United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 17-1704**
	)	**Issued: April 3, 2018**
DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Barstow, CA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 1, 2017 appellant filed a timely appeal from a June 19, 2017 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 19 percent permanent impairment of his left lower extremity, for which he previously received schedule awards.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 7, 2000 appellant, then a 57-year-old boiler plant operator, filed an occupational disease claim (Form CA-2) alleging that he developed hallux valgus deformity and a bunion on the first toe of his left foot due to wearing steel-toed boots as required by his employing establishment. OWCP accepted his claim for bunion on the first toe of his left foot on December 21, 2000. Appellant underwent an offset-V bunionectomy with Akin osteotomy and K-wire stabilization on the left foot on May 2, 2001. On May 30, 2001 he underwent additional surgery consisting of an excision of deep implant left foot and open reduction and internal fixation of the first metatarsal fracture in appellant's left foot.

By decision dated July 19, 2004, OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity which entitled him to 25.92 weeks of compensation. Appellant requested an oral hearing with OWCP's Branch of Hearings and Review and, by decision dated December 22, 2004, an OWCP hearing representative affirmed the July 19, 2004 decision.

Appellant requested an additional schedule award (Form CA-7) on February 18, 2006. OWCP accepted the additional condition of post-traumatic degenerative joint disease of the left first metatarsophalangeal (MTP) joint. By decision dated May 19, 2006, it granted appellant a schedule award for 10 percent permanent impairment of his left foot which entitled him to an additional 20.5 weeks of compensation.[3] OWCP then found that appellant had received an overpayment of compensation based on his dual schedule awards totaling 19 percent. A representative of its Branch of Hearings and Review affirmed this decision on March 21, 2007. By decision dated August 10, 2007, OWCP found that appellant had no more than 10 percent total permanent impairment of his left leg. Appellant appealed those decisions to the Board and the Board remanded the case, finding that the medical evidence of record did not correlate with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[4] and that OWCP medical adviser did not explain why the additional conditions

[2] Docket No. 10-1805 (issued May 10, 2011), *Order Dismissing Petition for Reconsideration* (issued September 27, 2011; Docket No. 08-0365 (issued June 11, 2008).

[3] The schedule award noted that it was for an additional 10 percent permanent impairment of the "lower left extremity/foot." The Board notes that under 5 U.S.C. § 8107(c), the leg and the foot are two separate body members for schedule award purposes. For total or 100 percent loss of the leg, 5 U.S.C. § 8107(c)(2) provides for 288 weeks of compensation while 5 U.S.C. § 8107(c)(4) provides for 205 weeks of compensation for 100 percent loss of use of the foot. As appellant's award was for 20.5 weeks of compensation, it is clear that the May 19, 2006 award was made on the basis of the foot (10 percent of 205 weeks equals 20.5 weeks). Under the A.M.A., *Guides* (6th ed. 2009), 10 percent permanent impairment of the foot equates to 7 percent permanent impairment of the leg. Table 16-10, page 530. The fifth edition of the A.M.A., *Guides* uses the same conversion formula. *See* page 527, A.M.A., *Guides*, (5th ed. 2001).

[4] A.M.A., *Guides* (5th ed. 2001).

diagnosed by appellant's physician should not be considered when calculating appellant's schedule award.[5]

On remand, OWCP referred appellant for a second opinion examination on October 16, 2009. The second opinion physician found, on November 10, 2009, that appellant had not reached maximum medical improvement (MMI) as he required removal of prior surgical hardware as well as a neurectomy of his Morton's neuroma.

By decision dated January 21, 2010, OWCP reviewed the merits of appellant's claim, but denied modification of its prior decision.

Appellant appealed to the Board and, by decision dated May 10, 2011, the Board affirmed the January 21, 2010 decision, finding that there was no medical evidence of record, correlating with the A.M.A., *Guides*,[6] which established that appellant had more than 10 percent permanent impairment of his left lower extremity. The Board further found that the weight of the medical evidence established that appellant had not reached MMI.

Following the Board's May 10, 2011 decision, on January 18, 2012, appellant underwent an authorized surgical correction of hallux limitus, left foot, and excision of foreign body left foot.

Appellant filed a claim for a schedule award (Form CA-7) on November 16, 2012. On November 29, 2012 OWCP requested additional medical evidence from appellant's attending podiatrist, Dr. Nicholas Crismali, regarding appellant's permanent impairment for schedule award purposes. In a January 22, 2013 note, Dr. Crismali diagnosed hallux limitus left foot, neuroma second interspace left foot, and hammer toe second toe left foot. He noted that appellant was one year postoperative from his left foot surgery. Appellant opined that his condition had worsened because his big toe and the two toes next to it hurt with a constant throb. Dr. Crismali indicated that he did not provide impairment ratings.

On August 28, 2013 appellant filed an additional schedule award claim (Form CA-7). In a report dated August 12, 2013, Dr. Mariam Amiri, a podiatrist, reviewed appellant's history of injury and retirement in 2001. She noted that appellant ambulated with a minimal limp and antalgia on the left. Dr. Amiri performed x-rays and found that they demonstrated that appellant's first metatarsal had severe arthritic changes and joint space narrowing of zero to one millimeter. She found that appellant had bilateral loss of range of motion in the ankles including on the right; five degrees of dorsiflexion with the knee extended, 50 degrees of plantarflexion with the knee extended, 10 degrees of dorsiflexion with the knee flexed, and on the left; 0 degrees of dorsiflexion with the knee extended, less than 50 degrees of plantar flexion with the knee extended, and less than 5 degrees of dorsiflexion with the knee flexed or 0 without pain. Appellant's subtalar joints had 20 degrees of inversion and 10 degrees of eversion, bilaterally. He also exhibited two degrees of varus deformity bilaterally at the mid tarsal joints. In the MTP joints range of motion on the

[5] Docket No. 08-0365 (issued June 11, 2008).

[6] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

left was less than 15 degrees of dorsiflexion of first MTP joint, and 0 degrees of plantarflexion of the first MTP joint. Dr. Amiri diagnosed arthritis of the first MTP joint, pain, and hallux limitus.

Dr. Amiri found 7 percent impairment of the left ankle based on loss of range of motion, 12 percent impairment based on arthritis of the first MTP joint, and 5 percent impairment due to less than 15 degrees of MTP extension. She also afforded appellant an additional 3 percent impairment due to pain for a total permanent impairment rating of 13 percent of the left lower extremity.[7]

OWCP's medical adviser reviewed Dr. Amiri's report on September 19, 2013 and applied the sixth edition of the A.M.A., *Guides*. He found that appellant had zero to one millimeter narrowing of the first MTP joint. OWCP's medical adviser found that no cartilage interval in the first MTP joint had a default value of 10 percent of the lower extremity.[8] He further found grade modifier 2 for functional history due to minimal antalgic gait, physical examination grade modifier 2 due to loss of range of motion, and that clinical studies grade modifiers were not applicable as it was used for class placement. Applying the net adjustment formula from the A.M.A., *Guides* resulted in plus 2 or grade E, 13 percent permanent impairment of the left lower extremity.[9]

Appellant underwent a left foot magnetic resonance imaging (MRI) scan on January 21, 2015 which demonstrated postoperative changes in the first MTP joint with moderate degenerative changes, small erosion along the lateral aspect of the second metatarsal head, and moderate atrophy of the intrinsic musculature within the left foot.

By decision dated March 21, 2016, OWCP denied appellant's claim for an additional schedule award. It noted that appellant had previously received a schedule award for 9 percent permanent impairment of the left lower extremity on July 19, 2004 and had received an additional schedule award for 10 percent permanent impairment of the left foot on May 19, 2006 for schedule awards totaling 19 percent permanent impairment.[10] OWCP found that its medical adviser established that appellant currently had 13 percent permanent impairment of his left lower extremity in accordance with the A.M.A., *Guides*, such that he was not entitled to payment for additional impairment.

On March 21, 2017 appellant requested reconsideration of OWCP's March 21, 2016 decision. He alleged that his ankle condition was part of his accepted employment injuries. Appellant alleged that he should have received compensation for the entire period covered by his second schedule award for an additional 10 percent permanent impairment of the left lower extremity. He further contended that he was entitled to a schedule award for an additional 13 percent permanent impairment of his left lower extremity, beyond that which he had already received.

[7] Dr. Amiri incorrectly applied the fifth edition of the A.M.A., *Guides* to her findings.

[8] A.M.A., *Guides* 507, Table 16-2.

[9] *Id.*

[10] *See supra* note 3.

By decision dated June 19, 2017, OWCP reviewed the merits of appellant's claim and modified the March 21, 2016 decision. It found the evidence of record sufficient to vacate in part, as appellant may be entitled to additional impairment as he had reached MMI following the January 18, 2012 surgery. As such, it noted that it would refer appellant for a second opinion evaluation to determine the degree of impairment associated with the surgical intervention. OWCP further determined that the March 21, 2016 decision was affirmed in part as the medical evidence of record did not establish more than 19 percent permanent impairment of appellant's left lower extremity.

LEGAL PRECEDENT

The schedule award provisions of FECA[11] and its implementing regulations[12] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[13]

In *Harry D. Butler*,[14] the Board noted that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.[15] On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides.*[16] The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of MMI or when the claim for such award was filed. The Board has adopted OWCP's finding that any

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

[13] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[14] 43 ECAB 859 (1992).

[15] *Id.* at 866.

[16] FECA Bulletin No. 09-03 (March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013).

recalculations of previous awards which result from hearing or reconsideration decisions issued on or after May 1, 2009, should be based on the sixth edition of the A.M.A., *Guides*.[17]

The protocol and formula of the sixth edition of the A.M.A., *Guides* requires that the physician determine the Class of Diagnosis (CDX) for the lower extremity and apply the appropriate grade modifiers for Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS) and apply the following formula (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) to reach the appropriate grade within the class of diagnosis.[18]

It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment and OWCP may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings of the attending physician.[19]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 19 percent permanent impairment of his left lower extremity, for which he previously received schedule awards.

Appellant previously received two schedule awards on July 19, 2004 for nine percent permanent impairment of his left lower extremity, and on May 19, 2006. The May 19, 2006 schedule award was expressed as impairment of his left foot and entitled appellant compensation for 10 percent permanent impairment of the left foot.[20] In its May 10, 2011 decision, the Board found that the medical evidence of record at that time did not support that appellant had more than a total of 10 percent permanent impairment of his left lower extremity, for which he had received schedule awards.

Appellant requested an additional schedule award and submitted a report from Dr. Amiri addressing the permanent impairment of his left lower extremity. Dr. Amiri provided findings on physical examination and x-rays regarding appellant's current left leg condition. The Board has long held that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment.[21] Dr. Amiri's report was based on the fifth edition of the A.M.A., *Guides*. OWCP, however, currently uses the sixth edition of the A.M.A., *Guides* to

[17] *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

[18] A.M.A., *Guides* 521.

[19] *Linda Beale*, 57 ECAB 429 (2006).

[20] As noted 10 percent foot impairment converts to 7 percent leg impairment. *See supra* note 3. Viewed as leg impairment, appellant's schedule awards equated to 17 percent permanent impairment. Appellant has received a total of 44.42 weeks of schedule award compensation attributable to his left leg and left foot.

[21] *See S.D.*, Docket No. 17-0862 (issued November 6, 2017); *P.O.*, Docket No. 15-1631 (issued June 2, 2016); *Fritz A. Klein*, 53 ECAB 642 (2002).

calculate schedule awards.[22] A medical opinion, based on an inappropriate edition of the A.M.A., *Guides*, is of diminished probative value in determining the extent of permanent impairment.[23]

OWCP's medical adviser applied the provisions of the sixth edition of the A.M.A., *Guides* to the findings of Dr. Amiri's report on September 19, 2013. He utilized Table 16-2, page 504, of the sixth edition of the A.M.A., *Guides* and found that appellant had a class 1 diagnosis. The medical adviser assigned a grade modifier of 2 for functional history due to appellant's antalgic limp, a grade modifier of 2 for physical examination due to loss of range of motion, and found that the grade modifier clinical studies was not applicable.[24] Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX), he calculated that appellant had a net adjustment of (2-1) + (2-1) = 2, which equated 13 percent permanent impairment of the left lower extremity.[25]

The Board finds that OWCP's medical adviser applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to Dr. Amiri's clinical findings. OWCP's medical adviser's calculations were mathematically correct.[26]

For these reasons, the Board finds that OWCP properly relied on an OWCP medical adviser's assessment of 19 percent permanent impairment of the left lower extremity for calculating appellant's entitlement to an additional schedule award.

There is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than 19 percent permanent impairment of the left lower extremity. Accordingly, appellant has not established that he is entitled to a schedule award greater than those previously awarded.

Appellant may request a schedule award or increased schedule award at any time based 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 has not met his burden of proof to establish greater than 19 percent permanent impairment of his left lower extremity, for which he previously received schedule awards.

[22] *Id.*

[23] *See T.R.*, Docket No. 17-0047 (issued July 27, 2017).

[24] If a particular criterion was used to determine impairment, it may not be used again to determine the grade and is disregarded in the impairment calculation. A.M.A., *Guides* 521.

[25] *Supra* note 8.

[26] *D.B.*, Docket No. 17-1444 (issued January 11, 2018).

ORDER

IT IS HEREBY ORDERED THAT the June 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board