United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 16-1759**
	)	**Issued: April 24, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Lynchburg, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 26, 2016 appellant filed a timely appeal from a March 3, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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 met her burden of proof to establish more than one percent permanent impairment of her right lower extremity, for which she received a schedule award.

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's March 3, 2016 decision was August 30, 2016. Because using the September 1, 2016 date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is August 26, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 21, 2013 appellant, then a 54-year-old city carrier, filed an occupational disease claim (Form CA-2) for right foot stress fracture and right Achilles tendon rupture. She indicated that she first became aware of her claimed condition on May 10, 2013, and first realized it was employment related on May 29, 2013. OWCP accepted appellant's claim for right Achilles tendon tear, right calcaneus stress fracture, and right calcaneal spur. On January 9, 2014 appellant underwent OWCP-authorized Achilles tendon repair and partial calcaneal exostectomy on January 9, 2014. OWCP paid disability compensation beginning January 11, 2014, and placed appellant on the periodic compensation rolls, effective February 9, 2014. Appellant's surgeon released her to resume regular work effective June 1, 2014. OWCP paid wage-loss compensation through May 31, 2014, and appellant retired effective June 1, 2014.

On May 31, 2015 appellant filed a claim for compensation (Form CA-7) claiming a schedule award due to her accepted work conditions.

In a May 1, 2015 report, Dr. Gautham Gondi, a Board-certified orthopedic surgeon, advised that appellant had reached maximum medical improvement (MMI). He also indicated that she had seven percent lower extremity impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*). However, Dr. Gondi did not explain how he arrived at his seven percent impairment rating.

In November 2015, OWCP referred appellant to Dr. J. Wayne Keeling, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated December 2, 2015, Dr. Keeling discussed appellant's factual and medical history and detailed the findings of his examination. He reported that range of motion testing of appellant's right and left ankles revealed dorsiflexion of 14 degrees, plantar flexion of 20 degrees, eversion of 14 degrees, and inversion of 20 degrees. Appellant had decreased ability to stand on her right heel. Dr. Keeling indicated that, using Table 16-22, Ankle Motion Impairments, A.M.A., *Guides* 549 (6th ed. 2009), appellant would fall under the mild severity category, which represented seven percent impairment of the right lower extremity. Additionally, Dr. Keeling found that appellant had some very mild limitation of hindfoot motion which, under Table 16-20, Hindfoot Motion Impairments, A.M.A., *Guides* 549 (6th ed. 2009), constituted two percent permanent impairment of her right lower extremity. Adding the seven percent rating to the two percent rating yielded a total permanent impairment of appellant's right lower extremity of nine percent.[3]

OWCP arranged for the December 2, 2015 report to be evaluated by Dr. Morley Slutsky, a Board-certified occupational physician serving as an OWCP medical adviser. On February 13, 2016 Dr. Slutsky determined that appellant had one percent permanent impairment of her right lower extremity. He indicated that he rated appellant's right lower extremity under the diagnosis-based impairment method, noting that this was the preferred method for rating lower extremity impairments. Dr. Slutsky posited that it was not appropriate for Dr. Keeling to use the range of motion rating method when it was possible to use the diagnosis-based impairment method. He indicated that appellant's right Achilles tendon injury was the most impairing

[3] In parts of his evaluation, Dr. Keeling inadvertently referred to rating the left lower extremity, rather than the right lower extremity.

diagnosis of her lower extremity and, using Table 16-2, Foot and Ankle Regional Grid, A.M.A., *Guides* 501 (6th ed. 2009), determined that appellant's condition fell under the class 1 default value of one percent. Dr. Slutsky found that there was no net adjustment due to grade modifiers and, therefore, determined that appellant had a total permanent impairment of her right lower extremity of one percent.

In a decision dated March 3, 2016, OWCP granted appellant a schedule award for one percent permanent impairment of her right lower extremity. The award ran for 2.88 weeks from December 2 to 22, 2015 and was based on the impairment rating of Dr. Slutsky, OWCP's medical adviser.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[5] 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, 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 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]

The sixth edition requires identifying the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[8] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[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. It further provides that alternative approaches are also provided for calculating impairment for peripheral nerve deficits, complex

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*. *See also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

[7] Federal (FECA) Procedure Manual, *id.* at Chapter 2.808.5a (February 2013); and *id.* at Chapter 3.700, Exhibit 1 (January 2010).

[8] A.M.A., *Guides* 494-531.

[9] *Id.* at 521.

regional pain syndrome, amputation, and range of motion. Range of motion is primarily used as a physical examination adjustment factor.[10] The A.M.A., *Guides*, however, also explain that some of the diagnosis-based impairment grids refer to the range of motion section when that is the most appropriate mechanism for grading the impairment. This section is to be used as a stand-alone rating when other grids refer to this section or no other diagnosis-based impairment sections of the chapter are applicable for rating a condition.[11]

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 impairment in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.[12]

ANALYSIS

The Board finds that this case is not in posture for decision regarding whether appellant has more than one percent permanent impairment of her right lower extremity.

Appellant received a schedule award for one percent impairment to her right lower extremity. The March 3, 2016 award was based on a February 13, 2016 impairment rating by Dr. Slutsky, an OWCP medical adviser, who reviewed the December 2, 2015 report of Dr. Keeling, the second opinion examiner.

A reasoned opinion by an OWCP medical adviser will not usually constitute the weight of the medical evidence in an accepted disability case, even if the medical adviser is a Board-certified specialist in the appropriate field of medicine and the attending physician is not a specialist and offers no rationale. This is because the medical adviser has not examined the claimant while the attending physician has.[13] The Board notes that while Dr. Slutsky posited that appellant's impairment should be evaluated using the diagnosis-based impairment method, Dr. Keeling applied the range of motion method to assess appellant's degree of permanent impairment and application of this rating method yielded nine percent permanent impairment of her right lower extremity.

Where the second opinion examiner's report fails to adequately explain and/or document the physician's findings, it is incumbent upon OWCP to obtain clarification from its referral physician.[14] Even if the provided range of motion measurements accurately reflect the extent of appellant's right lower extremity limitations, Dr. Keeling nonetheless failed to explain why rating appellant based on range of motion was presumably the most appropriate mechanism for grading appellant's impairment. Once OWCP undertakes development of the record, it must do

[10] *Id*. at 497, section 16.2.

[11] *Id.* at 543; *see also D.F.*, Docket No. 15-0664 (issued January 8, 2016).

[12] Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.808.6(f) (February 2013).

[13] *A.A.*, Docket No. 15-0898 (issued July 28, 2015).

[14] Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.808.6d and 2.808.6f(2)(c) (February 2013).

a complete job in procuring medical evidence that resolves the relevant issues in the case.[15] Accordingly, the case shall be remanded for further development.

On remand, Dr. Keeling should be provided an opportunity to submit a supplemental report explaining which method for rating permanent impairment is most appropriate in this case, *i.e.*, the diagnosis-based impairment method or the range of motion method. After such further development as OWCP deems necessary, it shall issue a *de novo* decision regarding the extent of appellant's right lower extremity impairment.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has more than one percent permanent impairment of her right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded for further proceedings consistent with this decision of the Board.

Issued: April 24, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[15] *Richard F. Williams*, 55 ECAB 343, 346 (2004).