

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

E.S., Appellant

and

**DEPARTMENT OF THE ARMY, TEST &
EVALUATION COMMAND, WHITE SANDS
MISSILE RANGE, NM, Employer**

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**Docket No. 13-355
Issued: April 22, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 3, 2012 appellant filed a timely appeal from the November 16, 2012 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 met his burden of proof to establish an increased permanent impairment of his right leg.

FACTUAL HISTORY

OWCP accepted that on June 7, 1971 appellant, then a 23-year-old worker trainee, sustained a right ankle sprain, right chondromalacia (except of the patella) and villonodular

¹ 5 U.S.C. §§ 8101-8193.

synovitis of the right ankle and foot due to twisting his ankle while stepping down from a truck at work.²

In December 1972, appellant received a schedule award for 10 percent permanent impairment of his right leg. The award ran from October 23 to May 23, 1972.

On August 29, 1977 appellant underwent a right ankle arthrotomy with tenolysis of the peroneal tendons. The procedure was authorized by OWCP.

In September 1978, appellant received a schedule award for an additional 15 percent permanent impairment of his right leg, for a total right leg impairment of 25 percent. The award ran from January 11 to November 9, 1978.

On October 3, 2005 Dr. Edward R. Sweetser, an attending Board-certified orthopedic surgeon, performed a right ankle arthroscopy with arthroscopic chondroplasty; on June 20, 2007, he performed a right ankle ligament reconstruction with peroneal tendon transfer and excision of bone spur. On October 4, 2011 Dr. Eric P. Anctil, an attending Board-certified orthopedic surgeon, performed a right ankle arthroscopy with arthroscopic debridement, osteochondral drilling, debridement and exostectomy; on April 25, 2012, he performed a right ankle fusion with internal fixation and bone grafting. These procedures were authorized by OWCP.

On September 9, 2012 appellant filed a claim for an increased schedule award due to his work injuries. In a decision dated September 17, 2012, OWCP denied his claim for additional schedule award compensation finding that he had not submitted medical evidence showing that he has more than 25 percent permanent impairment of his right leg, for which he received schedule awards.

Appellant requested reconsideration and submitted additional medical evidence.

In an October 16, 2012 report, Dr. Caryl Brailsford-Gorman, an attending Board-certified orthopedic surgeon, described appellant's medical history and reported the findings of the physical examination she performed on that date. She noted that x-rays showed good alignment for the right ankle and that the physical examination showed diffuse ankle edema, right greater than left. Dr. Brailsford-Gorman performed range of motion testing for the right ankle and noted that there was some diffuse sensory deficit around the surgical scar on the right ankle. She noted that appellant had some right ankle atrophy and an abnormal gait and she diagnosed right ankle fusion involving the tibial talar joint. Dr. Brailsford-Gorman indicated that, under Table 16 on page 508 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009), appellant had a diagnosis-based impairment rating for his right ankle fusion (neutral position) which had a class 1 default value of 10 percent. She determined that he had a Functional History (GMFH) modifier score of 2 (based on answers on a lower limb questionnaire) a Physical Examination (GMPE) modifier score of 1 (based on atrophy and abnormal gait) and a Clinical Studies (GMCS) modifier score of 0 (clinical studies being concordant with diagnosis). Dr. Brailsford-Gorman then applied the Net Adjustment Formula to find that appellant's condition warranted moving two places to the right from the 10

² Appellant retired from the employing establishment in March 1998.

percent default value on Table 16-2 on page 508. Therefore, appellant had 13 percent permanent impairment of his right leg.

On November 7, 2012 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, serving as an OWCP medical adviser, performed a review of the medical evidence of record. In a report produced on the same date, he detailed appellant's medical history and indicated that he agreed with the assessment of Dr. Brailsford-Gorman that, under Table 16-2 of the sixth edition of the A.M.A., *Guides*, appellant had 13 percent permanent impairment of his right leg. Dr. Harris posited that appellant reached maximum medical improvement by October 22, 2012, the date of Dr. Brailsford-Gorman's examination. He noted that, as appellant had already received compensation for 25 percent impairment, he was not entitled to any additional schedule award compensation for his right leg.

In a decision dated November 16, 2012, OWCP determined that appellant did not meet his burden of proof to establish that he has more than 25 percent permanent impairment of his right leg, for which he received schedule awards. It indicated that the reports of Dr. Brailsford-Gorman and Dr. Harris showed that appellant was not entitled to additional schedule award compensation.

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 For OWCP decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.⁶

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the ankle, the relevant portion of the leg for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.⁷ After the class of diagnosis (CDX) is determined from the Foot and Ankle Regional Grid (including

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *Id.*

⁶ See FECA Bulletin No. 9-03 (issued March 15, 2009). For OWCP decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

⁷ See *id.* at (6th ed. 2009) 501-08.

identification of a default grade value), the Net Adjustment Formula is applied using the GMFH, GMPE and GMCS. The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁸ Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.⁹

ANALYSIS

OWCP accepted that on June 7, 1971 appellant sustained a right ankle sprain, right chondromalacia (except of the patella) and villonodular synovitis of the right ankle and foot. It authorized several right ankle procedures, including right ankle fusion surgery. Appellant received schedule awards for 25 percent permanent impairment of his right leg and later claimed entitlement to additional schedule award compensation. In decisions dated September 17 and November 16, 2012, OWCP denied his claim for additional schedule award compensation.

The Board finds that appellant has not submitted medical evidence supporting an increased permanent impairment of his right leg. In an October 16, 2012 report, Dr. Brailsford-Gorman, an attending Board-certified orthopedic surgeon, found that he had 13 percent permanent impairment of his right leg. She properly indicated that, under Table 16 on page 508 of the sixth edition of the A.M.A., *Guides*, appellant had diagnosis-based impairment rating for his right ankle fusion (neutral position) which had a class 1 default value of 10 percent.¹⁰ She determined that he had a Functional History modifier score of 2, a Physical Examination modifier score of 1 and a Clinical Studies modifier score of 0 and then correctly applied the Net Adjustment Formula to find that appellant had 13 percent permanent impairment of his right leg.¹¹ On November 7, 2012 Dr. Harris, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, indicated that he agreed with the assessment of Dr. Brailsford-Gorman that appellant had 13 percent permanent impairment of his right leg.

Appellant did not submit any other medical evidence containing an assessment of his right leg impairment and OWCP properly denied his claim for additional schedule award compensation.

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.

⁸ *Id* at 515-22.

⁹ *Id.* at 523-28.

¹⁰ *See supra* note 7.

¹¹ *See supra* note 8.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 25 percent permanent impairment of his right leg, for which he received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 22, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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