United States Department of Labor
Employees' Compensation Appeals Board

F.S., Appellant **and** **U.S. POSTAL SERVICE, PHILADELPHIA PROCESSING & DISTRIBUTION CENTER, Philadelphia, PA, Employer**	**Docket No. 14-1657** **Issued: November 17, 2014**

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

On July 23, 2014 appellant, through her attorney, filed a timely appeal from a July 8, 2014 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.[2]

ISSUE

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

On appeal, counsel contends that an OWCP medical adviser found that appellant had a five percent impairment rating without explaining why his evaluation was distinguishable from the evaluation by the attending physician who rated seven percent impairment.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

This case was previously before the Board.[3] In a September 26, 2012 decision, the Board reversed OWCP's finding that appellant no longer had any residuals or disability causally related to her accepted employment-related injuries. In an order dated May 8, 2014, the Board denied OWCP Director's petition for reconsideration of its September 26, 2012 decision.[4] The facts of the case as set forth in the prior decision are hereby incorporated by reference. The relevant facts are set forth.

OWCP accepted that on June 25, 2008 appellant, then a 41-year-old mail handler, sustained an employment-related right ankle sprain. It also accepted the consequential condition of osteochrondritic desiccans. OWCP authorized appellant's May 28 and June 11, 2009 surgeries for right ankle arthroscopy, debridement of a microfracture and open excision of an os trigonum performed by Dr. Gene W. Shaffer, an attending Board-certified orthopedic surgeon.

On February 4, 2014 appellant filed a claim for a schedule award. In an October 29, 2013 medical report, Dr. Nicholas P. Diamond, an attending pain management specialist, provided a history of the accepted employment injuries and appellant's medical treatment, family and social background. Appellant complained of daily and constant right ankle pain and stiffness, numbness, tingling and instability. Her symptoms increased with weather changes. Appellant had difficulty performing household duties and driving a motor vehicle. She had no difficulty performing personal care. Posturally, appellant could comfortably stand 10 to 15 minutes and walk 15 to 20 minutes. She had to elevate her right leg while sitting. Appellant's postural difficulties occurred while going from a seated to standing position, climbing stairs and sleeping. She was unable to run, jog or exercise. Appellant rated her right foot and ankle pain as 8 to 9 out of 10. She denied having any pain or difficulties with activities of daily living prior to the accepted injuries. Dr. Diamond diagnosed post-traumatic right ankle strain and sprain, post-traumatic right ankle talar osteochondral lesion and os trigonum, status post right ankle arthroscopy with debridement and microfracture osteochondral lesion and open excision of os trigonum and decreased sensation over surgical and biopsy scar areas.

Dr. Diamond advised that appellant's June 25, 2008 work-related injury was the competent producing factor for her subjective and objective examination findings. Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A. *Guides*), Table 16-2, page 501, he determined that she had a class 1 right ankle strain with mild range of motion deficit, resulting in a default rating of five percent impairment. Under Table 16-6, Table 16-7 and Table 16-8 on pages 516 through 520, appellant had a grade modifier of 3 for Functional History (GMFH) and a grade modifier of 2 each for Physical Examination (GMPE) and Clinical Studies (GMCS). Applying the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), Dr. Diamond determined that (3-1) + (2-1) + (2-1) = 4. He concluded that appellant had seven percent impairment of the right lower extremity. Dr. Diamond further concluded that she reached maximum medical improvement as of the date of his examination.

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[3] Docket No. 11-863 (issued September 26, 2012).

[4] Docket No. 11-863 (issued May 8, 2014).

On June 4, 2014 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed the medical record. He determined that appellant reached maximum medical improvement on the date of Dr. Diamond's examination. Dr. Berman agreed with Dr. Diamond's finding that appellant had a class 1, grade C impairment with a default value of five percent under Table 16-2, page 506 of the sixth edition of the A.M.A., *Guides*. However, he determined that under Table 16-6, Table 16-7 and Table 16-8 on pages 516 through 520, appellant had a grade modifier of 1 each for GMFH, GMPE and GMCS. Applying the net adjustment formula, Dr. Berman found a net adjustment of zero. He concluded that appellant had five percent impairment to the right lower extremity.

In a July 8, 2014 decision, OWCP granted appellant a schedule award for five percent impairment of the right leg.

LEGAL PRECEDENT

The schedule award provision of FECA[5] and its implementing federal regulations[6] 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.[7] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[8] Effective May 1, 2009, FECA adopted the sixth edition of the A.M.A., *Guides*[9] as the appropriate edition for all awards issued after that date.[10]

The sixth edition requires identifying the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on functional history, physical examination and clinical studies.[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

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

[8] *Supra* note 6; *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

[9] A.M.A., *Guides* (6th ed. 2009).

[10] Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

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

[12] *Id.* at 521.

percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser proving rationale for the percentage of impairment specified.[13]

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.[14] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[15]

ANALYSIS

OWCP accepted appellant's claim for right ankle sprain and osteochrondritic desiccans, and authorized right ankle arthroscopy, debridement of microfracture and open excision of an os trigonum. Appellant received a schedule award for five percent impairment of the right lower extremity. The award was based on the June 4, 2014 impairment rating calculation of Dr. Berman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. Dr. Berman had evaluated the medical evidence of record, including the October 29, 2013 examination findings of Dr. Diamond, an attending pain management specialist.

The Board finds that there is a conflict in the medical opinion evidence regarding the extent of appellant's right lower extremity impairment between Dr. Berman, OWCP's medical adviser, and Dr. Diamond, appellant's attending physician.[16] In the June 4, 2014 report, Dr. Berman found that appellant sustained five percent permanent impairment of her right lower extremity under the standards of the sixth edition of the A.M.A., *Guides*. In contrast, Dr. Diamond found, in his October 29, 2013 report, that appellant had seven percent permanent impairment of her right lower extremity under the standards of the sixth edition of the A.M.A., *Guides*.

Both physicians used Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501, with associated Table 16-6 through Table 16-8 on page 516 through 520 to evaluate appellant's right lower extremity impairment.[17] However, the physicians disagreed about how to apply the medical findings of record to the standards of the tables. Dr. Diamond determined that appellant's accepted right ankle condition warranted a grade modifier 3 for functional history and a grade modifier 2 each for physical examination and clinical findings under Table 16-6, Table 16-7 and Table 16-8, respectively, while Dr. Berman found that it warranted a grade modifier 1 each for functional history, physical examination and clinical studies under the same tables.

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[13] *See C.K.*, Docket No. 09-2371 (issued August 18, 2010); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010).

[14] 5 U.S.C. § 8123(a). *See S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[15] *A.R.*, Docket No. 09-1566 (issued June 2, 2010); *M.S.,* 58 ECAB 328 (2007); *Bryan O. Crane*, 56 ECAB 713 (2005).

[16] *See supra* note 13.

[17] *See* A.M.A., *Guides* 516-20.

Due to the outstanding conflict in the medical opinion evidence regarding appellant's right lower extremity impairment between Dr. Diamond and Dr. Berman, the case must be referred to an impartial medical specialist to resolve the conflict.[18] On remand, OWCP should refer appellant, along with the case file and the statement of accepted facts, to an appropriate impartial medical specialist for a determination regarding the extent of her right lower extremity impairment as determined in accordance with the relevant standards of the A.M.A., *Guides*. After such further development as OWCP deems necessary, it should issue a *de novo* decision regarding her schedule award claim.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has more than five percent impairment of her right lower extremity, for which she received a schedule award, due to a conflict in the medical evidence.[19]

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision.

Issued: November 17, 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

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[18] *See supra* note 14.

[19] In light of the disposition of this case, the Board will not address counsel's argument on appeal.