepted the claim for Lyme disease. In support of his schedule award claim, appellant submitted a February 24, 2017 report from Dr. Macht who noted appellant's pain about the upper extremities and determined that appellant had two percent right upper extremity permanent impairment, two percent left upper extremity permanent impairment, two percent right lower extremity permanent impairment, and two percent left lower extremity permanent impairment, pursuant to the sixth edition of the A.M.A., *Guides*. Dr. Macht attributed appellant's bilateral upper and lower extremity permanent impairments to the accepted Lyme disease. In a June 12, 2019 report, he noted that appellant had underlying hip arthritis, nonspecific back and neck complaints, and shoulder rotator cuff pathology, which he opined did not preclude a finding that his current impairments were causally related to his Lyme disease.

OWCP referred appellant to Dr. Haskins to determine the nature and extent of any employment-related impairment based on the DMA's recommendation. In a September 25, 2018 report, Dr. Haskins found appellant's shoulder, hip, knee, and ankle complaints were not due to Lyme disease as they were either due to other conditions such as osteoarthritis or prior injuries, or that the exact etiology was unknown due to lack of objective findings and symptoms. Regarding whether appellant sustained an impairment rating pursuant to the sixth edition of the A.M.A., *Guides*, he found no evidence of any permanent impairment due to Lyme disease or any loss of function due to Lyme disease. Dr. Haskins concluded that appellant did not have any current impairment or disability as a result of the employment injury.

On June 12, 2019 the DMA noted his review of the record and agreed with Dr. Haskins' conclusion that appellant had no ratable impairment due to the accepted Lyme disease.

The Board finds that a conflict in the medical evidence exists between Dr. Macht, appellant's treating physician, and Dr. Haskins, OWCP's referral physician, and the DMA regarding whether appellant had permanent impairment to a schedule member causally related to the accepted Lyme disease. Therefore, the case must be remanded to OWCP for referral of appellant to an IME for an impartial medical examination and resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).¹⁶ After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹⁶ See *L.W.*, Docket No. 19-0722 (issued November 20, 2019).

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.¹⁷

Issued: February 17, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁷ Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.