United States Department of Labor
Employees' Compensation Appeals Board

C.T., Appellant	)	
and	)	**Docket No. 13-449**
	)	**Issued: November 1, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Reading, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of 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 December 13, 2012 appellant, through her attorney, filed a timely appeal of a July 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

ISSUE

The issue is whether appellant has more than five percent impairment of the right leg for which she received a schedule award.

On appeal, counsel contends that OWCP should have referred appellant to a referee medical examination in light of the conflicting opinions of the attending orthopedic surgeon and a second opinion examiner.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on February 3, 2011 appellant, then a 52-year-old casual vehicle operator, sustained a bimalleolar fracture of the right ankle as a result of a fall on the ice at work. On February 4, 2011 she underwent an open reduction, internal fixation of a right ankle bimalleolar fracture/dislocation performed by Dr. Robert D. Sutherland, a Board-certified orthopedic surgeon.

On April 3, 2012 appellant filed a claim for a schedule award.

By letter dated May 9, 2012, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion to determine the extent of her impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a May 21, 2012 medical report, Dr. Draper conducted a physical examination and reviewed a statement of facts, history of injury and the medical record. On examination, he found a well-healed 10-centimeter incision along the right lower aspect of the right ankle extending over the distal fibula and a 6-centimeter incision extending over the medial malleoulous. Dr. Draper reported range-of-motion measurements which included 60 degrees of flexion, 20 degrees of extension, 30 degrees of inversion and 20 degrees of eversion. He found no tenderness in the right ankle and foot and positive Tinel's sign over the tarsal tunnel. Dr. Draper diagnosed displaced trimalleolar fracture/dislocation of the right ankle. He advised that appellant was status post open reduction and internal fixation of the displaced trimalleolar fracture of the right ankle with anatomic restoration. Utilizing the sixth edition of the A.M.A., *Guides*, Table 16-2 on page 503, Dr. Draper determined that she had a class 1 impairment for a bimalleolar/trimalleolar ankle fracture which yielded a grade C default impairment of five percent with nondisplaced minimal findings. He assessed a grade 1 modifier each for Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). Applying the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), Dr. Draper found a net adjustment of zero which yielded a grade C impairment or five percent impairment of the right leg.

In an April 30, 2012 report, Dr. Arthur F. Becan, an attending orthopedic surgeon, obtained a history of the February 3, 2011 employment injury and appellant's medical treatment. He reviewed a February 3, 2011 right ankle x-ray report that revealed a trimalleolar fracture/dislocation. Dr. Becan stated that she ambulated with a mild limp on the right secondary to right ankle pain. On examination of the right ankle, he found a hypertrophic surgical tear along the lateral aspect measuring 12 centimeters in length and a hypertrophic surgical tear along the medial aspect measuring 8 centimeters in length. Dr. Becan otherwise found essentially normal findings except anterior talofibular ligament tenderness and severely limited range of motion of the ankle which included 0/15 degrees of dorsflexion, 0-40/55 degrees of plantar flexion, 0-20/35 degrees of inversion and 0-20/35 degrees of eversion. Manual muscle strength testing revealed dorsiflexion of 4/5 and plantar flexion, inversion and eversion at 5/5 each. Ankle joint circumference measured 25 centimeters on the right and 23 centimeters on the left. Dr. Becan diagnosed a right ankle trimalleolar fracture/dislocation. He advised that appellant

was status post closed reduction of the trimalleolar fracture/dislocation of the right ankle and status post open reduction and internal fixation of a bimalleolar fracture of the right ankle. Dr. Becan opined that the February 3, 2011 work-related injury was the competent producing factor of her subjective and objective findings. Utilizing the sixth edition of the A.MA., *Guides*, he determined that under Table 16-2 appellant had a class 1 impairment for right ankle trimalleolar fracture with mild motion deficit which represented 10 percent impairment. Dr. Becan assessed a grade 1 modifier for functional history under Table 16-6 on page 516 and a grade 2 modifier for physical examination under Table 16-7 on page 517. He applied the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) and determined a net adjustment of 1 which represented 12 percent impairment of the right lower extremity. Dr. Becan concluded that appellant reached maximum medical improvement on April 30, 2012.

On June 5, 2012 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed the medical record. He stated that the basic difference between Dr. Becan's 12 percent impairment rating and Dr. Draper's 5 percent impairment rating was that Dr. Draper found that the right ankle demonstrated normal range of motion which placed the evaluation in class 1 under Table 16-2. Dr. Berman stated that a class 1, grade C impairment for nondisplaced minimal findings, represented a five percent impairment. Dr. Becan, however, found a mild motion deficit or mild alignment, which was not consistent with a February 4, 2011 radiologic report.[2] He determined that this finding represented a class 1 impairment with a grade C default value ranging from 7 to 13 percent. Dr. Berman noted that the examinations of Drs. Draper and Becan were performed in close time, but that Dr. Draper's report carried the weight of the medical evidence as he was a Board-certified orthopedic surgeon. Based on his evaluation, the radiologic picture indicated a nondisplaced bimalleolar fracture with minimal findings. Dr. Berman utilized Table 16-2 to determine that appellant had a class 1, grade C or five percent impairment with a range of three to seven percent for nondisplaced minimal findings. Utilizing Table 16-6, Functional History Adjustment, Lower Extremities, on page 516, of the sixth edition of the A.M.A., *Guides*, he assessed a grade 1 modifier. Under Table 16-7, Physical Examination Adjustment, Lower Extremities, on page 517, Dr. Berman assessed a grade 1 modifier. He assessed a grade 1 modifier under Table 16-8, Clinical Studies Adjustment, Lower Extremities, on page 519. Applying the net adjustment formula on page 521 to these findings resulted in a net adjustment of zero. Dr. Berman found that appellant had five percent impairment of the right lower extremity which was a grade C impairment with no change based on the grade adjustment. He concluded that maximum medical improvement was reached on May 21, 2012, the date of Dr. Draper's examination.

In a July 11, 2012 decision, OWCP granted appellant a schedule award for five percent impairment of the right leg. It found that the weight of the medical opinion evidence rested with Dr. Draper and Dr. Berman.

[2] In a February 4, 2011 report, Dr. Elaine R. Lewis, a Board-certified radiologist, advised that an x-ray of appellant's right ankle demonstrated the placement of a plate with multiple screws which traversed a previously described fracture of the distal fibula. A screw extended through the medial malleoulous. There was satisfactory positioning of the fracture fragments. The ankle mortise was normal in appearance. Dr. Lewis listed her impression as a satisfactory alignment status post open reduction and internal fixation of a prior fracture/dislocation of the right ankle.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing federal regulations[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions and organs of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[5] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] For decisions issued after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7] For decisions issued after May 1, 2009, the sixth edition will be used.[8]

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[9] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[10]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is 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 an examination and resolve the conflict of medical evidence.[11] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[12]

ANALYSIS

The Board finds that this case is not in posture for decision because a conflict in medical evidence between the opinions of Dr. Becan, Dr. Draper and Dr. Berman. OWCP accepted appellant's claim for a bimalleolar fracture of the right ankle. On July 11, 2012 appellant was

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Ausbon N. Johnson*, 50 ECAB 304 (1999).

[6] *Supra* note 4.

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

[8] *Id.* at Chapter 3.700, Exhibit 1 (January 2010).

[9] A.M.A., *Guides* 494-531.

[10] *Id.* at 521.

[11] 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

[12] *R.C.*, 58 ECAB 238 (2006).

granted a schedule award for five percent impairment of the right lower extremity based on the opinions of Dr. Draper and Dr. Berman.

On April 30, 2012 Dr. Becan, an attending physician, determined that appellant had 12 percent impairment of the right lower extremity due to a right ankle trimalleolar fracture/dislocation. In a May 21, 2012 report, Dr. Draper, an OWCP referral physician, found that she had five percent impairment of the right lower extremity due to the same right ankle condition. OWCP properly referred the medical evidence to Dr. Berman, its medical adviser,[13] who agreed with Dr. Draper's impairment rating on June 5, 2012. All of the physicians used, Table 16-2 on page 503 of the sixth edition of the A.M.A., *Guides*, to rate appellant's right ankle fracture/dislocation a class 1 impairment. The physicians, however, disagreed regarding the nature of the residuals of her employment-related impairment. Dr. Becan advised that appellant's right ankle fracture had mild motion deficit and mild misalignment which warranted a 10 percent impairment. He applied grade modifiers of one for functional history and two for physical examination, resulting in a net adjustment of one which represented a 12 percent impairment of the right lower extremity. Dr. Draper and Dr. Berman advised that appellant had a nondisplaced fracture with minimal findings which warranted a five percent impairment. Both physicians applied grade modifiers of one for functional history, physical examination and clinical studies, resulting in no net adjustment from the five percent right lower extremity impairment.

As each physician applied and explained their respective ratings under the sixth edition of the A.M.A., *Guides* in arriving at diverse percentages of impairment, there is an unresolved conflict of medical opinion. Consequently, the case will be remanded to OWCP for referral of appellant, together with the case file and statement of accepted facts, to an appropriate impartial medical specialist to resolve the conflict. On remand, the impartial medical specialist should address the extent of appellant's permanent impairment, including the nature of any impairing employment-related residuals, in accordance with the sixth edition of the A.M.A., *Guides*. After OWCP has developed the case record to the extent it deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that this case is not in posture for decision as a conflict in medical evidence has been created regarding the extent and degree of appellant's right lower extremity impairment.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (February 2013).

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for action consistent with this decision of the Board.

Issued: November 1, 2013
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