United States Department of Labor
Employees' Compensation Appeals Board

C.T., Appellant	)	
	)	**Docket No. 14-1221**
and	)	**Issued: October 9, 2014**
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:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 30, 2014 appellant, through her attorney, filed a timely appeal from an April 22, 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.

ISSUE

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

On appeal, counsel contends that OWCP improperly relied on the medical report of an impartial medical examiner as it was not rationalized. He states that neither the referee physician nor OWCP medical adviser showed how they calculated their impairment ratings. Counsel contends that the impartial medical examiner's range of motion values far more closely track the values determined by an attending physician who provided sufficient analysis in support of his impairment rating and undermined the findings of an OWCP referral physician.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously before the Board.[2] In a November 1, 2013 decision, the Board set aside OWCP's July 11, 2012 schedule award decision. The Board found a conflict of medical opinion between Dr. Arthur F. Becan, an attending orthopedic surgeon, and Dr. Robert F. Draper, Jr., an OWCP referral physician and a Board-certified orthopedic surgeon, regarding the extent of appellant's right lower extremity impairment. The Board remanded the case for an impartial medical examination. The facts relevant to the current appeal are set forth below.[3]

On remand, OWCP referred appellant, a statement of accepted facts and the case record, to Dr. Eric B. Lebby, a Board-certified orthopedic surgeon, for an impartial medical examination and impairment rating. In a March 11, 2014 medical report, Dr. Lebby conducted a physical examination and reviewed a history of injury and the medical record. On examination of the back, bilateral upper extremities, hips and knees and left ankle, he reported normal findings. On examination of the right ankle, Dr. Lebby found well-healed surgical incisions over the medial and lateral malleoli. There was no effusion, tenderness over the medial or lateral malleolar, anterior talofibular (ATFL), peroneal tendons and posterior tibial. Anterior and posterior drawer tests and a Talar tilt test were negative. Appellant was able to heel and toe walk bilaterally. Dr. Lebby reported range of motion measurements which included 10 degrees of dorsiflexion, 30 degrees of inversion and 20 degrees of eversion. He found no ulcerations or signs of skin breakdown. Appellant had good capillary refill. Dr. Lebby stated that the accepted injury was bimalleolar fracture of the right ankle. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Table 16-2 on page 503, he determined that appellant 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. Dr. Lebby concluded that she did not have more than five percent impairment of the right lower extremity.

On April 15, 2014 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed the medical record, including Dr. Lebby's March 11, 2014 findings. Dr. Berman stated that the discrepancy between the reports of Drs. Becan and Draper was the same discrepancy between the reports of Drs. Becan and Lebby, *i.e.*, range of motion findings. Drs. Draper and Lebby found normal range of motion and, therefore, correctly concluded that this represented a class 1 impairment under Table 16-2 on page 503 of the sixth edition of the A.M.A., *Guides*, resulting in five percent impairment. Dr. Berman noted Dr. Becan's finding of decreased range of motion which represented 12 percent impairment. He stated that Drs. Draper and Lebby were Board-certified orthopedic surgeons while Dr. Becan was not a Board-certified physician. Dr. Berman, therefore, concluded that the weight of the

[2] Docket No. 13-449 (issued November 1, 2013).

[3] 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 appellant underwent an open reduction, internal fixation of the right ankle bimalleolar fracture/dislocation performed by Dr. Robert D. Sutherland, a Board-certified orthopedic surgeon. On July 11, 2012 OWCP granted her a schedule award for five percent impairment of the right lower extremity.

evidence rested with Drs. Draper and Lebby and appellant had no more than five percent impairment of the right lower extremity for which she had received a schedule award.

In an April 22, 2014 decision, OWCP denied appellant's claim for an additional impairment to the right lower extremity based on the opinions of Drs. Lebby and Berman.

LEGAL PRECEDENT

The schedule award provision of FECA,[4] and its implementing federal regulations,[5] 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.[6] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[7] For decisions issued after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8] For decisions issued after May 1, 2009, the sixth edition will be used.[9]

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 (foot) for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.[10] After the class of diagnosis (CDX) is determined from the Foot and Ankle Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using the grade modifier for Functional History, grade modifier for Physical Examination and grade modifier for Clinical Studies. The Net Adjustment Formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[11] 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.[12]

Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that diagnosis-based impairment is "the primary method of calculation for the lower

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

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

[7] *Supra* note 4.

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

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

[10] *See* A.M.A., *Guides* 501-7 (6th ed. 2008).

[11] *Id.* at 515-22.

[12] *Id.* at 23-28.

limb" and that most impairments are based on the diagnosis-based impairment where impairment class is determined by the diagnosis and specific criteria as adjusted by the grade modifiers for functional history, physical examination and clinical studies. Chapter 16 further provides:

> "Alternative approaches are also provided for calculating impairment for peripheral nerve deficits, complex regional pain syndrome, amputation and range of motion. Range of motion is primarily used as a physical examination adjustment factor and is only used to determine actual impairment values when it is not possible to otherwise define impairment."[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 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 on a proper factual background, must be given special weight.[15]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through the 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.[16]

ANALYSIS

OWCP accepted appellant's claim for bimalleolar fracture of the right ankle. In a July 11, 2012 decision, it granted her a schedule award for five percent impairment of the right lower extremity. Appellant contends that she has greater impairment.

In a prior appeal, the Board found a conflict in medical opinion between appellant's attending physician and an OWCP medical adviser. On remand, the case was properly referred to Dr. Lebby for an impartial medical evaluation as to the extent of appellant's permanent impairment. In a March 11, 2014 report, Dr. Lebby found that appellant had five percent impairment of the right lower extremity due to the accepted employment-related bimalleolar fracture of the right ankle. He reviewed the statement of accepted facts and the medical record. On examination of the ankle, Dr. Lebby reported normal findings which included, well-healed surgical incisions over the medial and lateral malleoli; no effusion; no tenderness in the medial or lateral malleolar, ATFL, peroneal tendons and posterior tibial; negative anterior and posterior drawer and Talar tilt tests; ability to heel and toe walk bilaterally; normal range of motion; no ulcerations or signs of skin breakdown; and good capillary refill. He referenced a diagnosis-

[13] *Id.* at 497, 544-53.

[14] 5 U.S.C. § 8123(a); *Y.A.*, 59 ECAB 701 (2008).

[15] *V.G.*, 59 ECAB 635 (2008).

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

based impairment under the category of ankle (malleolar, bimalleolar, trimalleolar) in Table 16-2 (Foot and Ankle Regional Grid) on page 503 of the sixth edition of the A.M.A., *Guides*. Dr. Lebby determined that appellant 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 concluded that she did not have more than five percent impairment of the right lower extremity for which she had already received a schedule award.

In accordance with its procedures, OWCP properly referred the evidence of record to Dr. Berman, a medical adviser, who reviewed the clinical findings of Dr. Lebby on April 15, 2014 and concurred with his impairment rating.[17] Dr. Berman concurred with the usage of the foot and ankle regional grid of Table 16-2 as a method of calculation from the A.M.A., *Guides*. He stated that Dr. Lebby correctly determined that appellant had a class 1 impairment under Table 16-2 based upon his examination finding of normal range of motion. Dr. Berman concluded that the weight of the evidence rested with Dr. Lebby's opinion that appellant had no more than five percent impairment of the right lower extremity for which she had received a schedule award.

When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[18] The Board finds that Dr. Lebby's impairment rating is entitled to the special weight of the medical evidence. Dr. Lebby reviewed the medical record and provided findings on examination. He provided a well-rationalized opinion and calculation under the sixth edition of the A.M.A., *Guides* and determined that appellant had a five percent impairment of the right lower extremity. Therefore, OWCP's April 22, 2014 decision finding five percent impairment of the right lower extremity was proper under the facts and circumstances of this case.

On appeal, counsel contended that OWCP improperly relied on Dr. Lebby's report as it was not rationalized. He stated that neither Dr. Lebby nor Dr. Berman showed how they calculated their impairment ratings. Both physicians, however, explained the basis for their impairment ratings and, as discussed, Dr. Lebby's report represents the special weight of the evidence.

Counsel further contended that Dr. Lebby's range of motion values far more closely track the values determined by an attending physician, who provided sufficient analysis in support of his impairment rating, and undermined the findings of an OWCP referral physician. As noted, above the sixth edition of the A.M.A., *Guides* provides that the diagnosis-based method of impairment rating is preferred for evaluating leg impairment and provides that calculating leg impairment using range of motion deficits, such as considering ankle motion deficits under Table 16-22,[19] should only be undertaken if no other approach is available for rating.[20] In the present case, a diagnosis-based impairment rating was available to evaluate appellant's right ankle

[17] *See supra* note 16.

[18] *V.G., supra* note 15.

[19] *See* A.M.A., *Guides*, *supra* note 10 at 549.

[20] *See supra* note 13.

impairment under Table 16-2. Further, Dr. Lebby found that her ankle had normal range of motion. Thus, there was no need for him to provide a range of motion impairment rating.

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 no more than five percent permanent impairment of the right lower extremity, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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