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

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| **S.C., Appellant** | ) | |
| **and** | ) | **Docket No. 15-1630** |
| | ) | **Issued: October 23, 2015** |
| **DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Chula Vista, CA, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*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 July 27, 2015 appellant filed a timely appeal from a May 4, 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 that he has more than five percent permanent impairment of his right lower extremity.

### ***FACTUAL HISTORY***

On April 24, 2013 appellant, then a 29-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that he sustained injury on April 21, 2013 when his right foot was caught in a pile of rocks and his right leg twisted as he fell. OWCP accepted sprain of

[1] 5 U.S.C. § 8101 *et seq.*

unspecified sites of the right leg and knee. Appellant received disability compensation on the daily rolls from June 10 to 24, 2013.

The findings of May 2, 2013 magnetic resonance imaging (MRI) scan testing of appellant's right ankle showed a low-to-moderate grade partial tear at the level of the fibula tip with immediate reconstitution distally, partial tear of the peroneus brevis, bone bruise of the posterior talus, and a low-grade acute sprain of the calcaneofibular ligament with associated marrow edema involving the posterior talus.

On December 20, 2013 appellant filed a claim for a schedule award (Form CA-7) due to his accepted work injury.

On February 6, 2014 OWCP advised appellant that he needed to submit an impairment rating derived in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009).

By decision dated February 11, 2015, OWCP denied appellant's schedule award claim because he had not submitted medical evidence entitling him to such an award.

Appellant submitted an October 29, 2013 report in which Dr. Tal S. David, an attending Board-certified orthopedic surgeon, detailed his factual and medical history and reported findings upon physical examination. Dr. David noted that appellant complained of mild right calf weakness with maximal push-off and jumping and also reported loss of right ankle internal rotation. He stated that, upon testing of various ankle motions, appellant had full right ankle range of motion compared to the opposite side, except that his left ankle inversion was to 30 degrees and his right ankle inversion was only to 20 degrees. Dr. David noted that, based on Table 16-2 (Foot and Ankle Regional Grid) on page 501 of the sixth edition of the A.M.A., *Guides*, appellant's moderate motion deficit on right ankle inversion and "mild weakness of both the inversion and posterior tibial tendon" meant that he had 12 percent permanent impairment of his right lower extremity. He indicated that, at the time of the October 29, 2013 examination, appellant had reached maximum medical improvement.

On April 15, 2015 Dr. Leonard A. Simpson, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, discussed his review of the medical evidence of record, including Dr. David's October 29, 2013 report. He stated that, under Table 16-2 (Foot and Ankle Regional Grid) on page 501, appellant had a strain with mild motion deficit which would place him under class 1 (five percent default rating). Dr. Simpson indicated that the records documented some loss of subtalar inversion which would be considered "mild" under Table 16-20 on page 549. He assigned a grade modifier 1 for Functional History (GMFH) and a grade modifier 1 for Clinical Studies (GMCS) (confirmed peroneus brevis partial tear). The grade modifier was nonapplicable for Physical Examination (GMPE) because the documented loss of motion was utilized for placement of appellant's condition under a class 1 diagnosis-based rating. Application of the Net Adjustment Formula resulted in no adjustment from the default value of five percent and therefore appellant had a total right lower extremity permanent impairment of five percent. Dr. Simpson indicated that the date of maximum medical improvement would correspond to Dr. David's October 29, 2013 examination and stated, "This reviewer would recommend five

percent lower extremity impairment and challenge the higher rating calculated at 12 percent, which is not supported by the data documented."

In a May 4, 2015 decision, OWCP vacated its February 11, 2015 decision, noting that appellant's submission of the October 29, 2013 report of Dr. David was sufficient to require this action. It indicated that a schedule award decision was attached. In another decision also dated May 4, 2015, OWCP granted appellant a schedule award for five percent permanent impairment of his right leg. The award ran for 14.4 weeks from October 29, 2013 to February 6, 2014 and was based on Dr. Simpson's impairment rating derived from the findings of Dr. David.

## ***LEGAL PRECEDENT***

The schedule award provision of FECA[2] 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. 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.[4]

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. For evaluation of the claimed impairment in this case, reference is made to Table 16-3 (Foot and Ankle Regional Grid) beginning on page 501.[5] After the class of diagnosis is determined from the Foot and Ankle Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using the GMFH, GMPE, and GMCS. The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[6]

Section 8123(a) of FECA provides in pertinent part: "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] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial

[2] *Id*. at § 8107.

[3] 20 C.F.R. § 10.404.

[4] *W.B.*, Docket No. 14-1982 (issued August 26, 2015). For OWCP decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

[5] *See* A.M.A., *Guides* 509-11 (6th ed. 2009).

[6] *Id* at 515-22.

[7] 5 U.S.C. § 8123(a).

medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[8]

## ***ANALYSIS***

OWCP accepted sprain of unspecified sites of the right leg and knee due to an April 21, 2013 work injury. On May 4, 2015 it granted appellant a schedule award for five percent permanent impairment of his right lower extremity. The award was based on an impairment rating by Dr. Simpson, a Board-certified orthopedic surgeon, who served as the medical adviser. Dr. Simpson's impairment rating was derived from the October 29, 2013 examination findings of Dr. David, an attending Board-certified orthopedic surgeon.

The Board finds that there is a conflict in the medical opinion evidence regarding appellant's right lower extremity impairment between Dr. David, the attending physician, and Dr. Simpson, OWCP medical adviser.[9]

In his October 29, 2013 report, Dr. David concluded that appellant had 12 percent permanent impairment of his right lower extremity. He reported that, upon testing of various ankle motions, appellant had full right ankle range of motion compared to the opposite side, except that his left ankle inversion was to 30 degrees and his right ankle inversion was only to 20 degrees. Dr. David noted that, based on Table 16-2 (Foot and Ankle Regional Grid) on page 501 of the sixth edition of the A.M.A., *Guides*, appellant's moderate motion deficit on right ankle inversion and "mild weakness of both the inversion and posterior tibial tendon" meant that he had 12 percent permanent impairment of his right lower extremity. He effectively placed appellant's right lower extremity strain under a class 1 category with a default value of 10 percent which was raised to 12 percent due to tendon weakness. Dr. David indicated that, at the time of the October 29, 2013 examination, appellant had reached maximum medical improvement.

In contrast, Dr. Simpson determined on April 15, 2015 that appellant had five percent permanent impairment of his right lower extremity. He stated that, under Table 16-2 (Foot and Ankle Regional Grid) on page 501, appellant had a strain with mild motion deficit which would place him under class 1 (five percent default rating), thereby placing him in a different subclass of class 1 than Dr. David's evaluation. Dr. Simpson derived grade modifiers and indicated that application of the Net Adjustment Formula resulted in no adjustment from the default value of five percent. Therefore, appellant had a total right lower extremity permanent impairment of five percent. Dr. Simpson indicated that the date of maximum medical improvement would correspond to Dr. David's October 29, 2013 examination.

In order to resolve the conflict in the medical opinion evidence, the case shall be remanded to OWCP for referral of appellant to an impartial medical specialist for an examination and evaluation of the permanent impairment of his right lower extremity. After carrying out this

[8] *William C. Bush*, 40 ECAB 1064 (1989).

[9] *See supra* notes 7 and 8.

development, OWCP shall issue a *de novo* decision regarding appellant's entitlement to schedule award compensation.

## ***CONCLUSION***

The Board finds that the case is not in posture for decision regarding whether appellant has more than five percent permanent impairment of his right lower extremity. The case is remanded to OWCP for further development.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 4, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: October 23, 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