United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 16-1826**
	)	**Issued: May 15, 2017**
U.S. POSTAL SERVICE, GRACELAND STATION, Chicago, IL, Employer	)	

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 September 15, 2016 appellant filed a timely appeal from a May 13, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.[2]

ISSUE

The issue is whether appellant has established that more than 16 percent permanent impairment of her left lower extremity and 23 percent permanent impairment of her right lower extremity, for which she previously has received schedule awards.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant timely requested an oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). After exercising its discretion, the Board by order dated February 10, 2017, denied the request for oral argument as the issue on appeal could be fully addressed on the record. *Order Denying Request for Oral Argument*, Docket No. 16-1826 (issued February 10, 2017).

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 22, 1992 appellant, then a 35-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 15, 1992, due to freezing temperatures, she sustained an injury to the bottom of her right foot when she stepped down on it, causing a sharp pain. On September 2, 1992 OWCP accepted her claim for bilateral frostbite of the feet. It subsequently expanded acceptance of the claim for bilateral plantar fibromatosis.[4]

OWCP had previously issued schedule awards for permanent impairment of appellant's left and right lower extremities. As of November 7, 2008, it had issued schedule awards totaling 13 percent for appellant's left lower extremity and 20 percent for appellant's right lower extremity.

On December 8, 2009 appellant filed a claim for an additional schedule award (Form CA-7). On July 15, 2011 OWCP expanded acceptance of her current claim to include acceptance for bilateral tarsal tunnel syndrome and bilateral lesion of the plantar nerve.

In a February 6, 2012 report, Dr. David H. Garelick, a physician Board-certified in orthopedic surgery with a subspecialty in orthopedic sports medicine, noted that appellant had previously been granted a schedule award for 13 percent left lower extremity permanent impairment and 20 percent right lower extremity permanent impairment. However, he noted that bilateral tarsal tunnel syndrome and a plantar nerve lesion (Morton's neuroma) had subsequently been accepted as work-related conditions. Dr. Garelick determined that based on Table 16-2 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter A.M.A., *Guides*), appellant was entitled to an additional 3 percent permanent impairment of her right lower extremity and an additional 3 percent for permanent impairment of her left lower extremity, for a total of 16 percent permanent impairment of her left lower extremity and 23 percent permanent impairment of her right lower extremity. By decision dated May 30, 2013, OWCP issued an increased schedule award for a total of 16 percent permanent impairment of the left lower extremity and 23 percent permanent impairment of the right lower extremity.

On September 19, 2013 appellant requested reconsideration.

In support of a greater award, appellant submitted a September 11, 2013 report from Dr. Michael Flood, a podiatrist, who contended that pursuant to the A.M.A., *Guides*, appellant

[3] Docket No. 14-1689 (issued July 2, 2015).

[4] Appellant had previously filed a claim for a traumatic injury (Form CA-1) that occurred on April 12, 1985 when she felt pain while lifting cases onto a table from a pallet on the floor while employed as a commodity grader with the Department of Agriculture. This claim was accepted for lumbosacral strain under OWCP File No. xxxxxx224. Appellant also filed a separate claim for a traumatic injury (Form CA-1) of December 26, 1998 that was accepted by OWCP for right knee contusion, right knee strain, and right knee chondromalacia resulting from appellant's fall on a slippery concrete floor while employed as a rehabilitation letter carrier under OWCP File No. xxxxxx040.

had 26 percent permanent impairment of her right foot and 26 percent permanent impairment of her left foot. Dr. Flood based his opinion on an evaluation of appellant's bilateral ankles and feet. With regard to her ankles, he noted that he applied Table 16-22 and Table 16-25 of the A.M.A., *Guides.* Dr. Flood found a class or key factor of 3, grade modifiers of 2, for a final class grade rating of A, which he determined equaled 26 percent permanent impairment of each lower extremity. With regard to appellant's feet, he indicated that he applied Table 16-8 and Table 16-2 of the A.M.A., *Guides* and found class or key factor of 3, grade modifiers of 2, and a final class grade rating of A, for 26 percent permanent impairment of each lower extremity.

On October 27, 2013 Dr. Christopher Gross, an OWCP medical adviser Board-certified in psychiatry and neurology, opined that appellant's impairment was less than what she received, and recommended an impartial medical examination. A second opinion examination was conducted by Dr. Allan Brecher on January 24, 2014.

By decision dated April 7, 2014, OWCP determined that the evidence of record was insufficient to modify the prior decision.

On August 4, 2014 appellant appealed to the Board. By decision dated July 2, 2015, the Board determined that Dr. Brecher did not base his report on an accurate factual history. The case was remanded to OWCP for further development of the medical evidence.[5]

On February 23, 2016 OWCP referred appellant to Dr. James Elmes, a Board-certified orthopedic surgeon, for a second opinion. In a March 24, 2016 report, Dr. Elmes listed appellant's diagnoses as: (1) bilateral frostbite on right and left feet, resolved; (2) plantar fibromatosis and fasciitis of the right and left feet; (3) bilateral tarsal tunnel syndrome; (4) bilateral plantar nerve lesions with plantar digital neuroma on second cleft, left foot; (5) right knee contusion and strain; (6) chondromalacia of the right knee; and (7) lumbosacral strain. In evaluating impairment, he did provide a rating pertaining to the lumbosacral condition as there was no clear motor or sensory deficit.

With regard to appellant's bilateral plantar fasciitis, Dr. Elmes calculated her impairment pursuant to Table 16-2, of the A.M.A., *Guides* which indicated a class 1 diagnosis for bilateral fasciitis with base impairment of one percent. He found a grade modifier of 2 for functional history, noting that appellant used a cane and limped. Under physical examination, Dr. Elmes noted moderate palpable findings and tenderness with normal range of motion, so he noted a grade modifier of 2. He indicated that clinical studies were not applicable. Utilizing the net adjustment formula, Dr. Elmes indicated that a grade modifier for functional history[6] of 2 minus class diagnosis of 1 equals a grade modifier of 1, and physical examination modifier of 2 minus diagnosis of 1 equals a grade modifier of 1. He explained that this resulted in a +2 adjustment, which corresponded to a bilateral permanent partial impairment of two percent for the right and left foot.

[5] Docket No. 14-1689 (issued July 2, 2015).

[6] Dr. Elmes mistakenly refers to functional history as family history on page 10 of his report.

With regard to the right knee, Dr. Elmes noted that according to Table 16-3,[7] there was a class 1 diagnosis with three millimeter cartilage interval noted under the diagnostic key fact of primary knee joint arthritis. Under functional history, appellant was known to utilize a cane when walking and therefore he found a grade 2 modifier. Under physical examination, Dr. Elmes noted normal range of motion with minimal tenderness on palpation, and therefore a grade modifier of 1 was allotted. He noted that clinical studies were not applicable. Utilizing the adjustment formula, Dr. Elmes noted a grade modifier for Functional History (GMFH) 2 minus 1 equaled a grade modifier of 1. A Physical Examination (GMPE) finding 1 minus a Class of Diagnosis (CDX) of 1 equaled a 0 grade modifier. Dr. Elmes noted that this resulted in a +1 adjustment, which correlated to class D or eight percent right lower extremity permanent impairment for the knee. He noted that when 8 percent was added to the 2 percent impairment of the right foot, this equaled 10 percent permanent impairment of the right lower extremity. As noted above, Dr. Elmes determined that the left lower extremity permanent impairment was two percent.

On April 28, 2016 OWCP asked its medical adviser to review appellant's claim for schedule award purposes. On April 29, 2016 Dr. Michael M. Katz, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed Dr. Elmes' calculations and concluded that he correctly determined impairment. However, he noted that appellant's calculations for the right knee were under OWCP File No. xxxxxx224, and for this reason, Dr. Elmes' determination of eight percent for the right lower extremity was not considered. Dr. Katz recommended a permanent impairment rating of two percent for the right lower extremity and two percent for the left lower extremity. Dr. Elmes noted that, since this impairment rating was less than the prior total for similar overlapping conditions, there was no additional award now due.

By decision dated May 13, 2016, OWCP determined that the evidence of record was insufficient to modify the prior decision.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.[8] Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[9]

[7] A.M.A., *Guides* 501, Table 16-3.

[8] *See* 20 C.F.R. §§ 1.1-1.4.

[9] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment.*" The document included various changes to the original text, intended to serve as an *erratum*/supplement to the first printing of the A.M.A., *Guides.* In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[10] The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[11]

ANALYSIS

Appellant has received total schedule award for 16 percent permanent impairment of her left lower extremity and 23 percent permanent impairment of her right lower extremity. She contends that she is entitled to a greater award. The Board finds, however, that the evidence does not support such a contention.

Dr. Gross, an OWCP medical adviser, indicated on October 27, 2013 that he believed that appellant's impairment was much less than what she had received, and recommended that OWCP refer appellant for an additional medical examination. A second opinion examination was obtained and Dr. Elmes indicated that appellant had two percent permanent impairment of each lower extremity. He indicated that the right knee was a part of a different claim and subtracted eight percent for a total of two percent of the right side.[12] OWCP's medical adviser concurred with Dr. Elmes' opinion.

The Board finds that appellant has not established that she is entitled to a schedule award greater than 16 percent permanent impairment of her left lower extremity and 23 percent permanent impairment of her right lower extremity. Dr. Elmes and Dr. Katz both determined that appellant is entitled to two percent impairment of her right and left lower extremities. Pursuant to Table 16-2 of the A.M.A., *Guides,* with a diagnostic key factor of plantar fibromatosis/fasciitis with significant consistent palpatory findings, appellant was rated as class 1 with a default value of 1 percent impairment. Adjustments were made for a grade modifier of 2 for functional history and a grade modifier of 2 for physical examination. Applying the formula pursuant to the A.M.A., *Guides,* (GMFH - CDX) + (GMPE - CDX) (2 - 1 + 2 - 1), appellant had a net adjustment of 2, which moved the default value to grade E, which equaled two percent impairment. Dr. Katz noted that Dr. Elmes' evaluation for knee was not included because that was an accepted condition under a different case, and could best be addressed when considering that case.

[10] *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).

[11] *Isidoro Rivera*, 12 ECAB 348 (1961).

[12] *Supra* note 4.

The Board finds that there is no rationalized medical opinion evidence establishing that appellant is entitled to a greater award. Dr. Flood determined that appellant had 26 percent permanent impairment of each lower extremity. Although he did reference specific Tables in the A.M.A., *Guides*, the Board is unable to follow Dr. Flood's rationale in determining that appellant is entitled to the greater award. The Board finds that Dr. Flood did not sufficiently explain how he arrived at his impairment ratings. He did not explain how he chose the class of impairment or the grade modifiers. Dr. Flood did not explain how specific Tables of the A.M.A., *Guides* applied to his rating. Board precedent is well settled that when an attending physician's report gives an estimate of impairment, but does not address how the estimate was based on the A.M.A., *Guides*, OWCP is correct to follow the advice of its medical adviser where he has properly applied the A.M.A., *Guides*.[13]

It is appellant's burden of proof to establish permanent impairment of a scheduled member.[14] He already received a schedule award for 16 percent permanent impairment of her left lower extremity and 23 percent permanent impairment of her right lower extremity. There is no probative medical evidence of record establishing a greater degree of impairment.[15]

Appellant may request a schedule award or increased schedule award at any time based on evidence of new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not established greater than 16 percent permanent impairment of her left lower extremity and 23 percent permanent impairment of her right lower extremity for which she previously received schedule awards.

[13] *J.S.*, Docket No. 16-0488 (issued May 10, 2016).

[14] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[15] *See M.P.*, Docket No. 15-0383 (issued July 1, 2015).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 13, 2016 is affirmed.

Issued: May 15, 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