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

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| **D.H., Appellant** | ) | |
| **and** | ) | **Docket No. 13-1482** |
| | ) | **Issued: March 10, 2014** |
| **U.S. POSTAL SERVICE, POST OFFICE, Macomb, IL, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, 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 June 10, 2013 appellant, through counsel, filed a timely appeal from a May 1, 2013 merit decision of the Office of Workers' Compensation Programs. 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 claim.

### *ISSUE*

The issue is whether appellant has more than 16 percent impairment of the left lower extremity for which he received a schedule award.

### *FACTUAL HISTORY*

OWCP accepted that on December 12, 2009 appellant, then a 46-year-old letter carrier, sustained left trimalleolar ankle fracture, left syndesmotic ligament strain, left ankle deltoid strain and left ankle dislocation due to a slip and fall on a patch of ice. It paid appropriate

[1] 5 U.S.C. §§ 8101-8193.

benefits, including authorizing several surgeries which appellant underwent on December 12, 2009, March 26 and August 4, 2010. Appellant eventually returned to full duty on February 8, 2011.

On April 22, 2011 appellant filed a claim for a schedule award. By decision dated August 1, 2011, OWCP granted him a schedule award for 10 percent impairment to the left lower extremity, based on the opinion of its medical adviser, who used the medical evidence of file and the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) to arrive at an impairment rating.

On August 12, 2011 appellant's attorney requested a telephonic hearing, which was held on November 15, 2011. In an August 12, 2011 report, Dr. William N. Grant, a Board-certified internist, noted the history of injury and presented examination findings. He opined that appellant reached maximum medical improvement and has 36 percent left lower extremity impairment under the sixth edition of the A.M.A., *Guides*. Dr. Grant provided detailed calculations as to how this figure was determined, citing tables and pages used. He opined that for the closed left fracture trimalleolar, there was 13 percent impairment. For the left ankle strain, there was 13 percent impairment. For the left strain of ankle deltoid, there was seven percent impairment. For left closed dislocation ankle, there was 13 percent impairment. There was five percent peripheral nerve involvement.

By decision dated February 2, 2012, an OWCP hearing representative set aside the August 1, 2011 decision and remanded the case for further medical development based on Dr. Grant's August 12, 2011 report.

In a February 5, 2012 report, Dr. Sanjai Shukla, a Board-certified family practitioner and an OWCP medical adviser, reviewed Dr. Grant's report and opined that he had incorrectly used the A.M.A., *Guides* in arriving at his impairment rating as he had rated each of appellant's individual injuries separately, which is not consistent with a diagnosis-based impairment rating, and he had rated appellant for nerve involvement despite that the attending physician had indicated in reports of record that appellant was neurovascularly intact. Dr. Shukla used the medical evidence of record and found 16 percent impairment to the left lower extremity.[2] He provided detailed calculations as to how this figure was determined and cited tables and pages used from the A.M.A., *Guides.*

By decision dated March 20, 2012, OWCP granted appellant an additional 6 percent impairment above the prior schedule award, for a total left lower extremity impairment of 16 percent. Appellant was paid 17.28 weeks' compensation for the period November 11, 2011 to March 10, 2012.

On March 28, 2012 appellant's attorney requested a telephonic hearing. By decision dated May 25, 2012, an OWCP hearing representative vacated the March 20, 2012 decision and

[2] In a November 10, 2011 report, Dr. Benjamin Stevens noted the history of injury and provided examination findings of the left lower extremity. These included a neurovascularly intact left lower extremity, well-preserved ankle motion with no crepitus but tenderness to palpation anteromedially and mild edema. An assessment of stable left ankle with mild arthritis was provided.

remanded the case for further medical development as there was an unresolved conflict in medical evidence between Dr. Grant and Dr. Shukla, the medical adviser, regarding the extent of appellant's left lower extremity impairment. OWCP was directed to update the statement of accepted facts, refer appellant to an impartial medical examiner to resolve the conflict in medical opinion and issue a *de novo* decision on schedule award entitlement.

On May 30, 2012 OWCP expanded the case to include the condition of post-traumatic arthritis of the left ankle and issued a new statement of accepted facts. In August 2012 it referred appellant, along with the updated statement of accepted facts, the medical record and questions, to Dr. Steven G. Potaczek, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the extent of the permanent impairment of his left lower extremity.

In an October 12, 2012 report, Dr. Potaczek noted the history of injury, his review of appellant's medical record and set forth his examination findings of September 28, 2012. He diagnosed post-traumatic arthritis, left ankle, with some continued symptoms. Dr. Potaczek opined that appellant reached maximum medical improvement on November 10, 2011, when the medical record indicated appellant's condition was stable. He stated that his impairment calculation agreed with that of Dr. Shukla's 16 percent impairment assessment. Dr. Potaczek stated that he agreed with the diagnosis-based impairment rating method employed by Dr. Shukla and could not accept the methodology employed by Dr. Grant. He further indicated his agreement with Dr. Shukla's comments that there could be no rating for peripheral nerve involvement as his review of the medical records showed appellant was repeatedly documented to have normal neurovascular status.

By decision dated October 16, 2012, OWCP found appellant was not entitled to additional schedule award compensation beyond the 16 percent total left lower extremity impairment previously awarded. Special weight was accorded to the opinion of Dr. Potaczek, the impartial medical specialist.

On October 22, 2012 appellant's attorney requested a telephonic hearing, which was held on February 12, 2013. He argued that he disagreed with the impairment rating provided by Dr. Potaczek as he failed to consider the diagnosis of polyneuritis and had failed to provide his own opinion regarding appellant's impairment of the left lower extremity. Appellant testified as to his continued symptoms.

By decision dated May 1, 2013, an OWCP hearing representative affirmed the October 15, 2012 decision finding that Dr. Potaczek's opinion was well reasoned, and consistent with the evidence of record and the sixth edition of the A.M.A., *Guides*.

## ***LEGAL PRECEDENT***

The schedule award provision of FECA and its implementing regulations[3] 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. FECA, however, does not

[3] 20 C.F.R. § 10.404.

specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.[4] 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] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

Section 8123(a) of FECA 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.[7] 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 OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[8] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

Board case precedent provides that, when OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the deficiency in his original report. If the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is incomplete, vague, speculative or lacking in rationale, OWCP should refer the claimant to a second impartial specialist.[10]

## ***ANALYSIS***

OWCP accepted that on December 12, 2009 appellant sustained left trimalleolar ankle fracture, left syndesmotic ligament strain, left ankle deltoid strain, and left ankle dislocation due to a slip and fall on a patch of ice. On May 30, 2012 it expanded the claim to include the

[4] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

[5] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[7] 5 U.S.C. § 8123(a).

[8] 20 C.F.R. § 10.321.

[9] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[10] *See Nancy Keenan*, 56 ECAB 687 (2005).

condition of post-traumatic left ankle arthritis. The record establishes that appellant received a schedule award for 10 percent left lower extremity impairment on August 1, 2011 and an additional schedule award for 6 percent left lower extremity impairment on March 20, 2012, for a total left lower extremity impairment of 16 percent. It subsequently determined that there was an unresolved conflict in medical opinion between Dr. Grant, appellant's treating physician, and Dr. Shukla, an OWCP medical adviser, with regard to the issue of permanent impairment to the left lower extremity. Dr. Shukla referred appellant for an impartial medical examination with Dr. Potaczek. On October 16, 2012 and May 1, 2013 OWCP denied appellant an additional schedule award to the left lower extremity based on the October 12, 2012 report of Dr. Potaczek, a Board-certified orthopedic surgeon who served as an impartial medical specialist.

On appeal, appellant's counsel argued that OWCP's decision is contrary to law and fact. The Board initially notes that OWCP improperly determined that a conflict in medical opinion arose regarding the extent of appellant's left lower extremity impairment between Dr. Grant and Dr. Shukla. Dr. Grant noted 36 percent left lower extremity by providing impairment ratings for closed left fracture trimalleolar; left ankle sprain; left sprain of ankle deltoid; closed left dislocation ankle; and peripheral nerve involvement. Dr. Shukla, OWCP's medical adviser, noted that Dr. Stevens, in a November 10, 2011 report, found appellant's ankle neurovascularly intact and that the resultant deficit was from post-traumatic arthritis, which was noted as mild. Additionally, Dr. Shukla properly found that a diagnosed-based impairment does not rate each individual injury separately; but rather focuses on the end result, or mild arthritis as assessed by Dr. Stevens. The A.M.A., *Guides* states that typically only one diagnosis is used per region to determine impairment.[11] As Dr. Grant's rating did not conform to the A.M.A., *Guides*, it is of diminished probative value.[12] His report did not create a conflict in medical opinion with Dr. Shukla. Therefore, the referral to Dr. Potaczek is not as an impartial medical examiner but as a second opinion physician.

The Board further finds that Dr. Potaczek's impairment rating is not sufficiently thorough or well reasoned. As appellant's counsel argued, Dr. Potaczek did not adequately explain his rating of impairment in the October 12, 2012 report. He did not set forth findings from examination in sufficient detail to allow the Board to fully visualize the nature and extent of permanent impairment. It is well established that a physician's opinion should include a description of impairment, including the loss in degrees, range of motion of affected members, any atrophy or deformity, decreases in strength or disturbance of sensation in such detail as those reviewing the file will be able to clearly visualize the impairment with all its limitations.[13] Dr. Potaczek noted range of motion findings and diagnosed post-traumatic arthritis in left ankle. He also indicated that the record demonstrated that appellant had normal neurovascular status and thus there could be no rating for peripheral nerve involvement as Dr. Grant found. However, Dr. Potaczek did not provide sufficient explanation or factual support regarding why he concurred with the diagnosed-based impairment rating method employed by Dr. Shukla nor did he reference any tables or pages from the A.M.A., *Guides.* The opinion of Dr. Potaczek thus

[11] A.M.A., *Guides* 389, 499.

[12] *Mary L. Henninger*, 52 ECAB 408 (2001).

[13] *See Peter C. Belkind*, 56 ECAB 580 (2005).

requires further clarification. On remand, OWCP should request a supplemental report from Dr. Potaczek.

The Board will set aside OWCP's May 1, 2013 decision and remand the case to OWCP to request a supplemental report from Dr. Potaczek. After such further development as may be required, OWCP shall issue an appropriate final decision on appellant's claim for a schedule award.

## ***CONCLUSION***

The Board finds that the case is not in posture for decision as further clarification is required from OWCP's second opinion physician, Dr. Potaczek, regarding the extent of permanent impairment to appellant's left leg.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 1, 2013 decision of the Office of Workers' Compensation Programs be set aside and the case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: March 10, 2014
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