

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

W.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bronx, NY, Employer**

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**Docket No. 11-1454
Issued: January 12, 2012**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 24, 2011 appellant, through her attorney, filed a timely appeal from a January 25, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 a five percent permanent impairment to her left leg.

FACTUAL HISTORY

On November 1, 2004 appellant, then a 36-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 29, 2004 she injured her left ankle when she fell while in the performance of duty. OWCP accepted the claim for a left ankle sprain on

¹ 5 U.S.C. § 8101 *et seq.*

January 13, 2005. Appellant also filed a claim for injury on April 28, 2005. This claim was accepted for a strain of the lateral collateral ligament of the left ankle.² Appellant underwent left ankle arthroscopic surgery on December 23, 2005.

In a report dated December 5, 2007, Dr. David Weiss, an osteopath, provided a review of the history and results on examination. With respect to a permanent impairment of the left leg, he opined that appellant had a 42 percent impairment based on motor deficits and pain. Dr. Weiss indicated that he used the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a report dated December 15, 2008, OWCP's medical adviser noting that appellant had a 20 percent left leg impairment under the A.M.A., *Guides*. OWCP found that a conflict existed and selected Dr. Martin Barschi, a Board-certified orthopedic surgeon, as a referee physician to resolve the conflict.³

In a report dated April 15, 2009, Dr. Barschi provided a history and results on examination. Referring to the fifth edition of the A.M.A., *Guides*, he opined that appellant had a 13 percent left leg permanent impairment. He noted mild muscle weakness and pain.

By letter dated June 12, 2009, OWCP advised Dr. Barschi that as of May 1, 2009 all impairment evaluations must be based on the sixth edition of the A.M.A., *Guides*. In a report dated July 13, 2009, Dr. Barschi noted that appellant did not have limitation on range of motion in the left ankle. He stated that she appeared to have mild decreased strength against resistance in eversion and inversion and a magnetic resonance imaging (MRI) scan showed a partial tear in the anterior talofibular ligament. Dr. Barschi referred to "section" 16-2 of the A.M.A., *Guides* and again opined that appellant had a 13 percent left leg permanent impairment. With respect to date of maximum medical improvement, he stated "the approximate year would have been in the year 2006 or 2007."

In a November 18, 2009 letter, OWCP advised Dr. Barschi that appellant also had an accepted left ankle injury on April 28, 2005, and enclosed medical evidence from that file. By report dated December 21, 2009, Dr. Barschi stated that, under section 16-2 of the sixth edition, there was a five percent impairment (grade B) for mild weakness in eversion/inversion, five percent (grade B) for the partial tear of the anterior talofibular ligament and three percent (grade A) for pain.

² The two claims were combined with the October 29, 2004 claim as the master file. By decision dated June 1, 2010, the Board affirmed a January 8, 2009 decision terminating medical benefits for the April 28, 2005 injury. Docket No. 09-1742 (issued June 1, 2010).

³ FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a). The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and it will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

OWCP's medical adviser submitted a January 31, 2010 report noting that Dr. Barschi did not properly apply the A.M.A., *Guides*. He noted that Table 16-2 requires identification of the specific diagnostic criteria enumerated in the table and application of grade modifiers for functional history, examination and clinical studies. The medical adviser agreed that the date of maximum medical improvement was April 15, 2009. In a letter dated March 1, 2010, OWCP requested that Dr. Barschi submit a supplemental report properly applying Table 16-2.

In a report dated March 23, 2010, Dr. Barschi identified an ankle ligament injury under Table 16-2, with a default impairment of five percent. He found grade modifier of 1 for Functional History (GMFH), Physical Examination (GMPH) and Clinical Studies (GMCS), resulting in no adjustment from the default value. Dr. Barschi concluded that appellant had a five percent permanent impairment to the left leg. By report dated May 9, 2010, OWCP's medical adviser concurred with Dr. Barschi. In a June 5, 2010 report, he opined that, given Dr. Barschi's opinion that maximum medical improvement was reached in 2006 or 2007, and Dr. Weiss' report dated December 5, 2007 regarding permanent impairment, the date of maximum medical improvement would be December 5, 2007.

By decision dated July 28, 2010, OWCP issued a schedule award for a five percent permanent impairment to the left leg. The period of the award was 14.40 weeks from December 5, 2007.

Appellant requested a hearing before an OWCP hearing representative by letter dated August 6, 2010. A hearing was held on December 6, 2010. Appellant argued that OWCP procedures provide for only one request for clarification from a referee physician, while in this case there were several requests for clarification.

By decision dated January 25, 2011, OWCP's hearing representative affirmed the July 28, 2010 schedule award decision.

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.⁶ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ OWCP procedures provide that, effective

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

⁶ See *Ronald R. Kraynak*, 53 ECAB 130 (2001); *August M. Buffa*, 12 ECAB 324 (1961).

⁷ 20 C.F.R. § 10.404 (1999).

May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*.⁸

With respect to leg impairment based on a diagnosed ankle condition, the A.M.A., *Guides* provides a regional grid at Table 16-2.⁹ The class of impairment (CDX) is determined based on specific diagnostic criteria, and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for GMFH, Table 16-6, GMPE, Table 16-7 and GMCS, Table 16-8. The adjustment formula is (GMFH -- CDX) + (GMPE -- CDX) + (GMCS -- CDX).¹⁰

ANALYSIS

In the present case, there was a disagreement between appellant's attending physician, Dr. Weiss, and an OWCP medical adviser with respect to the degree of employment-related permanent impairment to the left leg. Dr. Weiss found a 42 percent impairment, and a medical adviser found a 20 percent impairment. The physician chosen as a referee physician pursuant to 5 U.S.C. § 8123(a), Dr. Barschi, initially submitted an April 15, 2009 applying the fifth edition of the A.M.A., *Guides*. As noted above, any decision issued after May 1, 2009 must be based on the sixth edition. Since OWCP had not issued a decision by May 1, 2009, a supplemental report was necessary to resolve the conflict. In addition, Dr. Barschi did not have medical records from the April 25, 2005 injury, which also involved the left ankle.

Dr. Barschi submitted a December 21, 2009 report applying Table 16-2 of the A.M.A., *Guides*. He did not, however, properly apply the table. Dr. Barschi did not cite the diagnostic criteria enumerated in the table, the default value for the criteria or properly adjust the default value based on the grade modifiers. OWCP properly requested that he clarify his report. In his March 23, 2010, Dr. Barschi properly applied Table 16-2. For mild ligamentous laxity in the ankle, the default (grade C) impairment is five percent. Dr. Barschi then found a grade modifier of 1 (mild problem) for each of the adjustment factors: GMFH, GMPE and GMCS. Applying the adjustment formula noted above, there is no adjustment from the default value of five percent.

The Board accordingly finds that the referee physician properly determined the left leg impairment under the sixth edition. It is well established that when a case is referred to a referee specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹¹ Dr. Barschi's opinion represents the weight of the medical evidence in this case.

⁸ FECA Bulletin No. 09-03 (March 15, 2009); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010).

⁹ A.M.A., *Guides* 501-508, Table 16-2.

¹⁰ The net adjustment is up to +2 (grade E) or -2 (grade A).

¹¹ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the leg, the maximum number of weeks of compensation is 288 weeks. Since appellant's loss was five percent, she is entitled to five percent of 288 weeks or 14.40 weeks of compensation. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.¹² In this case, OWCP's medical adviser concluded that based on the evidence the date of maximum medical improvement was the date of examination by Dr. Weiss. The award therefore properly runs for 14.40 weeks commencing on December 5, 2007.

On appeal, appellant argues OWCP delayed issuing a schedule award decision utilizing the fifth edition of the A.M.A., *Guides* and deprived appellant of due process and property rights. The Board has addressed this issue in previous cases and found there is no vested right to a decision under the fifth edition and there is no deprivation of a due process or property right.¹³

Appellant contends that Dr. Barschi cannot represent the weight of the evidence because OWCP's memorandum of telephone call dated June 16, 2009 indicated that he did not have a copy of the sixth edition at that time, but the report on which the schedule award was based is dated March 23, 2010. Dr. Barschi utilized a copy of the sixth edition as he cited Table 16-2 and properly applied its provisions. His report was based on a complete background and represents the weight of the evidence. Appellant also argued that a referee physician can only be asked once for clarification per OWCP procedures. There is no specific limitation in OWCP procedures for only one request for clarification.¹⁴ OWCP noted that the report did not appear to properly apply Table 16-2 and requested clarification. There is no evidence of error in this regard.

CONCLUSION

The Board finds that the evidence does not establish more than a five percent permanent impairment to the left leg.

¹² *Albert Valverde*, 36 ECAB 233, 237 (1984).

¹³ *See, e.g., J.M.* Docket No. 11-404 (issued October 26, 2011).

¹⁴ OWCP's procedures indicate that, if the referee's report is vague or unrationalized, the claims examiner should secure a supplemental report to correct the defect. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11 (September 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 25, 2011 is affirmed.

Issued: January 12, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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