United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 11-988**
	)	**Issued: January 9, 2012**
DEPARTMENT OF THE ARMY, U.S. ARMY TEST & EVALUATION COMMAND, Aberdeen, MD, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 11, 2011 appellant filed a timely appeal from a December 15, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning his schedule award. 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 20 percent impairment of his right leg, for which he received a schedule award.

FACTUAL HISTORY

On October 30, 2007 appellant, then a 48-year-old engineering technician, was injured when a steel plate fell on his right foot. OWCP accepted the claim for close, right fracture of

[1] 5 U.S.C. § 8101 *et seq.*

cuboid bone; close, right fracture of the cuneiform bones; close, right fracture of the metatarsal bones and contusion of the right foot. It subsequently accepted reflex sympathetic dystrophy of the lower right limb. After a period of total disability, appellant returned to full-time light-duty work on March 24, 2008.

On January 12, 2009 appellant filed a claim for a schedule award. In an undated report, Dr. Howard L. Schultheiss Jr., a podiatrist, found that appellant had 42 percent impairment of the right leg based on Table 17-5, Table 17-6, Table 17-11, Table 17-14, Table 17-29, Table 17-31, Table 17-33, Table 17-37 and Table 17-38 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2] He concluded that maximum medical improvement was reached on the date of his examination.

In a February 2, 2009 letter, OWCP advised appellant of the evidence needed to support a schedule award claim under the fifth edition of the A.M.A., *Guides*.

On March 31, 2009 Dr. Morley Slutsky, an OWCP medical adviser, reviewed the medical evidence, including Dr. Schultheiss' report. He recommended that additional information be obtained from Dr. Schultheiss with regard to the impairment rating as he failed to document measurements or physical examination findings as required by the A.M.A., *Guides.* Additionally, Dr. Schultheiss had incorrectly combined all impairments when calculating the lower extremity impairment. The medical adviser also suggested that a second opinion examination be performed due to the significant errors in the calculations.

OWCP referred appellant to Dr. Robert Draper, a Board-certified orthopedic surgeon, for a second opinion. In an April 24, 2009 report, Dr. Draper examined appellant, reviewed the medical record and the statement of accepted facts. Based on the sixth edition of the A.M.A., *Guides*, he opined that appellant had 20 percent impairment of the right lower extremity. Under Table 16-13, page 539, Diagnostic Criteria for Complex Regional Pain Syndrome (CRPS), Dr. Draper reported that appellant had continuing pain proportional to the inciting event, had sensory changes of hyperesthesia and allodynia, basal motor changes with reports of temperature changes and skin color changes, pseudomotor edema changes, motor and trophic changes with reports of decreased range of motion on physical examination. He stated that appellant met four of the criteria for item 2 and at least two of the criteria for item 3, as he has allodynia, hyperulgesia to light touch motor and trophic changes with evidence of decreased range of motion with stiffness. Under Table 16-13, Dr. Draper stated that appellant fit the diagnostic criteria for CRPS for right foot and that the diagnosis was established. Under Table 16-14, he found that appellant established six points for changes due to skin color, skin temperature (cool), edema, joint stiffness and decreased passive range of motion and radiographic signs of trophic bone changes, osteoporosis, osteopenia on magnetic resonance imaging (MRI) scan and computerized tomography (CT) scan and bone scan findings consistent with CRPS. Under Table 16-15, Dr. Draper found that the six points fit into the class 2 impairment range which is moderate with a 20 percent impairment of the right lower extremity. Consequently, he found that appellant had 20 percent impairment of the right lower extremity for complex regional pain

[2] A.M.A., *Guides* (5th ed. 2001).

syndrome. Dr. Draper found that maximum medical improvement was reached on the date of his examination.

In a June 8, 2009 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed the medical record. He agreed with Dr. Draper's impairment rating of 20 percent impairment to the right leg based on the sixth edition of the A.M.A., *Guides.* Dr. Berman stated that the impairment rating should be based upon the complex regional pain syndrome diagnosis as it is the most severe and relevant of the diagnoses and as calculations based upon the fractures would have resulted in a lower award. Using Dr. Draper's examination findings, the medical adviser stated that, under Table 16-13, appellant met multiple physical examination findings to qualify for the diagnosis of complex regional pain syndrome or reflex sympathetic dystrophy. Under Table 16-14, page 540, he awarded six points which met the criteria or diagnosis. Under Table 16-15, page 541, six points equates to a class 2 or 20 percent lower extremity impairment. The medical adviser concluded that appellant reached maximum medical improvement on April 24, 2009.

In a March 12, 2009 report, which OWCP received on June 29, 2009, Dr. Schultheiss revised his original impairment evaluation of January 9, 2009 and opined that appellant had 42 percent right leg impairment based on Table 17-5, Table 17-6, Table 17-11, Table 17-14, Table 17-29, Table 17-31, Table 17-33, Table 17-37 and Table 17-38 on the fifth edition of the A.M.A., *Guides*. He opined that appellant reached maximum medical improvement on October 27, 2008, when he was discharged from care.

By decision dated July 1, 2009, OWCP granted appellant a schedule award for 20 percent impairment of the right lower extremity. The award ran 57.60 weeks for the period April 24 to June 6, 2009. Appellant was advised schedule awards were calculated under the sixth edition of the A.M.A., *Guides*.

On July 29, 2009 appellant requested a review of the written record. He submitted a July 28, 2009 report from Dr. Schultheiss, who opined that he had 35 percent right lower extremity impairment based on Table 17-5, Table 17-6, Table 17-11, Table 17-14, Table 17-29, Table 17-31, Table 17-33, Table 17-37 and Table 17-38 of the fifth edition of the A.M.A., *Guides*. Dr. Schultheiss provided objective findings and measurements of impairment due to gait derangement, unilateral leg muscle atrophy, ankle motion impairment, lesser digital contraction, loss of calcaneal/tibial angle, arthritic changes of the talonavicular joint, mid-foot deformity, nerve deficit to the medial and lateral plantar nerves. He concluded that maximum medical improvement occurred on October 27, 2008 when appellant was discharged from his care.

By decision dated November 19, 2009, an OWCP hearing representative set aside OWCP's July 1, 2009 decision. While the July 1, 2009 decision was correct, Dr. Schultheiss' July 28, 2009 report was new and relevant evidence. The case was remanded for referral to a medical adviser to determine whether appellant had greater than 20 percent permanent impairment of the right leg under the sixth edition of the A.M.A., *Guides.*

Pursuant to the hearing representative's instructions, OWCP referred appellant's medical record with Dr. Schultheiss' July 28, 2009 report to a medical adviser for review. On

December 9, 2009 Dr. Berman, the medical adviser, opined that, based on the sixth edition of the A.M.A., *Guides*, there was no increase in impairment to the right leg above the 20 percent already awarded. He opined that Dr. Draper provided accurate findings and observations on examination. Dr. Berman further indicated his agreement with Dr. Draper's impairment calculations under the sixth edition of the A.M.A., *Guides*. He agreed that Dr. Draper's specific findings of sensory changes of hyperesthesia based on motor changes, temperature changes, pseudomotor, edema changes met the criteria for items 2, Table 16-13. Under Table 16-14, Dr. Berman assigned one point each for skin color, cool temperature, edema, joint stiffness, trophic changes, osteoporosis, osteopenia on MRI scan and CT scan and bone scan changes, for a total of six points. Under Table 16-15, he advised six points represented class 2 impairment with default value of 20 percent lower extremity impairment. Dr. Berman found that appellant had grade modifier 2 for functional history adjustment, grade modifier 2 for physical examination adjustment, grade modifier 2 for clinical studies adjustment citing to Table 16-6, Table 16-7 and pages 516, 517 and 519. Utilizing the net adjustment formula, he found a net adjustment of zero. Dr. Berman concluded that appellant had 20 percent right leg impairment. The date of maximum medical improvement was June 8, 2009, the date of Dr. Draper's examination.

By decision dated December 14, 2009, OWCP denied an additional schedule award.

In a September 11, 2010 letter, appellant requested reconsideration and argued several points. He contended that he was entitled to a recurrent pay rate based on the surgery procedure for an epidural injection of April 1, 2009. Appellant also presented several arguments that he was entitled to receive the schedule award under the fifth edition of the A.M.A., *Guides*. He also argued that an OWCP medical adviser did not review the most recent medical reports from Dr. Schultheiss.

By decision dated December 15, 2010, OWCP affirmed the denial of the claim for an increased schedule award and modified it to reflect that appellant was entitled to the pay rate of April 1, 2009.

LEGAL PRECEDENT

The schedule award provision of FECA provides 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 scheduled losses and the Board has concurred in such adoption.[3] Schedule award decisions issued between February 1, 2001 and April 30, 2009 utilize the fifth edition of the A.M.A.,

[3] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000). *See* 5 U.S.C. § 8107.

Guides.[4] Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides*,[5] published in 2008, as the appropriate edition for all awards issued after that date.[6]

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).[7] 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 History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[8] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides.*[9]

ANALYSIS

OWCP accepted that appellant sustained closed, right fracture of cuboid bone; closed, right fracture of cuneiform bones; closed, right fracture of the metatarsal bones, contusion of the right foot and reflex sympathetic dystrophy of the right lower limb. By decision dated July 1, 2009, it granted him a schedule award for 20 percent impairment of the right lower extremity. In December 14, 2009 and December 15, 2010 decisions, OWCP found that appellant was not entitled to any additional schedule award.

The Board finds that OWCP properly based appellant's schedule award on the April 24, 2009 impairment calculations of Dr. Draper, the second opinion examiner, under the sixth edition of the A.M.A., *Guides.* OWCP's determination in this regard is further supported by the December 9, 2009 opinion of Dr. Berman, an OWCP medical adviser, who reviewed the medical evidence of record and agreed with Dr. Draper's impairment assessment made under the sixth edition of the A.M.A., *Guides*.

Dr. Draper explained that, under Table 16-13, appellant met the diagnostic criteria for complex regional pain syndrome and attributed six points for changes due to skin color, skin temperature (cool), edema, joint stiffness and decreased passive range of motion, radiographic signs of trophic bone changes on MRI scan and CT scan and bone scan findings consistent with CRPS under Table 16-14. Under Table 16-15, he found that the six points fit into class 2 or

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

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

[6] Federal (FECA) Procedure Manual, *see supra* note 4, Chapter 3.700, Exhibit 1 (January 9, 2010).

[7] A.M.A., *Guides* (6th ed., 2008), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[8] A.M.A., *Guides* 494-531 (6th ed. 2008).

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

moderate complex regional pain syndrome with a default impairment value of 20 percent. An OWCP medical adviser agreed with Dr. Draper's clinical findings and application of the A.M.A., *Guides*. He also discussed the relevant grade modifiers, noting that appellant had grade modifiers of 2 for functional history, grade modifier 2 for physical examination adjustment, grade modifier 2 for clinical studies under Table 16-6, Table 16-7 and pages 516, 517 and 519. An OWCP medical adviser properly identified that the impairment class for moderate complex regional pain syndrome (CDX) was 2 and correctly utilized the net adjustment formula of (GMFH - CDX)(2-2) + (GMPE - CDX)(2-2) + (GMCS - CDX)(2-2) to find a net adjustment of zero. Thus, appellant has a final 20 percent permanent right lower extremity impairment.

Although appellant submitted a July 28, 2009 report from Dr. Schultheiss noting greater impairment, the Board finds that this report is of diminished probative value. In his July 28, 2009 report, Dr. Schultheiss provided an impairment rating in accordance with the fifth edition of the A.M.A., *Guides.* As noted above, the sixth edition of the A.M.A., *Guides* is to be used in calculating impairment after May 1, 2009.[10] Since Dr. Schultheiss' July 28, 2009 report was not in accordance with the appropriate edition of the A.M.A., *Guides*, it is of diminished probative value.[11] Other reports from him were also based on the fifth edition of the A.M.A., *Guides.*

The Board finds that the record does not contain any medical evidence that establishes greater than 20 percent lower extremity impairment in accordance with the sixth edition of the A.M.A., *Guides.*

On appeal, appellant states that miscommunication between OWCP and his physicians caused unnecessary delay which then precluded the fifth edition of the A.M.A., *Guides* to be utilized. It is, as noted above, the date of OWCP's decision that determines which edition should be applied. There is no vested right to a schedule award decision under the fifth edition of the A.M.A., *Guides.*[12] Since OWCP's decision was issued after May 1, 2009, it was properly based on the sixth edition. While appellant properly notes that, in its February 2, 2009 development letter, OWCP advised impairment determinations were issued under the fifth edition of the A.M.A., *Guides*, that was the edition of the A.M.A., *Guides* that was in use at that time. He was clearly informed in OWCP's July 1, 2009 decision that the sixth edition of the A.M.A., *Guides* was in use.

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.

[10] *See supra* note 5.

[11] *See I.F.*, Docket No. 08-2321 (issued May 21, 2009) (an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of diminished probative value in determining the extent of permanent impairment).

[12] *See H.M.*, Docket No. 10-2205 (issued June 6, 2011).

CONCLUSION

The Board finds that appellant has not established more than 20 percent right lower extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 9, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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