United States Department of Labor
Employees' Compensation Appeals Board

F.S., Appellant	)	
and	)	**Docket No. 15-1536**
	)	**Issued: April 19, 2016**
OFFICE OF PERSONNEL MANAGEMENT, FEDERAL INVESTIGATIVE SERVICES, Los Angeles, CA, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 7, 2015 appellant, through counsel, filed a timely appeal from a March 24, 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 to review the merits of this case.

ISSUE

The issue is whether appellant has more than two percent permanent impairment of her left lower extremity.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 12, 2011 appellant, a 50-year-old special agent, sustained a traumatic injury in the performance of duty when she twisted her ankle on uneven pavement and fell to the ground. OWCP accepted her claim for left ankle sprain and authorized surgery.

Appellant underwent surgery to repair a torn peroneal brevis tendon and a torn peroneal retinaculum. On October 21, 2013 OWCP issued appellant a schedule award for one percent permanent impairment of her left lower extremity.

Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, evaluated appellant on January 14, 2014. He noted that she walked with a slight limp. Dr. Tauber also noted a healed scar over the lateral aspect of appellant's left ankle with tenderness. He noted pain with motion. Appellant had 1.25 inches of atrophy at the left calf compared to the right. X-rays were negative. Dr. Tauber opined that appellant had five percent permanent impairment of her left lower extremity due to weakness, according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* 501 (6th ed. 2009) (Table 16-2, Foot and Ankle Regional Grid). He stated, "Please note that the patient does not have a motion deficit but does have weakness. This patient has atrophy of the calf."

An OWCP medical adviser reviewed Dr. Tauber's report and noted that, although appellant had atrophy, Dr. Tauber had not documented muscle weakness or any instability. In the absence of motion deficit or discrete muscle weakness, he explained that appellant would not be entitled to a rating of five percent under Table 16-2, page 501 of the A.M.A., *Guides*. The medical adviser found that appellant was entitled to an additional one percent rating due to her antalgic gait, which was not present when she received her first schedule award. He therefore concluded that appellant had a two percent permanent impairment of her left lower extremity.

On June 10, 2014 OWCP issued a schedule award for a two percent impairment of appellant's left lower extremity, representing an additional one percent above the schedule award previously paid.

By decision dated March 24, 2015, an OWCP hearing representative affirmed the additional schedule award. She noted that Dr. Tauber had not reported any muscle strength testing, and added that objective findings are given greater weight than subjective findings. The hearing representative found that the opinion of OWCP's medical adviser constituted the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provision of FECA[2] and the implementing regulations[3] set forth the number of weeks of compensation payable for permanent impairment from loss or loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

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. OWCP has adopted the A.M.A., *Guides* 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]

ANALYSIS

Diagnosis-based impairment is the primary method of evaluating the lower extremity. Impairment is determined first by identifying the relevant diagnosis, then by selecting the class of impairment: no objective problem, mild problem, moderate problem, severe problem, or very severe problem approaching total function loss. This will identify the default impairment rating, which can then be adjusted slightly up or down using functional history, physical examination, and clinical studies grade modifiers.[7]

OWCP accepted appellant's claim for left ankle sprain and authorized surgery to repair a torn peroneal brevis tendon and a torn peroneal retinaculum. The A.M.A., *Guides* explains that in most cases only one diagnosis in a region will be appropriate. If a patient has two significant diagnoses, the examiner should use the diagnosis with the highest impairment rating in that region that is causally related for the impairment calculation.[8]

Appellant's torn peroneal retinaculum would be rated as a ligament injury under Table 16-2, page 502 of the A.M.A., *Guides*.[9] But such a rating requires at least some degree of clinical instability or ligamentous laxity, and Dr. Tauber, the evaluating orthopedic surgeon, reported neither. As there is no basis for rating impairment for the torn peroneal retinaculum, appellant's impairment should be rated for the accepted left ankle sprain, or more specifically, her torn peroneal brevis tendon.

Muscle and tendon injuries are rated under Table 16-2, page 501 of the A.M.A., *Guides*.[10] The Foot and Ankle Regional Grid has a special entry for history of ruptured tendon specifically involving the peroneal tendon. As Dr. Tauber did not report flexible or fixed deformity and loss

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

[5] 20 C.F.R. § 10.404; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

[7] A.M.A., *Guides* 497.

[8] *Id*.

[9] *Id.* at 502.

[10] *Id.* at 501.

of specific tendon function, appellant's impairment falls under the class 1 or mild problem category. He confirmed this with his impairment rating of five percent.

There are three levels of class 1 impairments, and appellant's placement depends on whether she merely had palpatory or radiographic findings (default impairment value of one percent), mild motion deficits, (default impairment value of five percent) or moderate motion deficits and/or significant weakness (default impairment value of 10 percent).[11] Dr. Tauber noted a healed scar over the lateral aspect of her left ankle with tenderness, which is a palpatory finding. He made clear that appellant had no motion deficits, but he added that she did have weakness.

As OWCP noted, Dr. Tauber did not document appellant's weakness. He gave no indication whether or how he evaluated it. Furthermore, for purposes of placing appellant's impairment in the regional grid, Dr. Tauber did not explicitly find that the weakness was significant. OWCP therefore correctly discounted the finding and placed appellant in the class 1 category of palpatory findings, with a default impairment value of one percent.

Dr. Tauber noted that appellant walked with a slight limp. As this was absent from her earlier schedule award evaluation, OWCP's medical adviser adjusted the default impairment value to two percent based on functional history. This is not supported under Table 16-6, page 516.[12] A slight limp, by itself, is regarded as a mild gait derangement, something that does not warrant an increase in the default impairment value. To justify an increase, there must be evidence of a moderate gait derangement, such as the routine use of a cane or crutch for ambulatory stability. Dr. Tauber made no mention of a cane or crutch, nor did he otherwise explain how appellant's gait derangement satisfied the criteria of a class 2 moderate problem.

Under the circumstances, OWCP's medical adviser erred in adjusting the default impairment value to two percent based on functional history. Nonetheless, it is clear that appellant does not have more than two percent permanent impairment of her left lower extremity, which is what OWCP awarded. On that basis, the Board will affirm OWCP's March 24, 2015 decision.

CONCLUSION

The Board finds that appellant has no more than two percent permanent impairment of her left lower extremity.

[11] *Id.*

[12] *Id.* at 516.

ORDER

IT IS HEREBY ORDERED THAT the March 24, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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