United States Department of Labor
Employees' Compensation Appeals Board

A.K., Appellant	)	
and	)	**Docket No. 18-0462**
	)	**Issued: June 19, 2018**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Victorville, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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 January 4, 2018 appellant, through counsel, filed a timely appeal from a December 5, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 13 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On January 13, 2012 appellant, then a 31-year-old correctional officer, filed a traumatic injury claim (Form CA-1), under OWCP File No. xxxxxx324, alleging that he sustained an injury while at work on January 11, 2012 due to twisting his left ankle while walking up stairs. He did not stop work. OWCP accepted this claim for left ankle sprain.

On April 29, 2013 appellant filed a traumatic injury claim, under OWCP File No. xxxxxx413, alleging that he sustained an injury at work on April 29, 2013 due to twisting his left ankle while walking down stairs. He stopped work on April 30, 2013. OWCP accepted this claim for sprain of the lateral collateral ligament of the left ankle. It paid appellant disability compensation on the daily rolls, effective June 13, 2013.[3]

On December 6, 2013 appellant underwent OWCP-approved left ankle fusion surgery. In an October 9, 2014 report, Dr. Amarilda Christensen, an attending Board-certified internist, described his left ankle fusion as resulting in "stable fixation and alignment with ankle joint."

On December 29, 2014 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to his accepted employment conditions.

In a May 20, 2015 report, Dr. Mesfin Seyoum, an attending Board-certified family practitioner, discussed appellant's factual and medical history, noting that he had a nonwork-related motorcycle accident in 2006 which caused a left distal fibula fracture necessitating two surgeries. He noted that on physical examination appellant exhibited limited left ankle and subtalar range of motion. Dr. Seyoum determined that, under Table 16-2 on page 503 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[4] appellant's left ankle fracture with necrosis of the left talus fell under a class 2 condition (for moderate-to-severe motion deficits and/or moderate malalignment; avascular necrosis with talar body collapse). This class 2 condition had a default value of 22 percent of the left lower extremity. Dr. Seyoum determined that appellant had a functional history grade modifier of 2 and a physical examination grade modifier of 3, and he posited that the clinical studies grade modifier was not applicable. Application of the net adjustment formula required movement one space to the right of the default value on Table 16-2. Therefore, appellant had a

[3] Appellant began receiving disability compensation on the periodic rolls effective November 17, 2013. The files for OWCP File No. xxxxxx324 and OWCP File No. xxxxxx413 have been combined with OWCP File No. xxxxxx413 designed as the master file.

[4] A.M.A., *Guides* (6th ed. 2009).

total permanent impairment of his left lower extremity of 24 percent.[5] Dr. Seyoum indicated that appellant had reached maximum medical improvement (MMI) by the time of his examination.

OWCP referred appellant's case to Dr. Leonard Simpson, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. It requested that Dr. Simpson review the medical evidence of record, including Dr. Seyoum's May 20, 2015 report, and provide an opinion on the permanent impairment of appellant's left lower extremity under the sixth edition of the A.M.A., *Guides*.

In a September 18, 2015 report, Dr. Simpson determined that appellant had 13 percent permanent impairment of his left lower extremity under the sixth edition of the A.M.A., *Guides*. He noted that, in an October 9, 2014 report, Dr. Christensen described appellant's left ankle fusion as resulting in "stable fixation and alignment with ankle joint." Dr. Simpson, therefore, found that Dr. Seyoum's determination that appellant's left ankle condition fell under class 3 (per Table 16-2) was not justified by the evidence of record. Rather, he determined that, under Table 16-2, appellant's left ankle condition fell under a class 2 condition (for mild motion deficits). This class 2 condition had a default value of 10 percent of the left lower extremity. Dr. Simpson determined that appellant had a functional history grade modifier of 1 and a physical examination grade modifier of 2, and he posited that the clinical studies grade modifier was not applicable. Application of the net adjustment formula required movement two spaces to the right of the default value on Table 16-2. Therefore, appellant had a total permanent impairment of his left lower extremity of 13 percent. Dr. Simpson indicated that appellant had reached MMI by May 20, 2015, the date of Dr. Seyoum's examination.

OWCP provided Dr. Simpson with a copy of the December 6, 2013 report detailing appellant's left ankle fusion surgery. On October 21, 2015 Dr. Simpson indicated that he had reviewed the report and advised that he still felt that appellant had 13 percent permanent impairment of his left lower extremity.

By decision dated November 19, 2015, OWCP granted appellant a schedule award for 13 percent permanent impairment of his left lower extremity. The award ran for 37.44 weeks from May 20, 2015 to February 6, 2016 and was based on the impairment rating of Dr. Simpson.

On December 3, 2015 appellant, through counsel, requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on July 6, 2016 counsel argued that Dr. Seyoum properly calculated appellant's permanent impairment.

By decision dated September 12, 2016, OWCP's hearing representative set aside the November 19, 2015 decision and remanded the case for further development of the evidence. She found that there were questions regarding the accepted employment conditions which needed to be resolved before a determination could be made regarding appellant's permanent impairment. The hearing representative indicated that, when Dr. Seyoum and Dr. Simpson produced their reports, it was unclear whether appellant's case had been accepted for a sceptic necrosis of the left talus. She directed OWCP to prepare a new statement of accepted facts and to refer appellant to a

[5] Dr. Seyoum inadvertently referenced 23 percent permanent impairment, but moving one space to the right of the default value yields 24 percent permanent impairment.

second opinion examiner who would examine him and render an opinion on the permanent impairment of his left lower extremity.

OWCP referred appellant for a second opinion examination to Dr. Michael Einbund, a Board-certified orthopedic surgeon, and requested that he provide an opinion on the permanent impairment of appellant's left lower extremity under the sixth edition of the A.M.A., *Guides*. It determined that it had not been accepted that appellant sustained employment-related a sceptic necrosis of the left talus and it provided Dr. Einbund with a statement of accepted facts reflecting this fact.

In a March 23, 2017 report, Dr. Einbund discussed appellant's factual and medical history, including his 2006 nonwork injury and related surgery. He reported the findings of his physical examination, noting that appellant exhibited no significant pain in his left ankle and that there was no range of motion of the left ankle.[6] Dr. Einbund determined that, under Table 16-2, appellant's left ankle condition fell under class 0 and, therefore, he had no permanent impairment of his left lower extremity under the sixth edition of the A.M.A., *Guides*. He explained that appellant's April 29, 2013 left ankle sprain had not resulted in any permanent residuals and opined that, given his nonwork-related left ankle injury in 2006, appellant would still have the same objective findings even in the absence of his April 29, 2013 left ankle sprain.

OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. It requested that Dr. Katz review the medical evidence of record, including Dr. Einbund's March 23, 2017 report, and provide an opinion regarding the permanent impairment of appellant's left lower extremity under the sixth edition of the A.M.A., *Guides*.

In an April 28, 2017 report, Dr. Katz indicated that he had reviewed Dr. Einbund's March 23, 2017 report. He asserted that, since appellant's December 6, 2013 left ankle fusion surgery was approved by OWCP, the permanent impairment resulting from this surgery should be compensable. Dr. Katz indicated that Dr. Einbund's impairment rating was "not probative." He noted that, if an additional impairment evaluation was desired, an impairment evaluation should be obtained from a Board-certified orthopedic surgeon or physical medicine and rehabilitation physician who is familiar with the sixth edition of the A.M.A., *Guides* and OWCP's procedures. Dr. Katz opined that Dr. Simpson's impairment rating, calculating 13 percent permanent impairment of the left lower extremity, was "accurate and reasonable."

By decision dated May 22, 2017, OWCP determined that appellant had no more than 13 percent permanent impairment of his left lower extremity, for which he previously received a schedule award. It noted that the impairment rating of Dr. Einbund did not show that appellant had greater permanent impairment than the 13 percent previously awarded.

On May 31, 2017 appellant, through counsel, requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing, held on

[6] Dr. Einbund indicated that there was no evidence that appellant had necrosis of the left talus. He also noted that x-ray testing showed solid fusion of the left tibiotalar joint.

November 3, 2017, counsel argued that Dr. Einbund did not properly evaluate appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.

By decision dated December 5, 2017, OWCP's hearing representative affirmed OWCP's May 22, 2017 decision. He indicated that the weight of the medical evidence with respect to the permanent impairment of appellant's left lower extremity continued to rest with the opinion of Dr. Simpson, as detailed in his September 18 and October 21, 2015 reports. The hearing representative discussed Dr. Einbund's March 23, 2017 impairment rating and Dr. Katz' April 28, 2017 report, but he did not discuss their probative value.

LEGAL PRECEDENT

The schedule award provisions of FECA[7] and its implementing regulations[8] 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.[9] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[10]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the ankle, the relevant portion of the leg for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.[11] After the Class of Diagnosis (CDX) is determined from the Foot and Ankle Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE), and grade modifier for Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] Under Chapter 2.3, evaluators are directed to provide reasons for their

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (1999).

[9] *Id*. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017); *id.*, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

[10] *Id.*, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.*, at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[11] *See* A.M.A., *Guides* 501-08 (6th ed. 2009).

[12] *Id.* at 515-22.

impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[13]

ANALYSIS

The Board finds that the case is not in posture for decision.

OWCP accepted that appellant sustained a left ankle sprain on January 11, 2012 and a sprain of the lateral collateral ligament of the left ankle on April 29, 2013. On December 6, 2013 appellant underwent OWCP-approved left ankle fusion surgery.

In May 20, 2015 report, Dr. Seyoum, an attending physician, determined that appellant had a total permanent impairment of his left lower extremity of 24 percent under the sixth edition of the A.M.A., *Guides*. In a September 18, 2015 report, Dr. Simpson, an OWCP medical adviser, determined that appellant had 13 percent permanent impairment of his left lower extremity under the sixth edition of the A.M.A., *Guides*, noting that his left ankle condition was a class 2 condition under Table 16-2 rather than a class 3 condition as determined by Dr. Seyoum.

By decision dated November 19, 2015, OWCP granted appellant a schedule award for 13 percent permanent impairment of his left lower extremity. The award was based on the impairment rating of Dr. Simpson.

By decision dated September 12, 2016, OWCP's hearing representative set aside the November 19, 2015 decision and remanded the case to OWCP for referral of appellant to a new second opinion physician. In January 2017, OWCP referred appellant for a second opinion examination to Dr. Einbund and requested that he provide an opinion on the permanent impairment of appellant's left lower extremity under the sixth edition of the A.M.A., *Guides*.

In a March 23, 2017 report, Dr. Einbund discussed appellant's factual and medical history, including his 2006 nonwork injury and related surgery. He reported the findings of his physical examination, noting that appellant exhibited no significant pain in his left ankle and that there was no range of motion of the left ankle. Dr. Einbund determined that, under Table 16-2, appellant's left ankle condition fell under class 0 and, therefore, he had no permanent impairment of his left lower extremity under the sixth edition of the A.M.A., *Guides*. He explained that appellant's April 29, 2013 left ankle sprain had not resulted in any permanent residuals and opined that, given his nonwork-related left ankle injury in 2006, appellant would still have the same objective findings even in the absence of his April 29, 2013 left ankle sprain.

The Board notes that the evaluation of Dr. Einbund is incomplete as he did not adequately consider all of appellant's accepted conditions in determining whether appellant has permanent impairment of his left lower extremity. In particular, Dr. Einbund did not adequately consider whether appellant had permanent impairment related to his December 6, 2013 left ankle fusion

[13] *Id.* at 23-28.

surgery which was approved by OWCP.[14] OWCP procedures provide that impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function. If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate. There are no provisions for apportionment under FECA. Rated impairment should reflect the total loss as evaluated for the schedule member at the time of the rating examination.[15]

On April 28, 2017 Dr. Katz, an OWCP medical adviser, highlighted the deficiencies of Dr. Einbund's impairment rating. He indicated that he had reviewed Dr. Einbund's March 23, 2017 report and expressed his opinion that Dr. Einbund's impairment rating was "not probative." Dr. Katz explained that, since appellant's December 6, 2013 left ankle fusion surgery was approved by OWCP, any permanent impairment resulting from this surgery should be compensable.

While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[16] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[17] Therefore, in order to address the above-noted concerns, the case shall be remanded to OWCP for further development of the matter of the permanent impairment of appellant's left lower extremity by seeking clarification from the second opinion physician, Dr. Einbund. After carrying out this development, OWCP shall issue a *de novo* decision regarding this matter.

CONCLUSION

The Board finds that the case is not in posture for decision.

[14] Dr. Einbund also did not clearly specify whether appellant had permanent impairment due to the January 11, 2012 employment injury as he only discussed the April 29, 2013 employment injury in the analysis section of his March 23, 2017 report.

[15] *Supra* note 9, Part 2 at Chapter 2.808.5(d) (March 2017).

[16] *Russell F. Polhemus*, 32 ECAB 1066 (1981).

[17] *See Robert F. Hart*, 36 ECAB 186 (1984).

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2017 merit decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further action.

Issued: June 19, 2018
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