

FACTUAL HISTORY

The case has previously been before the Board. By decision and order issued April 9, 1999,² the Board affirmed OWCP's October 15, 1995 decision terminating appellant's compensation benefits as the accepted herniated thoracic discs had resolved without residuals. By order issued October 21, 2013,³ the Board remanded the case to OWCP to double the present claim with File No. xxxxxx370, accepted for a closed fracture of the left metatarsal bone and a left ankle sprain. The Board found that OWCP had not formally adjudicated the percentage of impairment for the right lower extremity with appropriate findings of fact or a statement of reasons. The law and facts of the case as set forth in the Board's prior opinions are incorporated by reference. The relevant facts are set forth below.

On July 23, 2010 appellant claimed a schedule award. She submitted a March 20, 2011 report from Dr. Anca Bereanu, an attending Board-certified neurologist, who reviewed medical records and opined that appellant had reached maximum medical improvement. Dr. Bereanu noted appellant's symptoms of paresthasias in all extremities. On examination, appellant exhibited limited sitting tolerance, partially effaced lumbar lordosis, normal strength and enervation in the right leg, deep tendon reflexes at 1/5 in both lower extremities, absent Achilles reflexes bilaterally and minimally reduced position sense in both lower extremities consistent with mild diabetic neuropathy. Referring generally to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), Dr. Bereanu found permanent impairment of 24 percent of the right upper extremity, 6 percent of the left upper extremity, 21 percent of the right lower extremity and 24 percent of the left lower extremity.

In a September 4, 2011 report, an OWCP medical adviser concurred with Dr. Bereanu's impairment ratings of 24 percent of the right upper extremity, 6 percent of the left upper extremity and 21 percent of the right lower extremity. Regarding the left lower extremity, he concurred with Dr. Bereanu's finding of 13 percent impairment due to sciatic nerve involvement. The medical adviser opined, however, that no impairment should be assessed for a left knee contusion or for subtalar arthritis as neither was listed in the statement of accepted facts. He assessed a total 13 percent impairment of the left lower extremity.

In an October 13, 2011 memorandum, OWCP doubled appellant's claims under File Nos. xxxxxx341 and xxxxxx370, using File No. xxxxxx341 as the master case number. It noted that both files concerned schedule award claims for the same extremities.

By decision dated October 13, 2011, OWCP granted appellant schedule awards for 24 percent of the right upper extremity, 6 percent of the left upper extremity and 13 percent impairment of the left lower extremity. It did not address the right lower extremity.

In an October 24, 2011 letter, appellant asserted that the medical adviser had approved 21 percent impairment of the right lower extremity under File No. xxxxxx341 and requested that

² Docket No. 97-1876 (issued April 9, 1999).

³ Docket No. 13-567 (issued October 21, 2013).

OWCP correct the October 13, 2011 schedule award to include the right lower extremity impairment as previously found.

OWCP obtained a December 12, 2011 report from its medical adviser, noting that appellant's "right lower extremity impairment [was] related to the accepted conditions as outlined in the statement of accepted facts." The medical adviser concurred with Dr. Bereanu that appellant had 21 percent impairment of the right leg due to a "sensory motor deficit."

In a January 9, 2012 letter, OWCP advised appellant that she was entitled to a schedule award for 21 percent impairment of the right lower extremity. It noted that it could not pay the schedule award for the right leg until the previous schedule award expired, which was on August 31, 2013.

In September 27, 2012 letter, appellant requested reconsideration. She asserted that OWCP omitted the accepted left metatarsal fracture and left ankle sprain from the October 13, 2011 schedule award. Appellant also requested that OWCP issue a schedule award for permanent impairment of the right lower extremity.

Appellant submitted a September 19, 2012 impairment rating by Dr. Nicholas Diamond, an attending osteopath, finding that she had attained maximum medical improvement. Dr. Diamond noted paresthesias in both legs, effusion and tenderness in the right knee, and restricted flexion and extension on "[r]ange of motion testing, performed [times] 3." He diagnosed L4-5 radiculopathy and diabetic peripheral neuropathy of the lower extremities. Referring to the A.M.A., *Guides*, Dr. Diamond noted a class 1 Class of Diagnosis (CDX) of primary right knee joint arthritis demonstrated by a May 31, 2012 magnetic resonance imaging scan, equaling seven percent impairment of the right lower extremity according to Table 16-3.⁴ He assessed a grade modifier of 3 for Functional History (GMFH) for a Lower Extremity Activity Questionnaire (LEAQ) score of 67 percent according to Table 16-6 and a grade modifier of 2 Physical Examination (GMPE) according to Table 16-7.⁵ Applying the net adjustment formula, Dr. Diamond calculated a net adjustment of 3, raising the CDX of seven percent to a total of nine percent.

By decision dated January 3, 2013, OWCP denied appellant's request for reconsideration as it did not contain, new, relevant evidence, or argument. Appellant then filed the prior appeal with the Board, resulting in the Board's October 21, 2013 order remanding the case for a merit review and consideration of right lower extremity impairment.

During pendency of the prior appeal, by decision dated September 18, 2013, OWCP issued a schedule award for 21 percent permanent impairment of the right lower extremity for the period August 31, 2013 to October 28, 2014. On remand of the case the medical adviser

⁴ Table 16-3, page 511 of the sixth edition of the A.M.A., *Guides* is entitled "Knee Regional Grid -- Lower Extremity Impairments."

⁵ Table 16-7, page 517 of the sixth edition of the A.M.A., *Guides* is entitled "Physical Examination Adjustment -- Lower Extremities."

reviewed Dr. Diamond's September 19, 2012 report and concurred with his finding of nine percent impairment of the right lower extremity due to arthropathy of the right knee.

By decision dated February 27, 2014, OWCP affirmed its September 18, 2013 schedule award finding 21 percent impairment of the right leg, based on Dr. Bereanu's clinical findings and impairment rating. It found that as appellant had "already been paid for a 21 percent impairment of the right lower extremity and Dr. Diamond found that [appellant had] a 9 percent impairment [did] not establish that [she had] greater than a 21 percent impairment of the right lower extremity."

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ provide for compensation to employees sustaining impairment from loss or loss of use of specified members 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 determination is a matter which rests in the sound 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁷

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).⁸ Under the sixth edition, the evaluator identifies the impairment class for the Class of Diagnosis, which is then adjusted by grade modifiers based on GMFH, GMPE and Clinical Studies (GMCS).⁹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.¹⁰ There is no basis for including subsequently acquired conditions. OWCP procedures provide: "Impairment ratings for schedule awards include those conditions accepted by OWCP as job-related and any preexisting permanent impairment of the same member or function."¹¹ OWCP procedures provide that, after

⁶ 5 U.S.C. § 8107.

⁷ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁸ A.M.A., *Guides* (6th ed. 2008), page 3, section 1.3, "ICF: A Contemporary Model of Disablement."

⁹ *Id.* at 494-531.

¹⁰ *R.G.*, Docket No. 13-220 (issued May 9, 2013); *Peter C. Belkind*, 56 ECAB 580 (2005); *Raymond E Gwynn*, 35 ECAB 247 (1983).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.806.5(d) (February 2013).

obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.¹²

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹³ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹⁴

ANALYSIS

OWCP accepted that appellant sustained a herniated disc and traumatic upper and lower extremity injuries in 1993 and 2003 occupational incidents. Appellant claimed a schedule award for permanent impairment of all extremities, based on the opinion of Dr. Bereanu, an attending Board-certified neurologist. On October 13, 2011 OWCP issued a schedule award for permanent impairment of both upper extremities and the left lower extremity, based on Dr. Bereanu's opinion and the concurrence of the medical adviser. It then obtained a supplemental report from the medical adviser, concurring with Dr. Bereanu's assessment of 21 percent impairment of the right lower extremity due to sensory and motor deficits originating in the spine. Appellant then requested reconsideration, asserting that a September 9, 2012 report from Dr. Diamond, an attending osteopathic physician, established entitlement to an additional nine percent impairment of the right leg due to arthritis of the right knee. OWCP denied reconsideration on January 3, 2013.

On October 21, 2013 the Board issued its order remanding the case for consideration of the appropriate percentage of permanent impairment to the right leg. By February 27, 2014 decision, OWCP affirmed its September 18, 2013 decision issued during the pendency of the prior appeal, granting appellant a schedule award for 21 percent impairment of the right leg, based on Dr. Bereanu's August 22, 2011 opinion with the concurrence of the medical adviser. It found that Dr. Diamond's assessment of nine percent impairment of the right lower extremity was less than the 21 percent awarded. The Board notes that he did not opine that the diagnosed arthritis of the right knee was a preexisting condition that should be included in assessing impairment of the right leg.¹⁵ Therefore, OWCP correctly omitted right knee arthritis from the impairment rating.¹⁶

¹² *Id.* at Chapter 2.808.6(f); *see also* L.R., Docket No. 14-674 (issued August 13, 2014); D.H., Docket No. 12-1857 (issued February 26, 2013).

¹³ 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

¹⁴ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

¹⁵ *R.G.*, *supra* note 10.

¹⁶ Federal (FECA) Procedure Manual, Chapter 2.806.5(d), *supra* note 11.

The Board finds that OWCP properly relied on Dr. Bereanu's clinical findings and impairment rating regarding the right lower extremity, as reviewed by the medical adviser. Dr. Bereanu applied the appropriate portions of the correct edition of the A.M.A., *Guides* to her clinical findings.¹⁷ The medical adviser concurred with all elements of Dr. Bereanu's rating methodology and calculations. Therefore, OWCP's February 27, 2014 decision finding 21 percent impairment of the right lower extremity was proper in this regard.

The Board further finds that the case is not in posture for a decision regarding the left lower extremity due to a conflict of medical opinion. Dr. Bereanu, an attending Board-certified neurologist, provided an August 19, 2011 report assessing 13 percent impairment of the left leg for a motor strength impairment of the sciatic nerve, 2 percent impairment for a left knee contusion with range of motion deficit, and 14 percent impairment for subtalar arthritis. Appellant combined these impairments to equal a total 27 percent impairment of the left lower extremity. On September 4, 2011 the medical adviser concurred with Dr. Bereanu's calculation of 13 percent impairment due to sciatic nerve dysfunction. However, he disagreed with Dr. Bereanu's assessment of impairments for a left knee contusion and subtalar arthritis as OWCP had not accepted these conditions. The medical adviser therefore found that appellant had 13 percent impairment of the left leg and not 27 percent impairment as found by Dr. Bereanu.

As there is an outstanding conflict of medical opinion, the case will be remanded to OWCP for appointment of an impartial medical examiner.¹⁸ On remand of the case, OWCP shall prepare a unified statement of accepted facts to include all conditions accepted under File Nos. xxxxxx341 and xxxxxx370, as doubled under File No. xxxxxx341. It shall refer appellant, the unified statement of accepted facts, and the medical record to an impartial medical examiner to resolve the conflict of medical opinion between Dr. Bereanu and the medical adviser as to the left lower extremity. Following this and all other development deemed necessary, OWCP shall issue a *de novo* decision in the case.

On appeal, appellant does not contest the findings regarding both upper extremities. She asserts her entitlement to an additional 14 percent impairment rating for the left lower extremity, based on Dr. Bereanu's opinion. Appellant contends that the statement of accepted facts provided to the medical adviser did not include the accepted fractured left metatarsal and left ankle sprain. The Board notes that, while the record contains an addendum to the statement of accepted facts listing those conditions, the medical adviser's report does not reflect his knowledge of the additional accepted conditions. As stated above, the case will be remanded to OWCP for additional development regarding the appropriate percentage of impairment of the left lower extremity.

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.

¹⁷ See *id.* at Chapter 2.810.8(j).

¹⁸ *Supra* note 14.

CONCLUSION

The Board finds that appellant has not established that she sustained more than 21 percent impairment of the right lower extremity, for which she received a schedule award. The Board further finds that the case is not in posture for a decision regarding the appropriate percentage of impairment to the left lower extremity, as there is a conflict of medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2014 decision of the Office of Workers' Compensation Programs is affirmed in part regarding the percentage of impairment of the right lower extremity, and set aside in part regarding the percentage of impairment of the left lower extremity. The case is remanded to OWCP for additional development consistent with this decision and order.

Issued: July 1, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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