United States Department of Labor
Employees' Compensation Appeals Board

B.V., Appellant	)	
and	)	**Docket No. 15-1496**
	)	**Issued: November 4, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 30, 2015 appellant, through counsel, filed a timely appeal from an April 21, 2015 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 met his burden of proof to establish more than five percent impairment of the right lower extremity for which he received a schedule award.

FACTUAL HISTORY

On January 21, 2009 appellant, then a 33-year-old city carrier, stepped into a hole and injured his right ankle and foot. OWCP accepted the claim for ankle sprain, plantar fascia

[1] 5 U.S.C. § 8101 *et seq.*

sprain, and second metatarsal fracture of the right foot. Appellant stopped work that day and later returned to a modified-duty position on June 20, 2009.

Initial medical reports assessed possible fracture of the second metatarsal and sprained right ankle. A January 22, 2009 x-ray of the right foot revealed subtle lucency at the base of the second metatarsal on the frontal projection, probably representing a normal variation rather than fracture, and no evidence of fracture or dislocation of the ankle. Later, in a November 4, 2010 report, Dr. Brian Donley, Board-certified in orthopedic surgery, advised that appellant was still experiencing ankle pain but no longer had pain in the area said to have been fractured. In a January 30, 2011 report, Dr. Allan Boike, a podiatrist, advised that appellant had a slowly resolving ankle strain and assessed tendinitis in the right foot, sinus tarsitis, and plantar fasciitis of the right foot.

On November 13, 2012 appellant requested a schedule award.

In a December 4, 2012 report, Dr. John Dunne, a Board-certified osteopath specializing in preventive and occupational medicine, provided an impairment rating. He noted appellant's history of injury and examined his right foot and ankle. Examination revealed a slight antalgic shortened stance and inability to toe raise on the right with complaints of mid foot pain on the medial aspect. Dr. Dunne advised that range of motion of the ankle was obtained *via* goniometer and recorded flexion loss at 20 degrees, 10 degrees of extension, inversion at 25 degrees, and eversion limited to 10 degrees. He found that appellant had 19 percent permanent right lower extremity impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*[2] Using Table 16-10, pages 530-31, and Table 16-22, page 549, Dr. Dunne determined that appellant had 7 percent impairment for flexion, 7 percent impairment for extension, 2 percent impairment for eversion, and 2 percent impairment for inversion, totaling 18 percent permanent left lower extremity impairment. He advised that under Table 16-25, page 550, Range of Motion ICF Classification, appellant had a class 2 impairment. Using Table 16-6, page 516, Dr. Dunne assigned grade modifier 1 for Functional History (GMFH) because of appellant's antalgic limp with shortened stance. Using Table 16-17, page 545, he determined that his functional history adjustment was one higher than the impairment class, resulting in an increase of five percent for his total range of motion impairment. Multiplying 18 by 5 percent equaled .9 percent, which was rounded up to 1 percent and increased appellant's rating to 19 percent impairment of the right lower extremity. Dr. Dunne advised that appellant reached maximum medical improvement (MMI) in April or May 2009.

On January 31, 2013 an OWCP medical adviser evaluated Dr. Dunne's report and concurred with his 19 percent permanent impairment of the right lower extremity rating.

After counsel inquired about the status of the schedule award claim, OWCP advised counsel on January 10, 2014 that another OWCP medical adviser would review the matter to determine if the range of motion was an appropriate method of rating impairment.

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

On April 15, 2014 the medical adviser, Dr. Morley Slutsky, a Board-certified occupational medicine specialist, reviewed the medical evidence, including Dr. Dunne's report. He determined that appellant had five percent permanent impairment of the right lower extremity in accordance with the sixth edition of the A.M.A., *Guides*. Dr. Slutsky rated appellant using the diagnosis-based impairment method as opposed to the range of motion method citing Section 16.2 of the A.M.A., *Guides*, which states: "Range of motion is primarily used as physical examination adjustment factor and is only used to determine impairment values when it is not possible to otherwise define impairment."[3] Dr. Slutsky noted that Dr. Dunne erred when he adjusted the final ankle range of motion impairment by five percent. He noted that the A.M.A., *Guides* allows adjustment when the functional history grade modifier is greater than the range of motion grade modifier. However, Dr. Dunne adjusted the final impairment by five percent even though the grade modifier 1 for functional history was less than the ankle range of motion grade modifier 2. Using Table 16-22 and Table 16-20, page 549, and Dr. Dunne's range of motion measurements he assessed a moderate class 2 16 percent range of motion impairment. Dr. Slutsky advised that appellant had a class 1 ankle sprain with moderate motion deficits for five percent default impairment rating. He advised that fractured second metatarsal was not selected as the impairment class because it was not definitively diagnosed and Dr. Dunne did not address this condition in his impairment rating. Dr. Slutsky assessed a grade modifier 1 for functional history as appellant still had symptoms in the foot joint; grade modifier 1 for Physical Examination (GMPE) as appellant had tenderness to palpation; and no grade modifier for Clinical Studies (GMCS) as appellant had no diagnostic testing at the time of MMI. He applied the Net Adjustment Formula to find no adjustment from the default value; thus finding that appellant had five percent permanent impairment of the right ankle. Dr. Slutsky advised that the date of MMI was December 4, 2012 the date of Dr. Dunne's impairment examination.

In a June 19, 2014 decision, OWCP granted appellant a schedule award for five percent permanent impairment of his right lower extremity. The award ran for 14.4 weeks from December 4, 2012 to March 14, 2013.[4]

By letter dated June 25, 2015 appellant, though counsel, requested a telephone hearing before an OWCP hearing representative. On February 5, 2015 a telephone hearing took place. Counsel argued that, although the diagnosis based impairment method was the preferred method, the sixth edition of the A.M.A., *Guides* specifies that the method most favorable to the claimant should be used. He also disputed the fact OWCP deducted an overpayment of $3,817.87 from appellant's total schedule award payment of 10,774.74.

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[3] *Id*. at 497.

[4] To recover an overpayment under a separate claim, OWCP deducted $3,817.87 from appellant's total schedule award payment of $10,774.74, leaving $6,956.87 to be paid to appellant. The other claim and the overpayment matter in that claim are not before the Board on the present appeal. The record also contains a December 22, 2014 final overpayment decision in which OWCP found that appellant received a $6,956.86 overpayment of compensation because he received a duplicate schedule award payment. Counsel appealed this decision to the Board. On March 25, 2015 appellant repaid the overpayment. On August 6, 2015 the Board dismissed the appeal at counsel's request. Docket No. 15-0500.

By decision dated April 21, 2015, the hearing representative affirmed OWCP's June 19, 2014 decision finding that OWCP properly relied on Dr. Slutsky's report when determining appellant's entitlement to a schedule award.

LEGAL PRECEDENT

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[5] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.MA., *Guides* as the uniform standard applicable to all claimants.[6] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[7]

The sixth edition requires identifying the impairment Class for Diagnosis (CDX), which is then adjusted by grade modifiers based on functional history, physical examination and clinical studies.[8] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9] The sixth edition of the A.M.A., *Guides* also provides that range of motion may be selected as an alternative approach in rating impairment under certain circumstances. A rating that is calculated using range of motion may not be combined with a diagnosis-based impairment and stands alone as a rating.[10]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.[11]

ANALYSIS

The Board finds that OWCP properly determined appellant's five percent permanent impairment of his right leg. OWCP accepted the claim for ankle sprain, plantar fascia sprain,

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[5] 5 U.S.C § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[6] 20 C.F.R. § *supra* note 5.

[7] FECA Bulletin No. 09-03 (issued March 15, 2009).

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

[9] *Id*. at 521.

[10] *Id*. at 497; *K.H.*, Docket No. 13-501 (issued January 28, 2014); *L.B.*, Docket No. 12-910 (issued October 5, 2012).

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

and second metatarsal fracture of the right foot. Appellant claimed a schedule award and submitted an impairment rating from Dr. Dunne.

In his December 4, 2012 report, Dr. Dunne found 19 percent permanent right ankle impairment. Using Table 16-22 and Table 16-20, page 549, he determined that appellant had 7 percent impairment for flexion, 7 percent impairment for extension, 2 percent impairment for eversion, and 2 percent impairment for inversion, totaling 18 percent class 2 right lower extremity impairment. Using Table 16-6 on page 516, Dr. Dunne assigned grade modifier 1 for functional history because of appellant's antalgic limp with shortened stance. Using Table 16-17, page 545, he determined that appellant's functional history adjustment was one higher than the ICF class, resulting in an increase of five percent, totaling 19 percent permanent impairment of the lower extremity. The Board finds that this rating is not in conformance with the A.M.A., *Guides*. Dr. Dunne assessed two percent permanent impairment for inversion, which in accordance with Table 16-20 on page 549, specifies 10-20 degrees of inversion. However, he measured inversion at 25 degrees, which should have resulted in zero percent impairment for inversion. Dr. Dunne also incorrectly used the functional history modifier to adjust appellant's impairment. Table 16-17, page 545, specifies that the total range of motion impairment should be increased by five percent if the functional history modifier is greater than the range of motion ICF class. Here the functional history modifier of 1 is not greater that the ICF class of 2; therefore, Dr. Dunne should not have adjusted the impairment rating.

Consistent with its procedures,[12] OWCP properly referred the matter to its medical adviser for an opinion regarding appellant's permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. The initial January 31, 2013 report from the medical adviser is of limited probative value as it appears to merely restate Dr. Dunne's conclusions and did not note the errors in his calculation, noted above. OWCP thus properly referred the matter to another OWCP medical adviser, Dr. Slutsky.

The Board finds that the second medical adviser, Dr. Slutsky, applied the appropriate tables and grading schemes of the A.M.A., *Guides*, in determining that appellant has five percent permanent impairment of the right ankle. Dr. Slutsky explained that Dr. Dunne did not properly calculate range of motion impairment. He also explained that under the A.M.A., *Guides,* diagnosis-based impairment is the preferred rating method for the lower extremities and that range of motion ratings should only be used when no diagnosis-based ratings are available.[13] Dr. Slutsky also opined that the most appropriate diagnosis-based estimate was for right ankle sprain with moderate motion deficits, under Table 16-2 (foot and ankle-region grid), page 501. A class 1, default grade C equated to five percent permanent impairment of the right ankle. This selection was appropriate because the medical evidence of record specifies that appellant had a right ankle sprain with moderate motion deficits. Dr. Slutsky assessed a grade modifier 1 for functional history as appellant still had symptoms in the foot joint; grade modifier 1 for physical examination as appellant had tenderness to palpation; and no grade modifier for clinical studies as appellant had no diagnostic testing at the time of MMI. Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), he found that (1-1) + (1-1) + (n/a) resulted

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[12] *Id.*

[13] *See* A.M.A., *Guides,* 497, 552.

in a net grade modifier of zero, resulting in no change of the default grade C five percent permanent impairment of the right leg. There is no other current probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than five percent permanent impairment of the right leg.

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 not established that he had greater than five percent permanent impairment of his right lower extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board