United States Department of Labor
Employees' Compensation Appeals Board

G.M., Appellant	)	
and	)	**Docket No. 16-0705**
	)	**Issued: September 9, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant[1]
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 February 26, 2016 appellant, through counsel, filed a timely appeal from a September 16, 2015 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.[3]

---

[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.*

[3] The Board notes that appellant submitted additional evidence following the September 16, 2015 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt,* 57 ECAB 126 (2005).

ISSUE

The issue is whether appellant has established that he sustained more than 13 percent permanent impairment of the right lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On December 29, 2010 appellant, then a 49-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on December 27, 2010 he strained his right ankle at work. He stopped work on January 4, 2011 and returned on January 5, 2011. OWCP accepted appellant's claim for right ankle sprain and localized primary osteoarthritis of the right ankle and foot.

Appellant stopped work on February 25, 2011 and filed claims for disability compensation (Forms CA-7). OWCP paid disability compensation through April 26, 2011 when he was authorized to return to modified duty. Appellant worked part of his shift and filed a recurrence claim (Form CA-2a) on May 10, 2011 alleging that on April 28, 2011 he sustained a recurrence of the December 27, 2010 employment injury. OWCP accepted his recurrence claim and paid disability compensation.

On June 16, 2011 appellant underwent authorized surgery for right ankle arthrodesis and calcaneal bone graft joint fusion by Dr. Steven M. Raikin, a Board-certified orthopedic surgeon.

Dr. Raikin continued to provide postoperative treatment for appellant. In a July 29, 2011 report, he related that appellant had been nonweightbearing in his short leg cast approximately six weeks from his surgery. Upon examination, Dr. Raikin observed clean, dry, and intact incisions and minimally soft tissue swelling. He reported that x-rays of the ankle taken and reviewed that day demonstrated correct alignment and progressive healing of the ankle fusion. In a September 12, 2011 note, Dr. Raikin observed no range of motion at the tibiotalar joint and range of motion approximately 5 degrees dorsiflexion to 10 degrees plantar flexion of the mid-foot. He recommended that appellant discontinue use of the boot.

In a January 20, 2012 report, Dr. Raikin conducted a follow-up examination with appellant. He related that appellant continued to have complaints of numbness and pain along the plantar aspect of his foot, which worsened with ambulation. Dr. Raikin reported that appellant's ankle fusion was completely solid. He reviewed appellant's functional capacity evaluation and opined that appellant was capable of doing medium level work. Dr. Raikin related that electromyography (EMG) testing revealed chronic L5 and S1 radiculopathy with superimposed tarsal tunnel and peroneal neuropathy. He indicated that appellant had reached maximum medical improvement from the surgery itself.

On September 28, 2012 OWCP placed appellant on the periodic rolls.

On August 6, 2014 appellant returned to full-time limited duty after undergoing vocational rehabilitation.[4]

On November 20, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a January 5, 2015 note, Dr. David Weiss, an osteopath who specializes in pain medicine, indicated that appellant had been under his care since December 30, 2014.

In a decision dated March 2, 2015, OWCP denied appellant's schedule award claim on the basis of insufficient medical evidence to establish that he sustained any permanent impairment to the right lower extremity causally related to the December 27, 2010 employment injury.

On March 5, 2015 OWCP received appellant's request, through counsel, for reconsideration of the March 2, 2015 decision.

Appellant submitted a December 30, 2014 impairment rating report by Dr. Nicholas Diamond, an osteopath who specializes in physical medicine and rehabilitation. Dr. Diamond related that on December 27, 2010 appellant sustained a work-related injury to his right ankle when he slipped while walking on ice at work. He reviewed the medical treatment appellant received, including various diagnostic reports. Dr. Diamond noted that appellant complained of right foot and ankle pain, which stiffened daily and described appellant's limitations with activities of daily living. He explained that the lower extremity activity scale (LEAS) revealed an impairment level of 10/18, which equaled to a disability of 45 percent involving the right lower extremity. Upon examination, Dr. Diamond observed medial malleolar tenderness, lateral malleolar tenderness, anterior talofibular ligament tenderness, subtalar joint tenderness, and posterior tibial tenderness. He provided range of motion of the ankle findings of dorsiflexion of 10/15 degrees, plantar flexion 30/55 degrees, inversion of 10/35 degrees with pain, and eversion of 0/35 degrees with pain. Dr. Diamond indicated that range of motion testing was performed three times. Sensory examination did not reveal any definitive sensory loss involving the right or left lower extremities. Deep tendon reflexes were +2 bilaterally. Dr. Diamond diagnosed post-traumatic right ankle strain and sprain, post-traumatic right ankle arthritis, post-traumatic tarsal tunnel syndrome and peroneal neuropathy per EMG and nerve conduction velocity, and status post right ankle fusion arthrodesis, right calcaneal bone graft.

Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Diamond referenced Table 16-2, page 507, and opined that appellant was a class 4 for right ankle arthrodesis in the neutral position, which was a default 60 percent impairment. He noted that appellant had grade modifiers of 3 for functional

[4] On September 30, 2014 OWCP issued a preliminary determination of an overpayment in the amount of $1,936.34 for the period August 7 to 23, 2014, because appellant returned to work, but continued to receive compensation for total disability. It found that he was at fault in the creation of the overpayment. On October 17, 2014 OWCP received appellant's request, through counsel, for a prerecoupment hearing, which was held on May 14, 2015. In a decision dated July 22, 2015, an OWCP hearing representative affirmed the fact and amount of the overpayment and the finding of fault. As appellant did not file an appeal to the Board within 180 days of the July 22, 2015 overpayment decision, the overpayment decision is not before the Board. *See supra* note 2 and 20 C.F.R. §§ 501.2(c) and 501.3.

history, due to a LEAS score of 45 percent. Dr. Diamond reported grade modifiers of 4 for physical examination and 4 for clinical studies. He applied the net adjustment formula for a total of -1, which resulted in 56 percent permanent impairment of the right lower extremity. Dr. Diamond opined that appellant reached maximum medical improvement on December 30, 2014.

In a May 18, 2015 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed Dr. Diamond's December 30, 2014 report and noted that Dr. Diamond should have not considered appellant's June 16, 2011 surgery in his impairment rating. He explained that a January 12, 2011 magnetic resonance imaging scan of the right ankle revealed advanced osteoarthritic changes and tear of the peroneous brevis tendon, which would have required surgery regardless of the December 27, 2010 employment injury. Accordingly, Dr. Berman did not agree with Dr. Diamond's impairment rating of 56 percent. Utilizing Table 16-2, page 501, of the A.M.A., *Guides*, Dr. Berman determined that appellant was a class 1 for strain tendinitis or history ruptured tendon, specifically the peroneal tendon injury alone without arthrodesis, and moderate motion deficit and/or significant weakness, which was a default value of 10 percent impairment. Applying Dr. Diamond's examination findings, Dr. Berman opined that appellant had grade modifiers of 3 for functional history, 4 for physical examination, and 4 for clinical studies. He applied the net adjustment formula for a total of +2, which equaled 13 percent impairment. Dr. Berman concluded that appellant had 13 percent permanent impairment of the right lower extremity with the date of maximum medical improvement of December 30, 2014.

In a decision dated June 3, 2015, OWCP vacated the March 2, 2015 denial decision and granted appellant a schedule award for 13 percent permanent impairment for his right lower extremity based on Dr. Berman's May 18, 2015 medical report. The award ran for 37.44 weeks from December 30, 2014 to May 30, 2015.

On June 30, 2015 OWCP received appellant's request, through counsel, for reconsideration. Counsel contended that Dr. Berman should have included appellant's right ankle arthrodesis with calcaneal bone graft surgery in his impairment rating calculations since appellant's surgery was authorized by OWCP. He also noted that even if appellant's right ankle condition was preexisting, schedule award calculations should include preexisting impairments.

On August 31, 2015 OWCP referred appellant's schedule award claim back to Dr. Berman for an impairment rating. It instructed Dr. Berman to review the attached statement of accepted facts (SOAF) and to include the authorized June 16, 2015 surgery as part of his impairment rating.

In a September 7, 2015 supplemental report, Dr. Berman reviewed the medical records and SOAF and noted that appellant underwent approved surgery of fusion of the right ankle joint for localized primary osteoarthritis. He noted that Dr. Raikin placed appellant on maximum medical improvement from the surgery on January 20, 2012. Applying Table 16-2, page 508, Dr. Berman opined that appellant was a class 1 for ankle fusion in the neutral position, which was a default value of 10 percent. He indicated grade modifiers of 2 for functional history due to a limp, 3 for physical examination based on severe reduction of range of motion, and 3 for clinical studies. After applying the net adjustment formula, which resulted in +2, Dr. Berman

concluded that appellant had 13 percent permanent impairment of the right lower extremity. He explained that he disagreed with Dr. Diamond's impairment rating because 56 percent impairment would represent severe malalignment, plantar flexion 29 degrees, varus position 29 degrees, valgus position at 29 degrees, internal rotation at 30 degrees, and external rotation at 39 degrees. Dr. Berman noted that according to Dr. Raikin's January 20, 2012 postoperative examination there was no malalignment to warrant an impairment rating greater than 13 percent.

By decision dated September 16, 2015, OWCP affirmed the June 3, 2015 schedule award decision, based on Dr. Berman's May 18 and September 7, 2015 reports.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of his claim, including that he sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[5] Where a claimant has previously received a schedule award and subsequently claims an additional schedule award due to a worsening of his condition, the claimant bears the burden of proof to establish a greater impairment causally related to the employment injury.[6]

The schedule award provision of FECA[7] and its implementing regulations 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. FECA, however, does not specify the manner in which the percentage of 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 the appropriate standards for evaluating schedule losses.[8]

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.[9] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition is Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS). The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS -

---

[5] *See A.M.,* Docket No. 13-0964 (issued November 25, 2013).

[6] *Edward W. Spohr,* 54 ECAB 806 (2003).

[7] *Supra* note 2.

[8] 20 C.F.R. § 10.404 (1999); *see also Jacqueline S. Harris,* 54 ECAB 139 (2002).

[9] A.M.A., *Guides* (6th ed. 2009), p. 3, section 1.3.

CDX).[10] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

In determining impairment for the lower extremities, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the ankle, the relevant portion of the leg (foot) for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.[12] 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 grade modifier for functional history, grade modifier for physical examination, and grade modifier for clinical studies.[13]

ANALYSIS

OWCP accepted appellant's claim for right ankle sprain and localized primary osteoarthritis of the right ankle and foot. It authorized surgery for right ankle arthrodesis and calcaneal bone graft joint fusion on June 16, 2011. Appellant filed a claim for a schedule award on November 20, 2014. OWCP granted him a schedule award of 13 percent permanent impairment for his right lower extremity based on the report of Dr. Berman, OWCP's medical adviser. The Board has evaluated the evidence and finds that appellant has not established permanent impairment greater than 13 percent, for which he previously received a schedule award.

In support of his claim, appellant provided a December 30, 2014 impairment rating by Dr. Diamond. Dr. Diamond reviewed appellant's history and the medical treatment he received. He provided examination findings and diagnosed post-traumatic right ankle strain and arthritis, post-traumatic tarsal tunnel syndrome and peroneal neuropathy, and status-post right ankle (fusion) arthrodesis. Dr. Diamond noted that appellant had reached maximum medical improvement on that date. He referenced Table 16-2, page 507, of the A.M.A., *Guides* and classified appellant's impairment as a class 4, default value of 60 percent impairment, for right ankle arthrodesis in neutral position. Dr. Diamond assigned a grade modifier of 3 for functional history, 4 for physical examination, and 4 for clinical studies. Applying the net adjustment formula, he calculated an adjustment of -1, which resulted in an impairment rating of 56 percent for the right lower extremity.

Dr. Berman, an OWCP medical adviser, reviewed Dr. Diamond's impairment rating and disagreed with his assessment. He noted that under Table 16-2, a schedule award of 56 percent for ankle fusion would represent severe malalignment, which appellant did not demonstrate. The Board also notes that Dr. Diamond assigned class 4 diagnosis impairment due to arthrodesis in a neutral position. However, according to Table 16-2, a class 4 class of diagnosis for neutral position is assigned for pan-talar arthrodesis, not ankle arthrodesis. As there is no information in

---

[10] *Id.* at 494-531.

[11] *Id.* at 23-28; *see also R.V.,* Docket No. 10-1827 (issued April 1, 2011).

[12] *Id.* at 501-07.

[13] *Id.* at 515-22.

the record to support that appellant underwent pan-talar arthrodesis, the Board finds that Dr. Diamond's impairment rating fails to establish that appellant sustained permanent impairment greater than 13 percent for the right lower extremity.[14]

OWCP referred appellant to Dr. Berman, an OWCP medical adviser. In a September 7, 2015 supplemental report, Dr. Berman reviewed the medical record and opined that appellant had 13 percent impairment of his right lower extremity. He utilized Table 16-2, page 508, and assigned class 1 impairment for ankle arthrodesis (neutral position), which was a default value of 10 percent. Dr. Berman reported a grade modifier of 2 for functional history due to a limp. He also assigned grade modifiers of 3 for physical examination due to severe reduction in range of motion and 3 for clinical studies. After applying these grade modifiers to the net adjustment formula, he concluded that appellant had 13 percent right lower extremity permanent impairment.

The Board finds that the weight of the medical evidence rests with the opinion of Dr. Berman, OWCP's medical adviser, as he provided the only impairment rating that properly applied the sixth edition of the A.M.A., *Guides.* The Board notes that Dr. Berman properly reviewed the medical record and evaluated appellant's right lower extremity in accordance with the A.M.A., *Guides.* Dr. Berman appropriately applied the sixth edition of the A.M.A., *Guides* in determining that appellant had 13 percent permanent impairment of the right lower extremity. The record does not contain any current medical evidence in conformance with the A.M.A., *Guides* that shows greater impairment.

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 sustained more than 13 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

[14] *See T.C.,* Docket No. 14-2023 (issued June 11, 2015).

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2016
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