

**United States Department of Labor
Employees' Compensation Appeals Board**

S.J., Appellant)
)
and) **Docket No. 16-1162**
) **Issued: February 8, 2017**
DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER -- MIAMI, Miami, FL, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 16, 2016 appellant filed a timely appeal from a March 15, 2016 merit decision and an April 13, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established more than seven percent permanent impairment to her left lower extremity, for which she has received a schedule award; and (2) whether OWCP properly denied her request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 24, 1992 appellant, then a 36-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on that day she injured her left toe, leg and foot due to a crushing injury from a bed rail. OWCP accepted the claim for a contusion of left toe, contusion of foot, lesion of plantar nerve, left foot plantar fibromatosis, crushing injury of left foot, bunion, left foot and post-traumatic osteoarthritis, ankle and left foot and authorized surgery, which appellant underwent in November 1993 and June 1995. On December 10, 1997 OWCP found that the position of alternative duty nursing assistant fairly and reasonably represented her wage-earning capacity.² Appellant has not worked since August 4, 2000.

On July 17, 2015 appellant filed a Form CA-7 claim for compensation requesting schedule award compensation benefits. By decision dated November 10, 2015, OWCP granted two percent permanent impairment to her left lower extremity. The award ran 5.76 weeks from September 29 to November 8, 2015. The schedule award was based on crush injury left foot with nondisplaced orthochondral fracture first metatarsophalangeal joint (MPJ) with no pain.

In a January 8, 2016 report, Dr. Tania C. Turbay, DPM, a podiatrist, documented appellant's residual symptoms. Examination of the left foot demonstrated a hallux valgus deformity with tenderness to palpation, diminished sensation and pain with range of motion. Appellant was noted to walk with an antalgic gait. Dr. Turbay opined that appellant had 20 percent impairment rating based on Florida Compensation Guide for Impairment Ratings. This was due to appellant's chronicity of pain and neuropathy and the impairment on ambulation due to severe deformity of the toes of the right foot. Dr. Turbay indicated that appellant suffered from reflex sympathetic dystrophy (RSD) and post-traumatic arthritic changes from the crush injury to the foot. She noted that appellant's previous impairment only included pain to the foot.

On January 27, 2016 an OWCP medical adviser reviewed the medical evidence of file, noting that a statement of accepted facts was not contained in the case file. He indicated that appellant was status postcontusion and straining injury left foot/ankle and hallux valgus (bunion) left foot. Under Table 16-2, page 501 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ (hereinafter A.M.A., *Guides*), the medical adviser opined that appellant had seven percent lower extremity impairment for residual problems status post contusion and straining injury left foot and ankle. He noted that this equated to a class 1 grade E. The medical adviser indicated that the date of maximum medical improvement was January 21, 2016, when appellant was evaluated by Dr. Turbay.

On March 1, 2016 OWCP received appellant's request for reconsideration. She requested reconsideration based on Dr. Turbay's finding that her impairment percentage had increased.

² By decision dated July 9, 2015, OWCP denied modification of its December 10, 1997 loss of wage-earning capacity decision.

³ A.M.A., *Guides* (6th ed. 2008).

By decision dated March 15, 2016, OWCP awarded appellant an additional five percent impairment for a total left lower extremity impairment of seven percent. The award ran 14.4 weeks from November 9, 2015 to February 17, 2016. The date of maximum medical improvement was determined as January 21, 2016. The weight of the medical evidence was given to the medical adviser, who applied the A.M.A., *Guides* to Dr. Turbay's examination findings. .

On March 29, 2016 OWCP received appellant's March 29, 2016 request for reconsideration. She again requested reconsideration based on a finding by Dr. Turbay that her schedule award percentage had increased.

In a November 30, 2015 report, Dr. Turbay noted appellant had chronic pain and that maximum medical improvement was reached on November 30, 2015. He found that a diagnosis of displaced fracture of first metatarsal bone, right foot and displaced fracture of first metatarsal bone, left foot, would be two percent.

By decision dated April 13, 2016, OWCP denied appellant's request for reconsideration as the evidence submitted was either irrelevant or immaterial to the issue at hand.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,⁴ and its implementing federal 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to rate permanent impairment.⁷

The A.M.A., *Guides* provides a diagnosis-based method for evaluating permanent impairment.⁸ For lower extremity impairments, the evaluator identifies the impairment Class of Diagnosis (CDX) which is then adjusted by grade modifiers for Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS). The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁹ Under Chapter 2.3 of the A.M.A.,

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Part 3 -- Medical, *Schedule Award*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ A.M.A., *Guides* 493-531.

⁹ *Id.* at 515-22.

Guides, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹⁰

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.¹¹ In some instances, the medical adviser's opinion can constitute the weight of the medical evidence. This occurs in schedule award cases where an opinion on the percentage of permanent impairment and a description of physical findings is on file from an examining physician, but the percentage estimate by this physician is not based on the A.M.A., *Guides*. In this instance, a detailed opinion by OWCP's medical adviser which gives a percentage based on reported findings and the A.M.A., *Guides* may constitute the weight of the medical evidence.¹²

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision. OWCP's medical adviser noted that he had not been provided a statement of accepted facts. He based his report on Dr. Turbay's limited findings.

Dr. Turbay's January 21, 2016 report is of diminished probative value. She opined in her January 21, 2016 report that appellant had 20 percent impairment based on Florida Compensation Guide for Impairment Ratings. OWCP, however, uses the sixth edition of the A.M.A., *Guides* to calculate schedule awards.¹³ Dr. Turbay's report was not based on the A.M.A., *Guides*. A medical opinion not based on the appropriate edition of the A.M.A., *Guides* is of diminished probative value in determining the extent of permanent impairment.¹⁴

OWCP's medical adviser reviewed Dr. Turbay's January 8, 2016 report and indicated that the date of maximum medical improvement was January 21, 2016. He noted Dr. Turbay's examination findings of the left foot included a hallux valgus deformity with tenderness to palpation, diminished sensation and pain with range of motion, and that appellant walked with an antalgic gait. Under Table 16-2, page 501 of A.M.A., *Guides*, the medical adviser found appellant had seven percent left lower extremity impairment for residual problems status post contusion and straining injury to left foot and ankle or class 1, severity grade E. However, the medical adviser failed to adequately explain how his determination was reached in accordance with the relevant standards of the A.M.A., *Guides*.¹⁵ It is unclear what diagnostic criteria the

¹⁰ *Id.* at 23-28.

¹¹ *Supra* note 7 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013); *see also* *L.R.*, Docket No. 14-674 (issued August 13, 2014); *D.H.*, Docket No. 12-1857 (issued February 26, 2013).

¹² *See supra* note 7 at Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8(j) (September 2010).

¹³ *See supra* note 7.

¹⁴ *See F.T.*, Docket No. 14-553 (issued August 11, 2014); *Fritz A. Klein*, 53 ECAB 642 (2002).

¹⁵ *See Tonya R. Bell*, 43 ECAB 845, 849 (1992).

medical adviser used or how he arrived at a severity grade of E. Under Chapter 2.3 of the A.M.A., *Guides*, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹⁶ It is noted that the original schedule award was based on crush injury left foot with nondisplaced orthochondral fracture first MPJ with no pain. The medical adviser also has not explained why a different diagnostic class was used. Therefore the Board finds that he did not adequately follow the A.M.A., *Guides* and his report is of diminished probative value where the A.M.A., *Guides* were not properly followed.¹⁷

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁸ The Board finds that the case is not in posture for decision regarding the additional award.

On remand, OWCP should prepare a statement of accepted facts and forward it to OWCP's medical adviser for an updated report. After this and such other development as it deems necessary, OWCP should issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision on the extent of permanent impairment to appellant's left lower extremity.¹⁹

¹⁶ See *supra* note 10.

¹⁷ See *Paul R. Evans, Jr.*, 44 ECAB 646 (1993); *John Constantin*, 39 ECAB 1090 (1988) (medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value).

¹⁸ *Phillip L. Barnes*, 55 ECAB 426 (2004).

¹⁹ In light of the disposition of this case, issue 2 is hereby rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the March 15 and April 13, 2016 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further proceedings consistent with this decision.

Issued: February 8, 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