

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

A.G., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Port Lavaca, TX, Employer)

**Docket No. 17-0710
Issued: July 17, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 8, 2017 appellant filed a timely appeal from a January 24, 2017 merit 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.

ISSUE

The issue is whether appellant has more than three percent permanent impairment of his left lower extremity.

FACTUAL HISTORY

On October 26, 2009 appellant, then a 52-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a left foot condition causally related to factors of his federal employment. On the claim form he described his injury as Achilles

¹ 5 U.S.C. § 8101 *et seq.*

tendinitis with a heel spur syndrome and bursitis. Appellant identified such duties as casing mail, loading vehicles, and delivering mail. OWCP accepted the claim for left Achilles tendinitis, left foot contracture of tendon sheath, and left plantar fibromatosis. The record indicates that appellant received wage-loss compensation from January 27 to March 20, 2010.

On November 15, 2012 appellant also filed a claim for compensation (Form CA-7) from November 8 to December 20, 2012. This claim was denied by decision dated February 6, 2013. By decision dated September 11, 2103, an OWCP hearing representative affirmed the February 6, 2013 decision.²

On October 26, 2015 appellant filed a schedule award claim (Form CA-7). He submitted a report dated October 8, 2015 from Dr. Thomas Martnens, an osteopath. Dr. Martnens provided a history that included plantar fascia surgery occurring between 2008 and 2010. He provided results on examination, reporting “severe on palpation at the left heel” at the insertion point of the Achilles tendon. Dr. Martnens reported that plain films of the left foot on August 26, 2015 were negative for fracture,³ and “stress views of the L [left] foot on [September 22, 2015] were positive for minimal laxity the medial joint space of the ankle mortise with inversion and eversion.” He provided the diagnostic codes for Achilles bursitis or tendinitis (726.71), contracture of tendon (sheath) (727.81), and interstitial myositis (728.81). Dr. Martnens opined that under Table 16-2 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (hereinafter A.M.A., *Guides*) appellant had five percent permanent impairment of the left lower extremity.⁴ He applied a grade modifier of one for functional history, based on antalgic limp with asymmetric shortened stance corrected with footwear modification or orthotics. As to physical examination, he also found a grade modifier one was proper for minimal palpatory findings, consistently documented, without observed abnormalities.

OWCP prepared a statement of accepted facts dated June 20, 2016 and referred the case to an OWCP medical adviser. In a report dated July 1, 2016, the medical adviser opined that appellant had three percent left lower extremity permanent impairment under Table 16-2. He identified a diagnosis of Achilles tendinitis, with mild motion deficits. The medical adviser disputed the functional history grade modifier used by Dr. Martnens, opining that there was no evidence of a limp or shortened stance, and no evidence appellant was currently using orthotics. He used a grade modifier zero for functional history. As to physical examination, the medical adviser used a grade modifier three, for severe palpatory findings. He wrote that there were no applicable clinical studies, and he used a grade modifier zero. In applying the net adjustment formula, the medical adviser used a Class of Diagnosis (CDX) of two, and opined that appellant had a grade A impairment of three percent under Table 16-2. He opined the date of maximum medical improvement (MMI) was October 8, 2015, the date of the report from Dr. Martnens.

² At a June 12, 2013 hearing, appellant indicated that he had retired from federal employment.

³ The record contains an August 26, 2015 x-ray report from Dr. Yuming Yin, a radiologist, indicating no acute fractures.

⁴ A.M.A., *Guides* 501-08, Table 16-2.

By decision dated September 7, 2016, OWCP issued a schedule award for three percent left lower extremity permanent impairment. The period of the award was 8.64 weeks from October 8, 2015.

Appellant requested a review of the written record by an OWCP hearing representative on September 21, 2016. By decision dated January 24, 2017, the hearing representative affirmed the September 7, 2016 decision. She found that the medical adviser had correctly applied the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁵ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁷

With respect to a foot or ankle impairment, the A.M.A., *Guides* provides a regional grid at Table 16-2.⁸ The CDX is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value (Grade C) may be adjusted by using grade modifiers for functional history (GMFH) Table 16-6, physical examination (GMPE) Table 16-7, and clinical studies (GMCS) Table 16-8. The adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁹

ANALYSIS

Appellant submitted an October 8, 2015 report from Dr. Martnens, opining that appellant had five percent left lower extremity permanent impairment under Table 16-2. The case was referred to an OWCP medical adviser for review in accordance with OWCP procedures.¹⁰ In a

⁵ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁶ A. *George Lampo*, 45 ECAB 441 (1994).

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

⁸ *Supra* note 4.

⁹ The net adjustment is up to +2 (Grade E) or -2 (Grade A).

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013) (after obtaining medical evidence regarding permanent impairment, the case is routed to an OWCP medical adviser for an opinion as to the nature and percentage of permanent impairment).

July 1, 2016 report, the medical adviser opined that the permanent impairment under Table 16-2, the regional grid noted above, was three percent. OWCP issued a schedule award for three percent left lower extremity permanent impairment. The award commenced on the date of MMI, which was found by the medical adviser to be October 8, 2015, the date of the report from Dr. Martnens.¹¹

Both Dr. Martnens and OWCP's medical adviser found that under Table 16-2, a diagnosis of Achilles tendinitis was proper. Class 1 impairment with mild motion deficits has a default (Grade C) permanent impairment of five percent.¹² In identifying the grade modifiers to be used for the net adjustment formula, the medical adviser provided explanation for his findings. He noted that for functional history Dr. Martnens had opined a grade modifier one was proper, but as discussed by the medical adviser, there was no evidence presented of an antalgic limp, with asymmetric shortened stance, as provided in Table 16-6.¹³

With respect to physical examination, OWCP's medical adviser found that three is the proper grade modifier. Under Table 16-7, severe palpatory findings are a grade modifier three,¹⁴ and Dr. Martnens did report severe findings in his report. It is unclear why Dr. Martnens' calculations use a grade modifier one, for minimal palpatory findings.

Dr. Martnens did not use clinical studies as a grade modifier. He referred to a September 22, 2105 study showing minimal laxity, but this evidence is not of record. Under Table 16-8, no available clinical studies results in a grade modifier zero.¹⁵ OWCP's medical adviser used grade modifier zero for clinical studies.

When OWCP's medical adviser provides an opinion that is supported by medical rationale, it may constitute the weight of the medical evidence regarding permanent impairment.¹⁶ As to the grade modifiers, the medical adviser provided a rationalized medical opinion for functional history, physical examination, and clinical studies.

Once the grade modifiers are determined, the net adjustment formula is applied. Although the hearing representative found OWCP's medical adviser correctly applied the A.M.A., *Guides*, it is clear that the medical adviser incorrectly applied the net adjustment formula. The medical adviser used a class 2 (moderate problem) for his final calculation. This resulted in a net adjustment of -2, or a Grade A permanent impairment of three percent to the left lower extremity under Table 16-2, but the diagnosis in this case was for Achilles tendinitis with

¹¹ The period covered by a schedule award commences on the date that the employee reaches MMI from residuals of the employment injury. *Albert Valverde*, 36 ECAB 233, 237 (1984).

¹² *Supra* note 4 at 501.

¹³ *Id.* at 516, Table 16-6.

¹⁴ *Id.* at 517, Table 16-7.

¹⁵ *Id.* at 519, Table 16-8.

¹⁶ *See L.A.*, Docket No. 09-0168 (issued July 24, 2009); *G.B.*, Docket No. 10-1381 (issued October 4, 2006).

mild motion deficits, with a class 1 for mild problem.¹⁷ The net adjustment formula therefore must use a class 1. Using the grade modifiers identified by the medical adviser, the formula would be $(0 - 1) + (3 - 1) + (0 - 1)$, or no adjustment from the grade C default impairment of five percent.¹⁸

The Board accordingly finds that, based on the probative medical evidence of record, the permanent impairment to the left lower extremity was five percent under the A.M.A., *Guides*.¹⁹ On return of the case record, OWCP should issue a schedule award for an additional two percent permanent impairment.²⁰

CONCLUSION

The Board finds that appellant has established five percent left lower extremity permanent impairment.

¹⁷ A.M.A., *Guides* 501, Table 16-2. A CDX 2 has a default permanent impairment of 16 percent and is used only for flexible deformity and loss of specific tendon function.

¹⁸ *Id.* at 521.

¹⁹ Following the docketing of an appeal before the Board, OWCP does not retain jurisdiction to render a further decision regarding the issue on appeal until after the Board relinquishes jurisdiction. *See* 20 C.F.R. § 501.2(c)(3). During the pendency of this appeal before the Board, by decision dated May 17, 2017, OWCP issued a correction to the decision dated September 7, 2016. The Board and OWCP may not exercise simultaneous jurisdiction over the same issue in the same case at the same time. *Jacqueline S. Harris*, 54 ECAB 139 (2002); *Douglas E. Billings*, 41 ECAB 880 (1990). Thus, OWCP's May 17, 2017 decision is declared null and void. *S.O.*, Docket No. 13-1083 (issued April 15, 2014).

²⁰ When the evidence establishes the percentage of permanent impairment, the Board will modify OWCP decision and have OWCP issue an additional schedule award on return of the case record. *See R.K.*, Docket No. 11-0359 (issued November 21, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 24, 2017 is modified to reflect a left lower extremity permanent impairment rating of five percent and is affirmed, as modified.

Issued: July 17, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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