United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 13-299**
	)	**Issued: May 8, 2013**
DEPARTMENT OF THE AIR FORCE, AIR TRAINING COMMAND, LAUGHLIN AIR FORCE BASE, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 21, 2012 appellant filed a timely appeal from an August 29, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than 10 percent permanent impairment of the right lower extremity for which he received a schedule award.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 7, 1993 appellant, then a 31-year-old firefighter, injured his right foot during an employment-related softball game. OWCP accepted the claim for closed fracture of the right great toe. Appellant did not stop work.

Appellant was treated by Dr. Cedric L. Wong, an orthopedist, for his right foot injury. In reports dated July 20 to November 15, 1993, Dr. Wong diagnosed an avulsion fracture of the right great toe. In a September 21, 1994 report, he noted that x-rays revealed calcification at the distal part of the phalanx and diagnosed status post right great toe dislocation with residual stiffness. On December 2, 1994 OWCP referred appellant to Dr. Benzel C. MacMaster, a Board-certified orthopedist, for an impairment rating of the right foot. In a December 8, 1994 report, Dr. MacMaster opined that appellant had eight percent impairment of the right lower extremity in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*[2] In a January 26, 1995 report, an OWCP medical adviser, opined that appellant had 10 percent impairment of the right foot pursuant to the A.M.A., *Guides*.

In a decision dated February 10, 1995, OWCP granted appellant a schedule award for 10 percent impairment of the right foot. The period of the award was from September 2, 1994 to October 20, 1995.

On July 27, 2001 appellant filed a claim for an additional schedule award. He submitted a report dated July 18, 2001 from Dr. William L. Fontenot, a Board-certified orthopedist, who noted findings of mild interphalangeal valgus alignment of the interphalangeal joint of the right great toe, range of motion of the toe was 30 degrees of flexion with discomfort and crepitus. Dr. Fontenot noted that x-rays dated January 29, 2001 revealed mild degenerative changes in the interphalangeal joint. He diagnosed right great toe interphalangeal pain with history of fracture dislocation.

In a September 29, 2001 report, an OWCP medical adviser reviewed Dr. Fontenot's report and opined that, pursuant to the fifth edition of the A.M.A., *Guides*, appellant sustained two percent permanent impairment of the right lower extremity.

In an August 4, 2003 decision, OWCP denied appellant's claim for an additional schedule award. It noted that on February 10, 1995 he was previously granted a schedule award for 10 percent for the right foot and was not entitled to an additional award.

On January 14, 2012 appellant filed a claim for an additional schedule award.

In a letter dated January 26, 2012, OWCP requested that appellant provide a report from his treating physician with regard to his permanent impairment of the right lower extremity in accordance with the sixth edition of the A.M.A., *Guides*.[3]

[2] A.M.A., *Guides* (4th ed. 1993).

[3] *Id.* at (6th ed. 2009).

Appellant submitted a February 13, 2012 report from Dr. Eduardo Garcia, a Board-certified orthopedist, who opined that appellant had a five percent total impairment of the right leg. Dr. Garcia noted a history of appellant's work injury in 1993. Appellant complained of pain with the right forefoot on a daily basis, difficulty in performing activities of daily living that required walking, frequent muscle contracture of the right toe preventing sleep and noted taking Hydrocodone and Flexeril on a daily basis. Dr. Garcia noted tenderness to palpation over the entire medial forefoot, no edema or cyanosis, great toes were symmetrical without angulation deformity, toe standing was difficult and unbalanced. Right metatarsophalangeal extension was 0 degrees, right interphalangeal flexion was 10 degrees, left metatarsophalangeal extension was 45 degrees, left interphalangeal flexion was 30 degrees. Dr. Garcia noted a radiograph of the right foot revealed a nonunion fracture within the distal phalanx. He noted that, under Table 16-2, page 505, Foot and Ankle Regional Grid, Fracture/Dislocation of the Phalanx, appellant had a class 1 displaced or fragmented phalanx with a mid-range default value which yielded a grade C default impairment of five percent. Dr. Garcia found that, pursuant to Table 16-6, page 516, a functional history grade modifier should not be applied as there was no gait derangement; the grade for physical examination at Table 16-7, page 517 was two, for moderate range of motion loss for extension; and a grade modifier for clinical studies at Table 16-8, page 519, was one for a two millimeter excess opening fracture. Applying the net adjustment formula at page 521 of the A.M.A., *Guides*, Dr. Garcia found a net adjustment of zero which resulted in the default five percent impairment of the right leg.

In a March 22, 2012 report, an OWCP medical adviser, reviewed the medical record and concurred with Dr. Garcia's findings. He indicated that Dr. Garcia properly applied the sixth edition of the A.M.A., *Guides* to find five percent right lower extremity impairment. The medical adviser requested that OWCP indicate the amounts of prior awards paid for the right leg to determine if a net additional award was proper. In another March 22, 2012 report, he noted reviewing a March 12, 2012 statement of accepted facts which noted that appellant was paid a schedule award for 10 percent impairment of the right lower extremity in 1995 and 2 percent impairment for the right lower extremity in 2001.[4] The medical adviser noted that the 10 percent schedule award granted in 1995 overlapped with Dr. Garcia's present impairment rating. He calculated the net additional schedule award as follows: the prior award of 12 percent was subtracted from the present impairment of 5 percent which equaled 0. Therefore, the net additional award for the right lower extremity was zero. The date of maximum medical improvement was February 13, 2012.

In a decision dated April 10, 2012, OWCP denied appellant's claim for an additional schedule award.

[4] The Board notes that the statement of accepted facts improperly noted that appellant was granted a schedule award for two percent impairment of the right lower extremity in 2001. The record reveals that on February 10, 1995 he was granted 10 percent impairment of the right foot for the fracture of the right great toe. Upon appellant's request for an additional schedule award, on September 29, 2001, an OWCP medical adviser calculated a two percent total impairment of the right leg. In an August 4, 2003 decision, OWCP denied appellant's claim for an additional schedule award noting that he had previously been granted a schedule award for 10 percent impairment to the right leg for the fracture of the right great toe and was not entitled to an additional award. This does not change the result in this matter.

On April 15, 2012 appellant requested a telephonic oral hearing which was held on June 26, 2012. In an undated statement, he asserted that he lost 88 percent of the use of his large toe and believed he was entitled to a greater impairment.

In a decision dated August 29, 2012, an OWCP hearing representative affirmed the decision dated April 10, 2012.

LEGAL PRECEDENT

The schedule award provision 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. 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.[7] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8] For decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[9]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[10] Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] The grade modifiers are used on the net adjustment formula described above to calculate a net adjustment. The final impairment grade is determined by adjusting the grade up or down the default value C, by the calculated net adjustment.[13]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical consultant for an opinion concerning the nature and

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[9] FECA Bulletin No. 09-03 (issued March 15, 2009).

[10] A.M.A., *Guides* 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[11] *Id.* at 494-531.

[12] *Id.* at 521.

[13] A.M.A., *Guides* 497.

percentage of impairment in accordance with the A.M.A., *Guides* with the medical consultant providing rationale for the percentage of impairment specified.[14]

ANALYSIS

Appellant's accepted condition was closed fracture of the right great toe. On February 10, 1995 he was granted a schedule award for 10 percent permanent impairment of the right foot. On August 29, 2012 OWCP affirmed a decision denying appellant's claim for an additional schedule award pursuant to the sixth edition of the A.M.A., *Guides*.

In an February 13, 2012 report, Dr. Garcia properly found that, in accordance with Table 16-2, Foot and Ankle Regional Grid,[15] appellant's impairing diagnosis was a fracture/ dislocation of the phalanx, displaced or fragmented phalanx, which he rated as class 1, with a default five percent lower extremity impairment. He applied the modifiers for functional history, physical examination and clinical studies found in Table 16-6, Table 16-7 and Table 16-8.[16] Dr. Garcia applied the net adjustment formula to rate five percent right leg impairment under the A.M.A., *Guides*.

An OWCP medical adviser reviewed Dr. Garcia's report and concurred with his impairment rating. However, the medical adviser found that, since appellant had already received a schedule award for more than five percent impairment of the lower extremity for the same condition, he was not entitled to an additional award.[17] The Board finds that the weight of medical evidence establishes a five percent permanent impairment of appellant's right lower extremity pursuant to the sixth edition of the A.M.A., *Guides.* There is no current evidence in accordance with the A.M.A., *Guides* which supports that appellant sustained greater impairment.

On appeal, appellant argues that he sustained a greater impairment than that determined by the medical adviser. He asserts that Dr. Garcia detailed his impairment noting that he had only 5 percent use of his right toe and 95 percent loss of use of his right toe. The Board noted that Dr. Garcia explained his impairment rating in accordance with the A.M.A., *Guides.* Dr. Garcia determined that appellant had five percent impairment of the right lower extremity due to his work injury. OWCP's medical adviser concurred in this finding. Because appellant was previously granted a 10 percent schedule award for the same member for the same injury he was not entitled to an additional award. Additionally, as noted above, the record does not

[14] *See Federal* (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[15] A.M.A., *Guides* 505.

[16] *Id*. at 516-19.

[17] FECA provides for reduction of compensation for subsequent injury to the same body member. It provides that schedule award compensation is reduced by the compensation paid for an earlier injury where the compensation in both cases are for impairment of the same member or function and where it is determined that the compensation for the later disability in whole or part would duplicate the compensation payable for the preexisting disability. 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

contain any probative medical evidence to establish greater impairment under the sixth edition of the A.M.A., *Guides.*

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant is therefore not entitled to an additional schedule award for the right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 8, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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