

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

M.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer**

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**Docket No. 11-765
Issued: January 20, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 8, 2011 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' (OWCP) November 30, 2010 merit decision denying a schedule award. 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 has more than 11 percent impairment to each lower extremity, for which she received schedule awards.

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² In a July 20, 2010 decision, the Board set aside an August 17, 2009 OWCP decision which found that appellant did not have more than 11 percent impairment to each lower extremity. The Board found that Dr. Jack C. Tippett, a Board-certified orthopedic surgeon and OWCP referral physician, did not adequately explain why he excluded impairment due to chronic pain. The Board remanded the case to OWCP to obtain a supplemental medical report from Dr. Tippett addressing whether appellant had impairment to her lower extremities due to sensory loss or pain under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). The facts and history as set forth in the Board's prior decision are incorporated by reference.³ The facts relevant to the present appeal are set forth.

On September 16, 2010 OWCP was informed that Dr. Tippett no longer had a treating practice. By letter dated October 20, 2010, it referred appellant, together with a statement of accepted facts and the case record, to Dr. Richard T. Katz, a Board-certified physiatrist, for a second opinion.

In a November 2, 2010 report, Dr. Katz reviewed a history of appellant's medical background. He noted her symptoms of chronic foot pain that she rated as 7 out of 10. Appellant complained about arthritis, swelling and tingling in her feet. She had a hyperpronated and *pes planus* foot and secondary scar tissue. Appellant could not wear hard bottom shoes, dress shoes or heels. On physical examination of her bilateral feet, Dr. Katz reported essentially normal findings with the exception of decreased range of motion and sensory function. He advised that appellant reached maximum medical improvement on August 31, 2006 regarding her Morton's neuroma. Appellant reached maximum medical improvement on August 27, 2007 regarding her employment-related tarsal tunnel condition. She had nonspecific lower extremity complaints. Appellant also had reduced sensory function in both lower extremities which Dr. Katz suspected as being peripheral neuropathy. This would be corroborated by the inability of prior electromyogram/nerve conduction studies (EMG/NCS) to obtain the medial or lateral plantar nerve responses bilaterally. The EMG/NCS was read as consistent with tarsal tunnel syndrome, but it was more likely consistent with mild peripheral neuropathy sensory only. Dr. Katz stated that, since he could not prove the presence of peripheral neuropathy without performing another EMG/NCS, he assumed the diagnosis of tarsal tunnel syndrome and lesion of the plantar nerves was correct based on the statement of accepted facts. Under Table 16-11, he determined that appellant had a mild problem as there was no motor involvement. Dr. Katz further determined that she had two percent impairment each of the left and right tibial nerve (left and right lower extremities) under Table 16-12, page 536.

² Docket No. 10-35 (issued July 20, 2010).

³ OWCP accepted that appellant sustained bilateral plantar nerve lesions and tarsal tunnel syndrome as a result of frequent standing and walking while working as a supervisor at the employing establishment. On February 24 and April 21, 2006 appellant underwent surgery on her left and right lower extremities, respectively, for excision of neuromas. On December 20, 2006 she underwent a left tarsal tunnel release. On December 10, 2007 appellant filed a claim for a schedule award. In a May 15, 2008 decision, OWCP granted her a schedule award for 11 percent impairment to each lower extremity. Appellant retired from the employing establishment on September 30, 2008.

On November 5, 2010 Dr. Daniel O. Zimmerman, an OWCP medical adviser, reviewed the report of Dr. Katz. Although Dr. Katz did not specifically state that his impairment ratings were based on the sixth edition of the A.M.A., *Guides*, it could be inferred from the tables and page numbers he cited. Dr. Zimmerman advised that Dr. Katz's two percent impairment rating for each lower extremity was acceptable based on the sixth edition of the A.M.A., *Guides*. He noted that Dr. Tippett's finding that appellant had 11 percent impairment to each lower extremity was based on range of motion limitations that affected the right and left ankles due to the accepted tarsal tunnel syndrome condition. Dr. Zimmerman stated that both Dr. Tippett and Dr. Katz found no residuals of Morton's neuromas. He subtracted the 11 percent range of motion impairment rating from the 2 percent sensory impairment rating to calculate a -9 percent impairment rating which resulted in no additional bilateral lower extremity impairment.

In a November 30, 2010 decision, OWCP denied modification of its schedule award decision, finding that the medical evidence was insufficient to establish that appellant had more than 11 percent impairment to each lower extremity.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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.⁶ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.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 diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* See *Billy B. Scoles*, 57 ECAB 258 (2005); *C.M.*, Docket No. 09-1268 (issued January 22, 2010).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁹ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹⁰

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser proving rationale for the percentage of impairment specified.¹¹

ANALYSIS

By decision dated July 20, 2010, the Board remanded the case for OWCP to obtain clarification from its referral physician, Dr. Tippett, regarding appellant's entitlement to a schedule award beyond the 11 percent permanent impairment to each lower extremity previously award. The Board found that he did not explain why she was not entitled to impairment due to sensory loss or pain. On remand, OWCP discovered that Dr. Tippett no longer performed referral examinations. Consequently, it properly referred appellant to Dr. Katz for a second opinion.¹²

In a November 2, 2010 report, Dr. Katz reviewed the medical evidence and statement of accepted facts. He set forth his examination findings which included decreased sensory function that was due to the accepted conditions of tarsal tunnel syndrome and plantar nerve lesions. Dr. Katz determined that appellant had a mild problem as there was no motor involvement under Table 16-11, page 531. He concluded that she had two percent impairment of each lower extremity under Table 16-12, page 536.

The file was then properly routed to Dr. Zimmerman, an OWCP medical adviser, for an opinion concerning the nature or percentage of permanent impairment in accordance with the A.M.A., *Guides*.¹³ On November 5, 2010 he utilized Dr. Katz's findings, referenced the sixth edition of the A.M.A., *Guides* and concurred with his finding that appellant had two percent impairment to each lower extremity. Dr. Zimmerman indicated that, although Dr. Katz did not specifically state that his impairment ratings were based on the sixth edition of the A.M.A., *Guides*, it could be inferred that they were derived from this edition based on the tables and page numbers cited by Dr. Katz. He noted Dr. Tippett's finding that appellant had 11 percent range of motion impairment to each lower extremity due to the accepted tarsal tunnel syndrome condition. Dr. Zimmerman further noted that Dr. Tippett and Dr. Katz found no residuals of Morton's neuromas. He subtracted the 11 percent range of motion impairment rating from the 2 percent

⁹ *Id.* at 383-419.

¹⁰ *Id.* at 411.

¹¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

¹² See *Ayanle A. Hashi*, 56 ECAB 234 (2004) (when OWCP refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues).

¹³ See *supra* note 11.

sensory impairment rating to calculate a -9 percent impairment rating which resulted in no additional bilateral lower extremity impairment.

Based on the reports from Dr. Katz and Dr. Zimmerman, which were rendered in conformance with the applicable figures and tables of the A.M.A., *Guides*, the Board finds that appellant has no more than 11 percent impairment to each lower extremity for which she previously received schedule awards.

On appeal, appellant contends that OWCP's decision is contrary to fact and law. As stated, the weight of the medical evidence does not establish that appellant sustained more than 11 percent impairment to each lower extremity, for which she received a schedule award. Dr. Katz properly applied the sixth edition of A.M.A., *Guides* to his clinical findings, which was supported by Dr. Zimmerman who agreed with his impairment assessment utilizing the same edition of the A.M.A., *Guides*. There is no other medical evidence of record addressing the extent of appellant's permanent 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 has no more than 11 percent impairment to each lower extremity, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 20, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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