



## **FACTUAL HISTORY**

On June 25, 2007 appellant, then a 40-year-old painter helper, filed a traumatic injury claim (Form CA-1) alleging that on June 6, 2007 he sprained his left ankle when he was getting out of his truck, stepped onto uneven asphalt, and twisted his left ankle.

By decision dated October 26, 2007, OWCP accepted the claim for left ankle sprain.

On November 18, 2007 appellant filed a claim for a schedule award (Form CA-7).

In support of his claim, appellant submitted a July 21, 2008 medical report from Dr. Martin Fritzhand, a Board-certified urologist, who opined that appellant sustained 19 percent permanent impairment of the left lower extremity.

On September 24, 2008 OWCP referred appellant, a series of questions, a statement of accepted facts (SOAF), and the medical record to Dr. Pietro Seni, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether appellant had sustained permanent impairment of the left lower extremity.

In his September 24, 2008 report, Dr. Seni noted appellant's history of previous left ankle sprains in 2001 and 2005. A July 23, 2007 magnetic resonance imaging (MRI) scan of the left ankle showed a bone contusion, a microfracture to the medial malleolus and the inner surface of the talis, and chronic sprain/strain of the talofibular and calcaneofibular ligaments. Preexisting fibrosis was also noted. An August 22, 2007 x-ray revealed normal findings. Dr. Seni reported benign physical examination findings with no instability and swelling, and only slight weakness of the posterior tibial tendon indicating mild tibial tendinitis, unrelated to the injury. He further noted that appellant's MRI scan revealed fibrosis of the talofibular and calcaneofibular ligament indicating old remote injuries. Dr. Seni opined that there were no residuals of the June 6, 2007 work injury. He concluded that appellant had reached maximum medical improvement (MMI) and sustained no permanent partial impairment of the left lower extremity.

OWCP routed the case file to Dr. Nabil F. Angley, an orthopedic surgeon and OWCP district medical adviser (DMA), for review and a determination as to whether appellant sustained a permanent partial impairment of the left lower extremity. In a January 28, 2009 report, Dr. Angley concurred with Dr. Seni's report that appellant sustained no permanent impairment to the left lower extremity.

OWCP found a conflict in the medical evidence and referred the case to Dr. Jonathan J. Paley, a Board-certified orthopedic surgeon, for an impartial medical examination. In his April 27, 2009 medical report, Dr. Paley concluded that physical examination findings revealed no permanent impairment. He reported normal range of motion of the left ankle, normal strength, no atrophy of the left leg muscles, and normal sensation and motor power. Dr. Paley found no impairment of the left lower extremity.

The case file was again routed to OWCP's DMA, Dr. Angley, for review and a determination as to whether appellant sustained a permanent partial impairment of the left lower extremity. In a July 9, 2009 report, Dr. Angley concurred with Dr. Paley that appellant sustained zero percent permanent impairment of the left lower extremity.

By decision dated July 13, 2009, OWCP denied appellant's claim for a schedule award as the evidence was insufficient to establish that he sustained any permanent impairment to a member or function of the body.

On July 17, 2009 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. A telephone hearing was held on October 6, 2009 where counsel argued that the weight of the medical evidence should have rested with Dr. Fritzhand.

By decision dated November 18, 2009, an OWCP hearing representative affirmed the July 13, 2009 decision finding that the medical evidence of record failed to establish permanent partial impairment to the left lower extremity causally related to the June 6, 2007 employment injury.

On February 17, 2015 appellant filed another claim for a schedule award.

In a July 30, 2009 diagnostic report, Dr. Wilfredo J. Suntay, a Board-certified diagnostic radiologist, reported that an MRI scan of the left ankle revealed normal findings. He noted that osseous structures were intact, bone marrow signal was normal, joint spaces were well maintained, medial and lateral ligaments of the ankle were intact, and tendons and musculature were unremarkable.

By letter dated February 26, 2015, OWCP requested that appellant submit an impairment evaluation from his attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009) (hereinafter A.M.A., *Guides*).<sup>3</sup> It provided him 30 days to submit the requested impairment evaluation.

In a February 25, 2015 medical report, Dr. Fritzhand reported that on June 6, 2007 appellant stepped out of a government vehicle into a pothole and sustained immediate pain and swelling to the left ankle. He reported that a July 2007 MRI scan of the left ankle revealed bone contusion with trabecular microfracture involving the medial malleolus and medial talus, and chronic tear suggested involving the anterior talofibular ligament and calcaneal fibular ligament. Dr. Fritzhand provided findings on physical examination and noted that appellant's subjective symptoms were corroborated by the objective findings. He opined that appellant had reached MMI in October 2007. In accordance with the sixth edition of the A.M.A., *Guides*, Dr. Fritzhand used Table 16-2 Foot and Ankle Regional Grid to assess appellant's impairment, medial malleolus nondisplaced fracture, with minimal findings as class 1. He assigned a grade modifier of 2 for a *QuickDASH* score of 27, a grade modifier of 1 for physical examination, and a grade modifier of 2 for clinical studies. Applying the net adjustment formula, Dr. Fritzhand moved appellant from grade C to grade E resulting in seven percent permanent impairment of the left lower extremity.<sup>4</sup>

On April 17, 2015 OWCP routed Dr. Fritzhand's report and the case file to Dr. Morley Slutsky, an OWCP district medical adviser, Board-certified in occupational medicine, for review

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>4</sup> *Id.* at 503.

and a determination as to whether appellant sustained a permanent partial impairment of the left lower extremity and date of MMI.

In an April 17, 2015 report, Dr. Slutsky opined that appellant sustained zero percent permanent impairment of the left lower extremity. He noted that the date of MMI was September 24, 2008, the date of Dr. Seni's examination. Appellant's left ankle condition had stabilized at that time and there was no further treatment planned. He explained that both Dr. Seni and Dr. Paley found no ratable deficits, good range of motion, good strength, and the July 30, 2009 MRI scan found no abnormalities, all of which were in contrast to Dr. Fritzhand's findings. Dr. Slutsky explained that Dr. Fritzhand's evaluation may have represented a temporary exacerbation, however, two physicians found no left ankle medical conditions consistent with the most recent MRI scan of the left ankle. As such, there was no evidence of a permanent impairment of the left ankle. Dr. Slutsky concluded that appellant's sprain had resolved quite some time ago with no MRI scan deficits.

By decision dated July 2, 2015, OWCP denied appellant's claim for a schedule award as the evidence was not sufficient to establish that he sustained any permanent impairment to a member or function of the body.

By letter dated July 8, 2015, appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

In a January 26, 2016 medical report, Richard Donnini, a Doctor of Osteopathic Medicine, noted complaints of left ankle pain, tenderness, full range of motion, and normal sensory and strength findings. He diagnosed left ankle sprain and recommended physical therapy.

A telephone hearing was held on February 10, 2016 where counsel for appellant argued that appellant's MRI scan revealed a fracture warranting a ratable impairment.

By decision dated April 21, 2016, OWCP's hearing representative affirmed the July 2, 2015 decision finding that the medical evidence failed to establish that appellant sustained any permanent impairment to a member or function of the body warranting a schedule award.

#### **LEGAL PRECEDENT**

The schedule award provision of FECA 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.<sup>5</sup> 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

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<sup>5</sup> 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>6</sup>

The A.M.A., *Guides* provide a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF). For lower extremity impairments, the evaluator identifies the impairment for the Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).<sup>7</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>8</sup> Evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.<sup>9</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*.

### ANALYSIS

OWCP accepted appellant's claim for left ankle sprain. By decisions dated July 13 and November 18, 2009, it had denied his claim for a schedule award. On February 12, 2015 appellant filed another claim for a schedule award. By decisions dated July 2, 2015 and April 21, 2016, OWCP again denied his schedule award claim finding that the evidence was insufficient to establish that he sustained any permanent impairment to a member or function of the body.

Appellant has not submitted sufficient evidence to establish that, as a result of his employment injury, he sustained any permanent impairment to a scheduled member such that he would be entitled to a schedule award. By letter dated February 26, 2015, OWCP informed him of the type of evidence necessary to establish his schedule award claim and specifically requested that he submit an impairment evaluation from his attending physician in accordance with the sixth edition of the A.M.A., *Guides*.

In support of his claim, appellant submitted a February 25, 2015 impairment evaluation from Dr. Fritzhand who opined that appellant had sustained seven percent permanent impairment of the left lower extremity. Dr. Slutsky, serving as OWCP's district medical adviser, disagreed with Dr. Fritzhand's report and opined that appellant had zero percent permanent impairment of the left lower extremity.

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<sup>6</sup> *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

<sup>7</sup> *Supra* note 3 at 493-531.

<sup>8</sup> *Id.* at 521.

<sup>9</sup> *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

The Board finds that the report of Dr. Fritzhand is insufficient to establish appellant's claim for a schedule award. Dr. Fritzhand determined that appellant reached MMI in October 2007. Subsequent evaluations by Dr. Seni on September 24, 2008 and Dr. Paley on April 27, 2009 found physical examination findings and review of diagnostic testing revealed no permanent partial impairment of the left ankle. While Dr. Fritzhand's February 25, 2015 report provides more recent physical examination findings, he utilized stale medical evidence when calculating appellant's impairment rating. Dr. Fritzhand noted findings of the July 2007 left ankle MRI scan which revealed bone contusion with trabecular micro fracture involving the medial malleolus and medial talus, and chronic tear suggested involving the anterior talofibular ligament and calcaneal fibular ligament. He argued that appellant's subjective symptoms were corroborated by the objective evidence described. However, the most recent MRI scan of the left ankle was performed on July 30, 2009 by Dr. Suntay. Dr. Suntay reported that the left ankle MRI scan was within normal limits as the osseous structures were intact, bone marrow signal was normal, joint spaces were well maintained, medial and lateral ligaments of the ankle were intact, and tendons and musculature were unremarkable. Dr. Fritzhand failed to utilize the most recent clinical studies and did not reconcile the subjective complaints despite clinical studies revealing normal findings. Therefore, his report fails to establish that appellant sustained permanent impairment of the lower extremity as a result of his employment injury.<sup>10</sup>

The Board notes that Dr. Slutsky properly concluded that appellant had no permanent impairment to a member or function of the body.<sup>11</sup> Dr. Slutsky provided a well-reasoned report based on a proper factual and medical history and included detailed findings and rationale supporting his opinion. He noted that Dr. Fritzhand's evaluation differed from prior physician's and may have represented a temporary exacerbation as no left ankle medical conditions were consistent with the most recent MRI scan and prior examinations.<sup>12</sup> Dr. Slutsky further stated that appellant's condition had not changed significantly since the date of MMI, there was no evidence of a ratable condition in the left ankle, and the sprain had resolved quite some time ago with no MRI scan deficits. As his report establishes that appellant had zero percent impairment of the left lower extremity, the Board finds that OWCP properly denied his claim for a schedule award.<sup>13</sup>

It is appellant's burden of proof to establish that he sustained a permanent impairment of a scheduled member as a result of an employment injury.<sup>14</sup> The medical evidence must include a description of any physical impairment in sufficient detail so that the claims examiner and others reviewing the file would be able to clearly visualize the impairment with its resulting restrictions

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<sup>10</sup> *E.D.*, Docket No. 10-967 (issued January 7, 2011).

<sup>11</sup> *W.R.*, Docket No. 13-492 (issued June 26, 2013).

<sup>12</sup> *L.W.*, Docket No. 12-1613 (issued February 19, 2013).

<sup>13</sup> *M.J.*, Docket No. 13-598 (issued May 8, 2013).

<sup>14</sup> *Tammy L. Meehan*, 53 ECAB 229 (2001).

and limitations.<sup>15</sup> Appellant did not submit such evidence and thus, he has not met his burden of proof.<sup>16</sup>

Appellant may request a schedule award or increased schedule award at any time 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 met his burden of proof to establish entitlement to a schedule award for permanent impairment of his left lower extremity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated April 21, 2016 is affirmed.

Issued: April 12, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

<sup>16</sup> See *V.W.*, Docket No. 09-2026 (issued February 16, 2010); *L.F.*, Docket No. 10-343 (issued November 29, 2010).