

ISSUE

The issue is whether appellant met her burden of proof to establish more than 10 percent permanent impairment of her right lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On June 2, 2007 appellant, then a 51-year-old letter carrier, filed a timely occupational disease claim (Form CA-2) alleging that she developed a right calcaneal stress fracture due to repetitive walking at work. She indicated that she first became aware of the claimed condition on June 30, 2006 and first realized on May 11, 2007 that it was caused or aggravated by her federal employment. OWCP accepted appellant's claim for right calcaneal fracture, closed. Appellant worked limited duty as a modified carrier.

In a report dated February 27, 1997, Dr. John Spellman, an attending Board-certified orthopedic surgeon, noted that April 1995 x-rays did not show a heel spur, but that a bone scan of July 5, 1995 showed increased uptake in the region of the medial tubercle of the calcaneus. He noted that a repeat bone scan of April 30, 1996 showed uptake in the calcaneus consistent with plantar fasciitis.

In a report dated December 14, 1997, Dr. Leonard A. Simpson, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, opined that x-rays of appellant's right heel taken in April 1995 showed only a calcaneal spur rather than a fracture. He determined that she had 10 percent permanent impairment of her right lower extremity based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), *i.e.*, the edition then in effect. Dr. Simpson placed appellant at maximum medical improvement (MMI) as of February 27, 1997.

Appellant filed a claim for a schedule award (Form CA-7). On January 8, 1998 OWCP awarded her a schedule award for 10 percent permanent impairment of her right lower extremity.³

Appellant stopped work on April 17, 2009 due to withdrawal of the modified carrier position. OWCP paid compensation and placed her on the periodic rolls. Appellant was referred to vocational rehabilitation services. Effective May 6, 2013 she returned to work as a full-time clerk.

On July 15, 2014 appellant filed a claim for an additional schedule award (Form CA-7). On July 23, 2014 OWCP notified her of the medical evidence needed to support such claim, including an opinion by a treating physician as to permanent impairment in accord with the sixth edition of the A.M.A., *Guides*.

³ The award contains a typographical error in that it indicates permanent impairment of the left lower extremity rather than the right.

In a May 13, 2015 report, Dr. George T. Ricks, an attending Board-certified orthopedic surgeon, determined that appellant had five percent permanent impairment of her right lower extremity impairment. He cited Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501 of the sixth edition of the A.M.A., *Guides*. Citing Table 16-2 on page 503 (for the diagnosis of calcaneus fracture), Dr. Ricks determined a class 1, grade C impairment with grade modifiers of 1 for functional history (based on full motion and decreased sensation), and 1 for physical examination (based on mild palpatory findings). He found that the grade modifier for clinical studies was not applicable. The net adjustment was zero, for a final class C permanent impairment of the right lower extremity of five percent. Dr. Ricks placed appellant at MMI as of January 28, 2014.

OWCP referred the file to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, for a calculation of permanent impairment of appellant's right lower extremity. In an August 3, 2015 report, Dr. Harris cited the sixth edition of the A.M.A., *Guides* at Table 16-2 and applied the diagnosis-based impairment rating method for the most disabling condition of plantar fasciitis. He determined that appellant had one percent permanent impairment of her right lower extremity based on residual pain. Dr. Harris noted that the current impairment was less than previously awarded in 1998.

In a decision dated October 1, 2015, OWCP determined that appellant did not meet her burden of proof to establish more than 10 percent permanent impairment of her right lower extremity. It found that the record did not contain an opinion that she had more than 10 percent permanent impairment of her right lower extremity.

In an October 7, 2015 letter, appellant, through counsel, requested a telephone hearing with an OWCP hearing representative. During the June 1, 2016 hearing, counsel argued that OWCP violated her constitutional due process rights by applying the standards of the sixth edition of the A.M.A., *Guides* to her claim for an increased schedule award when it had previously applied the standards of the fourth edition of the A.M.A., *Guides* in connection with awarding the 1998 schedule award.

By decision dated July 5, 2016, OWCP's hearing representative affirmed OWCP's October 1, 2015 decision finding that appellant had not established more than 10 percent permanent impairment of her right lower extremity. He found that the recent medical reports of record did not contain an opinion that she had more than 10 percent permanent impairment of her right lower extremity.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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. However, it does not specify the manner in which the percentage of loss shall be determined. For consistent results and to

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁷

ANALYSIS

OWCP accepted that appellant sustained a right calcaneal fracture, closed. Appellant filed a claim for a schedule award and, on January 8, 1998, OWCP awarded her a schedule award for 10 percent permanent impairment of her right lower extremity. In July 2014, she filed a claim for an additional schedule award in connection with the accepted injury. By decisions dated October 1, 2015 and July 5, 2016, OWCP denied appellant's claim finding that the medical evidence of record did not establish more than 10 percent permanent impairment of her right lower extremity, for which she had already been compensated.

The Board finds that appellant did not meet her burden of proof to establish more than 10 percent permanent impairment of her right lower extremity, for which she previously received a schedule award.

Appellant submitted a May 13, 2015 report in which Dr. Ricks, an attending physician, cited Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501 of the sixth edition of the A.M.A., *Guides*. Dr. Ricks calculated grade modifiers and determined that there was no net adjustment from the default class C value of five percent. He concluded that appellant had five percent permanent impairment of her right lower extremity under the sixth edition of the A.M.A., *Guides*.

The Board notes that the submission of this report would not require an award of additional schedule award compensation because the report contains an opinion that appellant had 5 percent permanent impairment of her right lower extremity and she has already been compensated for 10 percent permanent impairment of the same extremity.

In an August 3, 2015 report, Dr. Harris, an OWCP medical adviser, cited the sixth edition of the A.M.A., *Guides* at Table 16-2 and applied the diagnosis-based impairment rating method for the most disabling condition of plantar fasciitis. He determined that appellant had one percent permanent impairment of her right lower extremity based on residual pain. Therefore, Dr. Harris provided an opinion that the current impairment was less than the 10 percent permanent impairment previously awarded in 1998 and his report cannot serve as a basis to award her additional schedule award compensation.

Counsel argues on appeal that OWCP violated appellant's constitutional due process rights by applying the standards of the sixth edition of the A.M.A., *Guides* to her claim for an

⁶ *Id.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (January 2010); *id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

⁷ *Id.* at Chapter 2.808.5a (February 2013); see also *id.* at Chapter 3.700, Exhibit 1 (January 2010).

increased schedule award when it had previously applied the standards of the fourth edition of the A.M.A., *Guides* in connection with awarding the 1998 schedule award. The Board notes that it was appropriate to apply the standards of the sixth edition of the A.M.A., *Guides* as her claim for increased permanent impairment was evaluated after the effective date of the sixth edition.⁸ The Board finds counsel's argument without merit. Moreover, OWCP and the Board do not have jurisdiction to review claims regarding constitutional due process rights.⁹

Appellant may request a schedule award or increased schedule award based at any time 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 did not meet her burden of proof to establish more than 10 percent permanent impairment of her right lower extremity, for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 5, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 14, 2017
Washington, DC

Christopher J. Godfrey, 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

⁸ *Id.*

⁹ See *Robert F. Stone*, 57 ECAB 292 (2005).