United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 16-0951**
	)	**Issued: December 19, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Bryan, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 4, 2016 appellant, through counsel, filed a timely appeal from a February 26, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 established more than six percent permanent impairment of her right lower extremity, for which she received a schedule award.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 21, 2012 appellant, then a 44-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day she injured her right ankle when she fell while descending porch steps. She stopped work that same day. OWCP accepted the claim for closed bimalleolar fracture of the right ankle and closed dislocation of the right ankle. It paid appropriate benefits, which included a September 22, 2012 open reduction and internal fixation surgery on the right ankle and an October 11, 2013 hardware removal surgery, which were performed by Dr. Matthew Grothaus, a Board-certified orthopedic surgeon. Appellant returned to full-time limited duty on January 25, 2013 and full-time unrestricted work duties on February 19, 2014. She received wage-loss benefits on the supplemental rolls from November 1, 2012 through February 18, 2013. Following the October 11, 2013 surgical removal of hardware, appellant returned to full-time unrestricted work duties. She received wage-loss benefits on the supplemental rolls again for intermittent periods from October 11, 2013 through March 20, 2015.

On October 9, 2014 appellant filed a claim for a schedule award (Form CA-7). In a September 16, 2014 report, Dr. Grothaus indicated that appellant had reached maximum medical improvement (MMI) from her work-related conditions.

In an October 24, 2014 letter, OWCP requested that appellant provide a medical report from her treating physician which addressed whether MMI had been reached and which provided an impairment rating according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[3] (hereinafter A.M.A., *Guides*). Appellant was afforded 30 days to provide such evidence.

In a January 2, 2015 report, Dr. Catherine Watkins Campbell, a family practitioner, indicated that appellant was evaluated on November 20, 2014. She noted the history of injury and appellant's medical course. Dr. Campbell reviewed the diagnostic evidence on file, which included September 21, 2012 and February 11, 2014 x-rays, and office notes from Dr. Grothaus. She provided physical examination findings and noted that appellant ambulated with a mildly antalgic gait, wore a hinged AFO brace, and did not utilize a cane. Dr. Campbell noted active range of motion of the right ankle. She also noted mild diffuse swelling of the right ankle, with mild lateral and medial joint laxity on the right, as well as a positive Tinel's sign over the right medial right ankle, normal strength, and tenderness over the anterior tibialis tendon anterior to the medial surgical scar and the medial malleolus were further noted.

Based on the sixth edition of the A.M.A., *Guides*, Dr. Campbell opined that appellant had 13 percent right lower extremity impairment. Under Table 16-2, she found appellant had class 1 mild malalignment for the conditions of bimalleolar fracture and dislocation of the ankle, which had a default value of 10 percent impairment. Based on the use of an orthotic device to stabilize an antalgic gait, Dr. Campbell assigned a functional modifier of grade 2. A physical examination modifier of grade 2 was assigned based on documented two-centimeter calf atrophy on the right side. No applicable clinical studies were found. The net adjustment formula (GMFH - CDX) (2-1) + (GMPE - CDX) (2-1) + (GMCS - CDX) (N/A), yielded a net adjustment of 2, which

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

resulted in grade E impairment of 13 percent permanent impairment of the right lower extremity. Dr. Campbell concurred with Dr. Grothaus that appellant had reached MMI as of September 16, 2014.

In a February 18, 2015 report, OWCP's medical adviser reviewed the medical record and determined that the date of MMI was November 20, 2014, the date of Dr. Campbell's impairment examination. He indicated that the February 11, 2014 x-ray interpreted by Dr. Grothaus demonstrated early arthritic changes most prominent to the medial gutter with preserved joint spaces. There was no mention of malalignment and range of motion was within normal limits. The medical adviser found the most impairing diagnosis in the right ankle region was bimalleolar fracture with normal range of motion and alignment and indicated that this diagnosis would be used for final impairment calculations.

OWCP's medical adviser explained that Dr. Campbell, in choosing the mild motion deficits and/or mild malalignment impairment class to rate appellant's impairment for the impairing diagnosis, did not document appellant as having an antalgic gait which required the use of a single gait aid/external orthotic device for stabilization. He further explained that the A.M.A., *Guides* indicate that the diagnosis-based impairment method is the preferred rating method for the lower extremities and that the range of motion method would be used as a physical adjustment factor. The medical adviser reported that appellant's range of motion equaled zero percent impairment when using Dr. Campbell's findings. He found class 1 or five percent default impairment value for bimalleolar fracture with normal range of motion and alignment. Based on Dr. Campbell's findings, the medical adviser found that appellant had grade 1 functional history grade modifier and grade 2 physical examination grade modifier with clinical studies grade modifier inapplicable. Under the net adjustment formula, he calculated a net adjustment of 1 or (GMFH - CDX) (1-1) + (GMPE - CDX) (2-1) + (GMCS - CDX) (N/A). This resulted in a class 1 or D grade permanent impairment of six percent.

By decision dated May 13, 2015, OWCP issued a schedule award for six percent permanent impairment of the right lower extremity. The award ran for 17.28 weeks for the period November 20, 2014 through March 20, 2015.

On May 19, 2015 OWCP received counsel's May 18, 2015 request for a telephonic hearing before an OWCP hearing representative. On January 11, 2016 a telephonic hearing was held before an OWCP hearing representative. At the hearing, counsel disagreed with the medical adviser's finding that appellant had normal alignment and argued that it was not based on a personal examination of appellant or documentation. He also argued that the medial adviser's opinion was not rationalized.

In a November 19, 2015 report, Dr. Grothaus provided an impression of right ankle post-traumatic osteoarthritis and right ankle peroneal tendon tear and discussed the medical treatment provided to appellant.

In a December 16, 2015 report, Dr. Maggi Smith, a podiatrist, provided examination findings and noted that appellant ambulated without antalgic gait. An assessment of peroneal tendinitis, right leg; nondisplaced dome fracture of right talus, strain of muscle and tendon of long flexor muscle of toe at ankle and foot level, right foot; and osteochondritis dissecans, right

ankle and joints of right foot was provided. Dr. Smith opined that the osteochondral defect in the talar dome and the tendon tear with ligament injury were directly proximate to the work injury and an ankle arthroscopy was required.

By decision dated February 26, 2016, an OWCP hearing representative affirmed OWCP's May 13, 2015 schedule award decision. She explained that, while counsel alleged that the district medical adviser (DMA) could not determine that appellant had normal gait because he did not examine appellant, OWCP policy allowed the DMA to base his opinion on the report of an examining physician. The DMA related that his rating was based on Dr. Campbell's report, which did not explain that appellant actually had antalgic gait which required a stabilization device. The DMA had also properly reviewed x-rays dated September 21, 2012 and February 11, 2014 which showed satisfactory alignment and no malalignment. Therefore the hearing representative concluded that the DMA's application of the grade modifier was not based on actual documentation of appellant's physical findings of record. The hearing representative concluded that appellant had not met her burden of proof to establish an additional schedule award impairment greater than her previous award.

LEGAL PRECEDENT

The schedule award provisions of FECA[4] provide for compensation to employees sustaining impairment from loss or loss of use of specified members 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 sound 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[5] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[6]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[7] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[8] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

[4] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[5] *See Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[6] *See J.Y.*, Docket No. 14-1807 (issued March 9, 2015); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[7] A.M.A., *Guide*s 3, (6th ed. 2009), section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[8] A.M.A., *Guides* 494-531, (6th ed. 2009).

Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[9]

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 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.

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 of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[10]

ANALYSIS

The Board finds that this case is not in posture for a decision regarding whether appellant has established more than six percent permanent impairment of her right lower extremity, for which she previously received a schedule award.

OWCP accepted that appellant sustained closed bimalleolar fracture and closed dislocation of the right ankle. It granted appellant a schedule award for six percent permanent impairment of her right lower extremity. The award was based on the February 18, 2015 report of the DMA. It is appellant's burden to submit sufficient evidence to establish the extent of her permanent impairment.[11]

In support of her claim, appellant submitted the January 2, 2015 report of Dr. Campbell, who opined that she had 13 percent permanent impairment of the right lower extremity. Dr. Campbell placed appellant in class 1 based on the diagnosis of mild malalignment[12] for the conditions of bimalleolar fracture and dislocation of the ankle, which had a default value of 10 percent permanent impairment according to Table 16-2, page 503, of the A.M.A, *Guides*. She assigned a functional modifier of grade 2 based on use of an orthotic device to stabilize an antalgic gait. Dr. Campbell assigned a physical examination modifier of grade 2 based on two-centimeter calf atrophy on the right side. Finally, she found that no modifier was applicable based on clinical studies.

OWCP's medical adviser reviewed Dr. Campbell's medical report and concurred that the impairing diagnosis was bimalleolar fracture, but found that it was within normal range of

[9] *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

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

[11] *See T.T.*, Docket No. 15-0944 (issued March 22, 2015); *see also Annette M. Dent*, 44 ECAB 403 (1993).

[12] The description for class 1 diagnosis of ankle (malleolar, bimalleolar, trimalleolar) notes mild motion deficits and/or mild malalignment.

motion and alignment. Based on Dr. Campbell's physical findings, the medical adviser assigned grade 1 functional history grade modifier, a grade 2 physical examination grade modifier, and found the clinical studies grade modifier inapplicable.

The difference between the two opinions, as to the extent of permanent impairment, is limited to the description of class 1 impairment for ankle bimalleolar as nondisplaced with minimal findings as found by the medical adviser or mild motion deficits and/or mild malalignment as found by Dr. Campbell, and the respective functional history grade modifier.

Under Table 16-2, page 503 a class 1 diagnosis for bimalleolar diagnosis is divided into either an impairment which is nondisplaced with minimal findings or an impairment with mild motion deficits and/or mild malalignment. OWCP's medical adviser placed appellant into the former category, while Dr. Campbell placed appellant into the latter category. The Board notes that Dr. Campbell based her opinion on a mild malalignment description of appellant's ankle upon her examination of appellant. The medical adviser reviewed the medical records and found that appellant's range of motion equaled zero percent impairment when using Dr. Campbell's findings. Dr. Campbell, in choosing the mild motion deficits and/or mild malalignment impairment class to rate appellant's impairment for the impairing diagnosis, noted that appellant was wearing a brace to stabilize her ankle, but she did not specifically note that appellant had an observed antalgic gait or that she required the use of a single gait aid/external orthotic device for stabilization. OWCP's medical adviser noted that the February 11, 2014 x-rays interpreted by Dr. Grothaus demonstrated some early arthritic changes prominent to the medial gutter, but there was no observation of malalignment in the report.

The Board finds that Dr. Campbell's report contains a history of injury, consistent medical diagnosis, consistent and detailed physical findings, and an opinion that appellant had demonstrable loss of function upon physical evaluation. Her report differs from the DMA only as to the modifier of minimal versus mild for functional history. The difference of opinion between Dr. Campbell and the DMA is created by the DMA's interpretation of the medical reports authored by Dr. Campbell and Dr. Grothaus. The Board notes that he relies upon his interpretation of appellant's physical findings based on what the examining physicians' failed to denote in their medical reports, but Dr. Campbell has provided sufficient findings and rationale so as to require further development by OWCP.[13] For this reason the Board finds that the case is not in posture for decision. On remand OWCP shall refer appellant, together with the case record and a statement of accepted facts, to an appropriate specialist for a second opinion examination to determine the extent of permanent impairment of her right lower extremity based upon a new physical examination.

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[14]

[13] *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

[14] *John J. Carlone*, 41 ECAB 354 (2006).

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether appellant has more than six percent permanent impairment of her right lower extremity, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: December 19, 2016
Washington, DC

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

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

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