

FACTUAL HISTORY

On November 9, 2006 appellant, then a 60-year-old recreational therapist, injured his right leg and right shoulder and arm when he stepped onto a step stool. OWCP accepted the claim for right thigh sprain and effusion. He did not stop work.

Appellant was initially treated by Dr. Pankaj A. Patel, a Board-certified physiatrist, on December 7, 2006 for right neck and thigh pain, which began after the November 9, 2006 work injury. Dr. Patel diagnosed right sided myofascial neck pain. Appellant was treated by Dr. Frank Padberg, Board-certified surgeon, on December 22, 2006, who diagnosed ripped musculotendinous structure on the right thigh caused by a work incident. A February 27, 2007 magnetic resonance imaging (MRI) scan of the legs revealed right intramuscular cavernous hemangioma with hemorrhage. Appellant was treated by Dr. David Weiss, an osteopath, from May 2 to July 28, 2008, who diagnosed right quadriceps rupture and recommended physical therapy. Dr. Weiss noted persistent defect of the proximal quadriceps and referred appellant for a surgical consult. Appellant was seen by Dr. Ronald M. Selby, a Board-certified orthopedic surgeon, on July 22 and August 19, 2008, who diagnosed torn quadriceps of the right thigh and recommended additional physical therapy. An MRI scan of the right thigh revealed resolved abnormal signal in the right rectus femoris muscle.

On March 12, 2009 appellant filed a claim for a schedule award. He submitted a January 7, 2009 report from Dr. Nicholas Diamond, an osteopath, who provided an impairment rating under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² Dr. Diamond advised that, in accordance with the fifth edition of the A.M.A., *Guides* appellant had 30 percent impairment of the right lower extremity and 3 percent impairment of the left lower extremity. He noted that appellant was at maximum medical improvement.

In a July 23, 2009 letter, OWCP requested that appellant submit an assessment of permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*³ which OWCP began using effective May 1, 2009.

Appellant submitted a December 11, 2009 report from Dr. Diamond, who provided an impairment rating under the sixth edition of the A.M.A., *Guides*.⁴ Dr. Diamond noted rectus femoris defect with anterior thigh tenderness in the right thigh. Examination of the left foot revealed great toe joint tenderness with range of motion of 70 degrees and examination of the right foot revealed calcaneal tenderness. Dr. Diamond diagnosed status post left great toe fracture by history, status post right calcaneal fracture by history, chronic post-traumatic trochanteric bursitis of the right hip and chronic right thigh contusion injury with wasting of the right rectus femoris musculature. He noted that appellant was at maximum medical improvement. Dr. Diamond advised that, in accordance with Chapter 16 of the sixth edition of

² A.M.A., *Guides* (5th ed. 2001).

³ *Id.* at (6th ed. 2008).

⁴ *Id.*

the A.M.A., *Guides* for a right quadriceps rupture/strain, she would fit class 1 under Table 16-4 with a default grade of five percent.⁵ He found a grade modifier of one for functional history under Table 16-6, a physical examination grade modifier of two, for observed and palpatory findings, under Table 16-7 and a clinical studies grade modifier of one under Table 16-8. Dr. Diamond applied the net adjustment formula to the grade modifiers to arrive at a net adjustment of one which yielded adjusted impairment of six percent right leg impairment based on right quadriceps rupture. He further advised that under Table 16-2 appellant would fit class 1 for right calcaneal fracture with a default grade of three percent.⁶ Dr. Diamond found grade modifiers of one for functional history and physical examination and stated that a clinical studies modifier was not applicable. He noted that the net adjustment formula resulted in an adjustment from the default grade C so that there was total impairment of three percent for the right calcaneal fracture. Dr. Diamond then combined the right thigh impairment of six percent with the right calcaneal fracture of three percent, yielding a nine percent impairment of the right leg. He also rated left leg impairment for a fracture of the great toe, under Table 16-2, to find that appellant had one percent impairment for the left lower extremity.

In a January 20, 2010 report, OWCP's medical adviser reviewed Dr. Diamond's report and agreed with his conclusion that appellant had a total nine percent impairment of the right leg. He noted that Dr. Diamond included a right calcaneal fracture in his impairment determination and advised that this was an old preexisting injury but occurred in the same extremity so it was properly included in the impairment evaluation. The medical adviser noted that Dr. Diamond also rated the left lower extremity for a fracture of the great toe; however, appellant's claim was not accepted for a left lower extremity injury and therefore this finding was not properly included in appellant's rating.

On March 24, 2010 appellant was granted a schedule award for nine percent impairment of the right lower extremity. The period of the award was January 7 to July 7, 2009.

On April 6, 2010 appellant requested a review of the written record and asserted that the schedule award claim should have been developed under the fifth edition of the A.M.A., *Guides*.

In a decision dated July 12, 2010, the hearing representative affirmed the March 24, 2010 OWCP decision.

LEGAL PRECEDENT

The schedule award provision of FECA⁷ and its implementing federal 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. However, it does not specify the manner in which the percentage of loss shall be determined. For consistent

⁵ *Id.* at 512, Table 16-4.

⁶ *Id.* at 503, Table 16-2.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

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 For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰ For decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.¹¹

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).¹² 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).¹³ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁴

OWCP's 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 percentage of impairment in accordance with the A.M.A., *Guides* with the medical consultant providing rationale for the percentage of impairment specified.¹⁵

ANALYSIS

The sixth edition of the A.M.A., *Guides* provides that lower extremity impairments be classified by diagnosis which is then adjusted by grade modifiers according to the formula noted above.¹⁶ Appellant's accepted diagnosed conditions are for right thigh sprain and contusion. On March 24, 2010 he was granted a schedule award for nine percent permanent impairment of the right lower extremity.

By report dated December 11, 2009, Dr. Diamond discussed the relevant tables in the sixth edition of the A.M.A., *Guides*. He followed the assessment formula of the sixth edition of the A.M.A., *Guides* and advised that, in accordance with Chapter 16, for the right quadriceps rupture/strain, using Table 16-4, Hip Regional Grid, appellant would fit a class 1 category, yielding a default grade C for five percent impairment.¹⁷ As discussed, Dr. Diamond then

⁹ *Id.* at § 10.404(a).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

¹¹ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹² A.M.A., *Guides*, 3, section 1.3, The ICF: A Contemporary Model of Disablement.

¹³ *Id.* at 494-531.

¹⁴ *Id.* at 521.

¹⁵ See *supra* note 10, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

¹⁶ *Supra* notes 13, 14.

¹⁷ A.M.A., *Guides* 512, Table 16-4

applied the grade modifiers for functional history, 1, physical examination, 2 and clinical studies, 1, to the net adjustment formula and determined that appellant had a net adjustment of one¹⁸ which moved the default grade of C to grade D for six percent impairment. For the right calcaneal fracture, Dr. Diamond referenced Table 16-2, Foot and Ankle Regional Grid¹⁹ and opined that appellant fit in class 1 with a default three percent impairment.²⁰ He noted grade modifiers and found that no net adjustment was warranted. Dr. Diamond then combined the right thigh impairment of six percent with the right calcaneal fracture of three percent, yielding a nine percent impairment of the right lower extremity. OWCP's medical adviser reviewed Dr. Diamond's report and agreed with his conclusion that appellant had a total nine percent right lower extremity impairment.²¹

The Board finds that OWCP's medical adviser properly applied the A.M.A., *Guides* to rate impairment to appellant's right lower extremity. The medical adviser reviewed the medical evidence and fully explained how he determined appellant's rating and why the rating of Dr. Diamond with regard to the left lower extremity was not in conformance with the A.M.A., *Guides*.

Appellant asserts that she has a property right in a schedule award benefit under the fifth edition of the A.M.A., *Guides* and a protected property interest cannot be deprived without due process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). These cases held only that a claimant who was in receipt of benefits (in *Goldberg* public assistance and in *Mathews* social security benefits) could not be terminated without due process. Appellant had received no schedule award under the fifth edition.

In *Harry D. Butler*,²² the Board noted that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.²³ On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of the Office should reflect use of the sixth edition of the A.M.A., *Guides*.²⁴ The applicable date of the sixth

¹⁸ See *id.* at 521; $(1-1) + (2 - 1) + (1 - 1) = 1$.

¹⁹ *Id.*, at 503, Table 16-2.

²⁰ OWCP's medical adviser opined that the right calcaneal fracture was preexisting. It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included. *Peter C. Belkind*, 56 ECAB 580, 586 (2005).

²¹ Although Dr. Diamond rated the left leg for a fracture of the great toe, appellant's claim was not accepted for a left leg injury. See *Veronica Williams*, 56 ECAB 367 (2005) (a schedule award can be paid only for a condition related to an employment injury; the claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment).

²² 43 ECAB 859 (1992).

²³ *Id.* at 866.

²⁴ FECA Bulletin No. 09-03 (issued March 15, 2009). FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award & Disability Claims*, Chapter 2.808.6(a) (January 2010).

edition is as of the schedule award decision reached. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed.

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 has nine percent impairment of the right lower extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board