

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

T.C., Appellant)

and)

DEPARTMENT OF JUSTICE, FEDERAL)
BUREAU OF INVESTIGATION,)
Philadelphia, PA, Employer)

**Docket No. 11-1414
Issued: March 21, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 24, 2011 appellant, through her attorney, filed a timely appeal from a decision of the Office of Workers' Compensation Programs (OWCP) dated February 7, 2011 concerning 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 schedule award case.

ISSUE

The issue is whether appellant has more than a three percent impairment of the right lower extremity, for which she received a schedule award.

On appeal, appellant contends that there is a conflict in the medical opinion evidence.

¹ 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously before the Board. On February 24, 2010 the Board issued a decision affirming in part and setting aside in part a September 30, 2008 schedule award decision. The Board affirmed OWCP's decision granting appellant a six percent impairment of the left upper extremity, but set aside the determination regarding the right lower extremity impairment.² The Board found that the opinion of Dr. David Weiss, an examining osteopath, was of diminished probative value insufficient to determine the extent of her right lower extremity impairment as he provided no explanation of how his evaluation of appellant conformed to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed., 2001). The Board also found that the report from Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, was of diminished probative value as he provided no explanation why Chapter 17 of the A.M.A., *Guides* could not be used to determine appellant's right lower extremity impairment. Thus, the Board remanded the case for further medical development on the issue as there was no probative medical report addressing appellant's right lower extremity impairment. The facts and the circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.³

Following the Board's instructions OWCP referred appellant for a second opinion evaluation with Dr. Aldo D. Iulo, a Board-certified orthopedic surgeon. On April 28, 2010 Dr. Iulo, based upon a review of medical records, the statement of accepted facts and physical examination, concluded that appellant had a four percent right lower extremity impairment using the sixth edition of the A.M.A., *Guides*. In reaching this determination, he identified right ankle tendinitis from page 501, which he found was class 1 and grade C, resulting in four percent right lower extremity impairment.

On May 26, 2010 Dr. Henry J. Magliato, an OWCP district medical adviser, reviewed Dr. Iulo's report and concluded that an additional report was required as Dr. Iulo did not include any grade modifiers or Disabilities of the Arm, Shoulder and Hand (*QuickDASH*) when determining appellant's impairment rating.

In a July 19, 2010 addendum, Dr. Iulo concluded that appellant had two percent right lower extremity impairment. In reaching this determination he found a class 1, grade C using Table 16-2, page 501. Dr. Iulo noted that Achilles tendinitis and ankle sprain under Table 16-2, resulted in a default impairment of one percent. He found grade modifier 0 for Functional History (GMFH)⁴ and Clinical Studies (GMCS)⁵ and a grade modifier 1 for and Physical

² Docket No. 09-808 (issued February 24, 2010).

³ On March 21, 2002 appellant, then a 34-year-old investigative specialist, filed a traumatic injury claim alleging that on March 20, 2002 she sustained back, neck and leg injuries as a result of her car hydroplaning and hitting a cement barrier. OWCP accepted the claim for right ankle sprain and herniated cervical disc, which was expanded to include a fracture of the tarsal and metatarsal bones, laminotomy, foraminotomy and right-sided C6-7 disc excision.

⁴ A.M.A., *Guides* 516, Table 16-6.

⁵ *Id.* at 519, Table 16-8.

Examination (GMPH),⁶ resulting in an adjustment of 1 from the default value. Dr. Iulo noted that he assigned a grade modifier 1 for physical examination based on palpatory findings and tenderness. He concluded that appellant had a two percent permanent impairment to the right lower extremity.

On July 28, 2010 Dr. Magliato reviewed Dr. Iulo's addendum report and concluded that appellant had a one percent right lower extremity impairment. He related that Dr. Iulo did not apply the net modifier adjustment formula correctly. Using only a GMPE of 1, he found $GMPE(1) - CDX(1) = 0$, resulting in no adjustment of the default value of one.

By decision dated August 11, 2010, OWCP denied appellant's claim for an increased schedule award for her right lower extremity impairment, finding that she had no greater than the three percent impairment for which she had previously received a schedule award.

Appellant's counsel requested an oral hearing before an OWCP hearing representative, which took place on December 7, 2010.

By decision dated February 7, 2011, an OWCP hearing representative affirmed the August 11, 2010 decision.

LEGAL PRECEDENT

Under section 8107 of FECA⁷ and section 10.404 of the implementing federal regulations,⁸ schedule awards are payable for permanent impairment of specified body members, functions or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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.⁹

With respect to leg impairment based on a diagnosed ankle condition, the A.M.A., *Guides* provides a regional grid at Table 16-2.¹⁰ The class of diagnosis (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 $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$.¹¹

⁶ *Id.* at 517, Table 16-7.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *D.J.*, 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

¹⁰ A.M.A., *Guides* 501-08, Table 16-2.

¹¹ The net adjustment is up to +2 (Grade E) or -2 (Grade A).

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.¹²

ANALYSIS

OWCP accepted appellant's claim for right ankle sprain, herniated cervical disc, fracture of the tarsal and metatarsal bones, laminotomy, foraminotomy and right-sided C6-7 disc excision. On the prior appeal the Board affirmed OWCP's six percent impairment of the left upper extremity. However, it found the medical evidence insufficient regarding appellant's right lower extremity rating and remanded the case to OWCP for further development. The issue on appeal is whether appellant has established that she is entitled to a greater than three percent right lower extremity impairment, for which she was granted a schedule award.

On April 28, 2010 Dr. Iulo found that, using page 501 of the A.M.A., *Guides*, appellant's impairing diagnosis was right ankle tendinitis, which he found equaled a four percent lower extremity impairment. He was asked to provide a supplemental report as he had failed to consider the grade modifiers or explain how he arrived at this impairment determination. In a July 19, 2010 report, Dr. Iulo found, in accordance with Table 16-2, Foot and Ankle Regional Grid,¹³ that appellant had a two percent right lower extremity impairment based on a class 1, grade C. He applied the modifiers for functional history, physical examination and clinical studies found in Tables 16-6, 16-7 and 16-8, respectively.¹⁴ Dr. Iulo rated a functional history modifier 0, a physical examination modifier 1 and a modifier 0 for clinical studies. He adjusted appellant's impairment rating by one based on modifier for physical examination, resulting in a right lower extremity impairment rating of two percent. While Dr. Iulo correctly identified the class and grade of impairment for her ankle condition, he did not properly apply the adjustment formula.

The Board finds that Dr. Magliato, an OWCP medical adviser, applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to Dr. Iulo's clinical findings. Dr. Magliato correctly used the grade modifier adjustment formula to determine that the diagnosis-based percentage did not require modification. The Board finds that his mathematical calculations were correct. Also, there is no medical evidence of record utilizing the appropriate elements of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of permanent impairment. Therefore, OWCP properly relied on its medical adviser's assessment of a one percent impairment of the right lower extremity.

This rating was based on the applicable protocols and tables of the sixth edition of the A.M.A., *Guides*. As the record contains no other impairment evaluation, in conformance with

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010). See *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

¹³ A.M.A., *Guides* 501.

¹⁴ *Id.* at 516-19.

the sixth edition of the A.M.A., *Guides*, showing any greater right lower extremity impairment, the Board will affirm OWCP's decision.

On appeal, appellant's counsel contends that there is an unresolved conflict in the medical opinion. Contrary to appellant's contention there is no unresolved conflict in the medical opinion evidence. The Board in the prior decision found Dr. Weiss' opinion to be of diminished probative value as he provided no explanation of how his evaluation of the employee conformed to the applicable protocols and tables of the A.M.A., *Guides*. Moreover, Dr. Weiss has not provided any impairment rating using the sixth edition of the A.M.A., *Guides*. His prior impairment rating was made using the tables of the fifth edition of the A.M.A., *Guides*. As noted above, for all schedule award decisions issued after May 1, 2009, the applicable version of the A.M.A., *Guides* is the sixth edition. For these reasons, Dr. Weiss' opinion is insufficient to create a conflict in the medical opinion evidence.

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 not established that she is entitled to a greater than three percent impairment of the right lower extremity, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 7, 2011 is affirmed.

Issued: March 21, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board