United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 16-0156**
	)	**Issued: August 16, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Moberly, AL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 3, 2015 appellant filed a timely appeal of a September 8, 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)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has more than one percent impairment of his right lower extremity for which he received a schedule award.

On appeal appellant alleged that Dr. Kevin Komes, a Board-certified physiatrist, properly evaluated his left ankle for schedule award purposes.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 16, 2014 appellant, then a 57-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 14, 2014 he stepped off a porch, missing the stair and landing on his right foot while delivering mail. He noted that he had previously broken his right ankle on June 26, 2012. Appellant was off work starting January 15, 2014.

Dr. Thomas R. Turnbaugh, a Board-certified orthopedic surgeon, examined appellant on January 16, 2014 and described his history of injury. He noted that appellant had a previous right ankle injury. Dr. Turnbaugh reported that appellant's foot was swollen, painful, and ecchymotic. He diagnosed probable partial rupture of the right anterior talofibular ligament and injury to the midfoot. Appellant underwent a magnetic resonance imaging (MRI) scan of his right ankle on January 27, 2014 which demonstrated tenosynovitis and a bone bruise with mild effusion along the posterior talotibial and subtalar articulations. On January 30, 2014 Dr. Turnbaugh diagnosed bony injury to the right hindfoot and talus.

On March 12, 2014 OWCP accepted appellant's claim for contusion of the right foot and ankle. Appellant returned to light duty on March 20, 2014. Dr. Turnbaugh reported continuing pain and weakness of the peroneal tendons on the lateral side of appellant's right hindfoot on June 5, 2014.

Appellant filed a claim for compensation (Form CA-7) on September 12, 2014 requesting a schedule award. In a report dated September 4, 2014, Dr. Turnbaugh diagnosed evolving subtalar arthritis of the right hindfoot due to the January 2014 employment injury. He found that appellant had pain with varus and valgus stress to his heel and the tip of his fibula. Dr. Turnbaugh opined that appellant had 10 percent disability of his hindfoot as a result of his employment injury.

In a letter dated September 24, 2014, OWCP requested additional medical evidence in support of appellant's claim for a schedule award. Dr. Turnbaugh completed an additional note on September 12, 2014 and again opined that appellant had post-traumatic arthritis of the subtalar joint of the right foot due to his accepted employment injury. He indicated that appellant's "disability" was 10 percent due to this condition.

Appellant filed a second Form CA-7 requesting a schedule award on October 18, 2014.

OWCP accepted unspecified arthropathy of the right foot and ankle as resulting from his employment injury on January 14, 2014. OWCP's medical adviser reviewed Dr. Turnbaugh's notes on December 12, 2014 and found that they were insufficient to meet appellant's burden of proof. He requested a second opinion evaluation to determine appellant's permanent impairment for schedule award purposes.

OWCP referred appellant for a second opinion evaluation with Dr. Komes on January 2, 2015. In a report dated January 28, 2015, Dr. Komes described appellant's history of injury and noted an ankle MRI scan had been scheduled. He found no swelling in appellant's right ankle, with no fluid in the subtalar space. Appellant demonstrated normal strength, but pain at the ankle with resisted eversion on the right. His range of motion was 20 degrees of flexion

and 40 degrees of extension, 20 degrees of varus hindfoot movement and 30 degrees of valgus hindfoot movement. Dr. Komes found no sensory deficits and intact reflexes. He diagnosed arthritis of the ankle and utilized Table 16-2 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] to find a class 1 impairment due to mild osteophytes with impingement. Dr. Komes noted that the clinical studies grade modifier was not applicable as these were used to make the diagnosis. He reported that the physical examination grade modifier was normal or zero, appellant's functional history grade modifier was zero as he had discomfort, but was able to ambulate up to eight miles without difficulty and there was no evidence of antalgia on examination. Dr. Komes determined that appellant had grade A lower extremity impairment of one percent of the lower extremity. He determined that appellant reached maximum medical improvement on April 18, 2014.

OWCP's medical adviser reviewed the report of Dr. Komes on February 4, 2015 and agreed with his findings and conclusions.

By decision dated March 12, 2015, OWCP granted appellant a schedule award for one percent of his right leg. Appellant requested a review of the written record from OWCP's Branch of Hearings and Review on March 17, 2014. He argued that his condition would likely worsen in the future based on Dr. Turnbaugh's reports requiring ankle fusion. Appellant further objected to Dr. Komes' characterization of his ankle condition. He stated that he walked only six miles a day when he returned to work rather than eight, and was in constant pain. Appellant attributed his retirement to the pain and weakness in his ankle.

By decision dated September 8, 2015, OWCP's hearing representative found that Dr. Komes' report was entitled to the weight of the medical evidence, that OWCP's medical adviser agreed with this impairment rating and that appellant had no more than one percent impairment of his left lower extremity for which he received a schedule award. She noted that if appellant's ankle condition worsened he could file for an additional schedule award and affirmed OWCP's March 12, 2015 decision.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of

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

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[5]

The protocol and formula of the sixth edition of the A.M.A., *Guides* requires that the physician determine the Class of Diagnosis (CDX) for the lower extremity and apply the appropriate grade modifiers for Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS) and apply the following formula (GMFH-CDX) + (GMPE-CDX) + (GMCS–CDX) to reach the appropriate grade within the CDX.[6]

ANALYSIS

The Board finds this case not in posture for a decision.

OWCP accepted appellant's claim for contusion of the right foot and ankle as well as unspecified arthropathy of the right foot and ankle. Appellant requested a schedule award. In support of his schedule award claim, he submitted reports from Dr. Turnbaugh. The Board finds that these reports are insufficient to support appellant's claim for an additional schedule award as Dr. Turnbaugh did not provide his findings and conclusions in accordance with the standards of the A.M.A., *Guides*. As Dr. Turnbaugh did not use the A.M.A., *Guides* to rate appellant's right lower extremity impairment, his opinion is of diminished probative value.[7]

OWCP referred appellant for a second opinion evaluation with Dr. Komes due to the deficiencies in Dr. Turnbaugh's report. Dr. Komes applied the A.M.A., *Guides* formula to his findings and utilized a diagnosis-based estimate based on arthritis to determine appellant's permanent impairment. The Board notes that this diagnosis of ankle arthritis is dependent on x-ray studies demonstrating a cartilage interval of more than three millimeters as well as mild osteophytes with impingement.[8] The only clinical study in the record is the January 27, 2014 MRI scan which demonstrated tenosynovitis and a bone bruise with mild effusion along the posterior talotibial and subtalar articulations. Neither Dr. Komes nor the medical adviser explained how the diagnosis of subtalar or ankle arthritis under the A.M.A., *Guides* was selected. The Board further finds the reports not sufficiently well rationalized to support the diagnosis upon which impairment has been based. On remand OWCP should further develop the medical evidence by obtaining clarification of what clinical studies constitute the basis of the diagnosis-based estimate.[9] After this and such other development, OWCP should issue a *de novo* schedule award decision.

[5] For new decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[6] A.M.A., *Guides* 521.

[7] *L.C.*, Docket No. 15-0512 (issued July 13, 2015).

[8] A.M.A., *Guides* 506, Table 16-2.

[9] *R.B.*, Docket No. 13-2072 (issued September 19, 2014).

CONCLUSION

The Board finds that this case is not in posture for a decision regarding appellant's lower extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: August 16, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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