

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

M.S., Appellant)

and)

U.S. POSTAL SERVICE, DETROIT)
PERFORMANCE CLUSTER, Detroit, MI,)
Employer)

**Docket No. 11-1961
Issued: April 23, 2012**

Appearances:
Steve Burt, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 31, 2011 appellant, through her representative, filed a timely appeal from the May 24, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her schedule award claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant is entitled to schedule award compensation based on his right foot condition.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 23, 2003 appellant, then a 53-year-old mail carrier, filed an occupational disease claim alleging that she sustained bunions, neuroma and dislocation of her right foot due to her job duties including standing and walking for extended periods.

On January 28, 2003 Dr. Tameka Lee, an attending podiatrist, performed right foot surgery including a bunionectomy, open reduction and internal fixation of the second metatarsophalangeal (MTP) joint dislocation and excision of neuroma of interspaces two and three.² On May 5, 2006 OWCP accepted appellant's claim for aggravation of a closed dislocation of the second MTP joint of the right foot. On November 14, 2006 appellant filed a claim for a schedule award due to her work injury.

In a March 29, 2007 report, Dr. Marc Richter, an attending Board-certified family practitioner, advised that appellant's January 2003 surgery caused pain along the extensor tendons of the second and third toes and second and third metatarsal heads as well as a fixed deformity of the second and third toes such that she could not bend the second and third toes at the interphalangeal (IP) joint.

On October 23, 2007 a person with an illegible signature completed a worksheet based on Figure 17-10 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). The worksheet diagnosed "metatarsalgia; lack of (illegible) right 2nd and 3rd digits." Appellant had 80 percent weakness and 80 percent range of motion of the right second and third digits.

In a November 14, 2007 report, Dr. Nabil Angley, a Board-certified orthopedic surgeon, serving as an OWCP medical adviser, noted that the October 23, 2007 worksheet was illegible and had not been properly completed. He recommended that OWCP obtain a through report concerning appellant's right foot condition and possible permanent impairment.

In April 2008, OWCP referred appellant to Dr. Jeffrey Lawley, a Board-certified orthopedic surgeon, for an examination and impairment rating.

In a May 30, 2008 report, Dr. Lawley stated that appellant complained of frequent pain in her right foot which she rated at 6 to 7 on a scale of 1 to 10. Physical examination of her right foot showed well-healed surgical scars and slight decreased planar flexion of the great toe at the IP joint with full extension of 25 degrees. Appellant reported diminished sharp pinprick sensation in the second web space and second and third toes. Dr. Lawley stated that she had full active and painless range of motion of the ipsilateral ankle with plantar flexion and dorsiflexion. Appellant had full subtalar joint motion with inversion and eversion and her gait was normal. Dr. Lawley diagnosed status post bunionectomy with corrective surgery with osteotomies proximal phalanx and first metatarsal, status post open reduction and internal fixation, dorsal dislocation of the second MTP joint and status post excision neuroma right foot. He stated, "Per Table 17-14 in the fifth edition of the [A.M.A.,] *Guides*, there is no impairment for the great toe

² OWCP later accepted that this surgery was necessitated by a work injury.

IP joint flexion at 25 degrees; there needs to be less than 20 degrees to have impairment, therefore, this is [zero percent].”

In an August 1, 2008 report, Dr. Anthony Skalak, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, found that appellant had a zero percent permanent impairment of her right foot based on normal range of motion of the MTP and IP joints of her toes.

In an October 22, 2008 decision, OWCP denied a schedule award on the grounds that the medical evidence did not establish permanent impairment of appellant’s right foot. In reaching this determination, it relied on the opinions of Dr. Lawley and Dr. Skalak. In a March 17, 2009 decision, an OWCP hearing representative affirmed the October 22, 2008 decision.

Appellant submitted a handwritten note dated March 9, 2009 of Dr. Kathleen Duzak, an attending podiatrist, who indicated that there was a problem with the impairment ratings of record, noting the range of motion in the second and third toes of appellant’s right foot had not been measured. Dr. Duzak stated that a February 19, 2009 examination revealed a weakness of 60 to 80 percent in appellant’s right second and third toes and range of motion of 60 to 80 percent in her right second and third toes.

In a July 2, 2009 report, Dr. Murray Kahn, an attending podiatrist, noted that appellant had last been examined in March 2009 by Dr. Marc Chicorel, an attending podiatrist. X-rays performed on March 5, 2009 demonstrated arthrosis of her right foot. Dr. Kahn provided a copy of Table 17-14 of the fifth edition of the A.M.A., *Guides* on which he rated a seven percent impairment of the right great toe based on less than 15 degrees of MTP joint extension and IP joint flexion. He also noted a seven percent impairment on MTP joint extension of the lesser toes, including the first and second digits of the right foot.

On a copy of Table 17-14 of the fifth edition of the A.M.A., *Guides*, Dr. Chicorel provided a notation, on an unspecified date, that the second digit of appellant’s right foot had 60 percent dorsiflexion.

In a March 25, 2010 report, Dr. Angley reviewed Dr. Kahn’s report, but was unable to determine appellant’s impairment due to incomplete information. He recommended referring her to an orthopedic surgeon for additional examination and impairment evaluation. In a supplemental May 17, 2010 report, Dr. Angley explained that the document from Dr. Chicorel was not a true worksheet and stated, “It is a copy of the A.M.A.[,] *Guides*, [fifth] edition and, therefore, is useless.” He continued to recommend referral to an orthopedic surgeon to obtain an accurate calculation of impairment.

In a May 19, 2010 decision, OWCP denied appellant’s claim for a schedule award of her right foot. It found that the new evidence submitted by her did not include a proper impairment rating under the relevant edition of the A.M.A., *Guides*.

Appellant submitted a document in which Dr. Kahn provided notations, made on October 25, 2010 on a copy of Figure 16-12 on page 551 of the sixth edition of the A.M.A., *Guides*. Dr. Kahn wrote the number four in the line pertaining to the right third toe and the number five and the phrase “mid foot” on the line pertaining to the right ankle and hindfoot.

In a May 19, 2011 report, Dr. Angley indicated that the report of Dr. Kahn on October 25, 2010 did not have any meaning and that other tables concerning impairment rating methods needed to be referenced. There were no modifiers or adjustments discussed and the rating was unacceptable. Dr. Angley again recommend that appellant be referred to an orthopedic surgeon to obtain an accurate calculation of impairment.

In a May 24, 2011 decision, OWCP affirmed its May 19, 2010 decision finding no permanent impairment of appellant's right foot.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing regulations⁴ 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 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁶

OWCP is not a disinterested arbiter but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on OWCP to see that its administrative processes are impartially and fairly conducted.⁷ Although the claimant has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence.⁸ Once OWCP starts to procure medical opinion, it must do a complete job.⁹

ANALYSIS

OWCP accepted that appellant sustained an occupational disease in the form of aggravation of a closed dislocation of the second MTP joint of her right foot. On January 28, 2003 appellant underwent right foot surgery including a bunionectomy, open reduction and internal fixation of the second MTP joint dislocation and excision of neuroma of interspaces two and three. OWCP accepted that this surgery was necessitated by appellant's work-related

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *Id.*

⁶ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁷ *Thomas M. Lee*, 10 ECAB 175 (1958).

⁸ *William J. Cantrell*, 34 ECAB 1233 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

⁹ *William N. Saathoff*, 8 ECAB 769 (1956).

condition. Appellant claimed entitlement to schedule award compensation for permanent impairment of her right foot, but OWCP found that she had not established entitlement to such compensation.

In April 2008, OWCP referred appellant to Dr. Lawley, a Board-certified orthopedic surgeon, for an examination and impairment rating. In a May 30, 2008 report, Dr. Lawley indicated that physical examination of her right foot showed slight decreased planar flexion of the great toe at the IP joint with full extension of 25 degrees. He stated, "Per Table 17-14 in the [fifth] edition of the [A.M.A.,] *Guides*, there is no impairment for the great toe IP joint flexion at 25 degrees; there needs to be less than 20 degrees to have impairment, therefore, this is [zero percent]." In reports dated March 25 and May 17, 2010 and May 19, 2011, Dr. Angley, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, recommended that appellant be referred to another orthopedic surgeon for additional examination and impairment evaluation.

The Board notes that OWCP referred appellant to Dr. Lawley for further evaluation of her claimed right foot impairment, but that he did not conduct a complete assessment of her right foot condition. Dr. Lawley did not provide the range of motion in the second and third toes of her right foot. These are the area's most affected by the accepted work condition and the January 2003 surgery necessitated by the accepted work condition.¹⁰ OWCP did not address the deficiencies in the second opinion referral. It shares responsibility in the development of the evidence, particularly when it initiates such development.¹¹

The case will be remanded to OWCP for proper development of the medical evidence to include referral of appellant to an appropriate medical specialist for examination and evaluation of her right foot impairment. After such development as it deems necessary, OWCP shall issue an appropriate decision on this matter.

CONCLUSION

The Board finds that the case is not in posture regarding whether OWCP properly determined that appellant is not entitled to schedule award compensation. The case is remanded to OWCP for further development.

¹⁰ The Board notes that, under both the fifth and sixth editions of the A.M.A., *Guides*, assessment of toe motion is an integral element of evaluating foot impairment. See A.M.A., *Guides* 549, Table 16-18 and Table 16-19 (6th ed. 2009); A.M.A., *Guides* 537, Table 17-14 (5th ed. 2001). The record contains a July 2, 2009 report, in which Dr. Kahn provided an impairment rating due to limited toe motion under the standards of the fifth edition of the A.M.A., *Guides*. However, this impairment rating was made when the standards of the sixth edition of the A.M.A., *Guides* were in effect. See *supra* note 6. Other physicians evaluated appellant's foot impairment, but they did not provide a complete evaluation and impairment rating under the relevant edition of the A.M.A., *Guides*.

¹¹ See *supra* notes 7 through 9.

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: April 23, 2012
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board