United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 17-1907**
	)	**Issued: March 8, 2018**
DEPARTMENT OF THE AIR FORCE, ALTUS AIR FORCE BASE, OK, 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 11, 2017 appellant filed a timely appeal from a June 22, 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 over the merits of the merits of this case.

ISSUE

The issue is whether appellant established more than 70 percent permanent impairment of the left lower extremity, for which he previously received schedule awards.

On appeal appellant asserts that the medical report from his attending physician establishes that he is entitled to 100 percent permanent impairment of his left leg.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 30, 2009 appellant, then a 58-year-old pest controller, filed a traumatic injury claim (Form CA-1) alleging that, on August 29, 2009, he fractured and dislocated bones in his left ankle when he slipped while climbing down from a tractor at work. He stopped work that day. On August 31, 2009 Dr. John Ryan Gallagher, Board-certified in orthopedic surgery and sports medicine, performed open reduction internal fixation of the fibula, left ankle, and percutaneous reduction and fixation of posterior tibial fracture. Appellant was hospitalized from September 4 to 19, 2009 for acute myocardial infarction and acute renal failure. Dr. Gallagher debrided appellant's left ankle wound due to infection on October 8, 2009.

On October 9, 2009 OWCP accepted closed fracture of left tibial with fibula, and closed fracture of the medial malleolus of the left ankle. Appellant received continuation of pay and was placed on the periodic compensation rolls. He was again hospitalized from December 15 to 19, 2009 for possible hepatorenal syndrome. On January 8, 2010 Dr. Gallagher removed hardware in appellant's left ankle due to failed fracture fixation and to osteomyelitis. Appellant was again hospitalized in February 2010 with increased left foot infection. On March 8, 2010 OWCP expanded the acceptance of appellant's claim to include temporary aggravation of acute myocardial infarction and temporary aggravation of renal failure from September 4 to 19, 2009. Appellant underwent extensive wound treatment in 2010 and 2011.

On August 24, 2011 appellant filed a schedule award claim (Form CA-7). By letter dated January 25, 2012, OWCP informed appellant that his claim was not in posture for schedule award benefits as he was receiving FECA wage-loss compensation. It forwarded an election form. On February 20, 2012 appellant underwent coronary artery bypass surgery.

Appellant filed a second schedule award claim (Form CA-7) on April 18, 2012.[2] In support of his schedule award claim, he submitted a November 2, 2011 report in which Dr. Gallagher noted that appellant ambulated with a controlled ankle movement (CAM) walker boot and had no recurrent problems of wounds or failure of hardware. Left ankle examination demonstrated a 15 degree angulated hind foot, a five centimeter left leg length discrepancy, and mild swelling of the left foot and ankle. Dr. Gallagher indicated that appellant had reached maximum medical improvement (MMI). He advised that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[3] under Table 16-2, Foot and Ankle Regional Grid, appellant had a class 4 impairment due to hind foot valgus, for 50 percent left lower extremity impairment.

Dr. Ronald Blum, an OWCP medical adviser who is a Board-certified orthopedic surgeon, subsequently reviewed Dr. Gallagher's report. He agreed that under Table 16-2 appellant had 50 percent permanent impairment of the left lower extremity.

By decision dated May 8, 2012, appellant was granted a schedule award for 50 percent permanent impairment of his left lower extremity.

[2] Appellant elected to receive civil service retirement benefits instead of wage-loss compensation under FECA.

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

In a report dated February 12, 2014, Dr. Gallagher noted that appellant had a longstanding ulcer of the left great toe. Left foot x-ray demonstrated a stable fusion, missing second and third toes, and a clawing deformity of the fourth and fifth toes. He diagnosed status post left tibiotalocalcaneal fusion and nonhealing wound of the left great toe. Dr. Gallagher recommended a left below-knee amputation for osteomyelitis of left great and third toe and acquired limb length discrepancy. An authorized left knee below-knee amputation was performed by Dr. Gallagher on February 28, 2014.

By report dated August 4, 2014, Dr. Gallagher noted that appellant's below-knee amputation surgical incision was well healed. He advised that appellant was at MMI and now had class 4 impairment with a 60 percent default value. Dr. Gallagher modified the impairment to class E, noting that appellant had modifiers of 4 for functional history, clinical studies, and physical examination. He concluded that appellant had 100 percent left leg impairment.

Appellant again filed a schedule award claim (Form CA-7) on January 14, 2015. On January 27, 2015 Dr. Michael M. Katz, an OWCP medical adviser who is Board-certified in orthopedic surgery, reviewed Dr. Gallagher's report. He noted that Dr. Gallagher did not reference a specific table in the sixth edition of the A.M.A., *Guides*. OWCP's medical adviser evaluated appellant's left lower extremity impairment under Table 16-16, and advised that under this table a rating of 100 percent impairment could only be awarded for a hip disarticulation or proximal above-knee amputation. He found that, based on Dr. Gallagher's physical findings, an amputation diagnosis with a greater than three inch stump, yielded class 4 impairment with a default value of 70 percent. Dr. Katz applied modifiers of 4 for functional history, clinical studies, and physical examination to the net adjustment formula which yielded a net adjustment of zero. OWCP's medical adviser concluded that appellant had a total of 70 percent permanent impairment of his left lower extremity and noted that, as appellant had previously received a schedule award for 50 percent impairment, he was entitled to only an award for an additional 20 percent.

By decision dated February 19, 2015, appellant was granted a schedule award for an additional 20 percent left leg permanent impairment. The award was for 57.6 weeks, to run from February 8, 2015 to March 17, 2016. Appellant requested reconsideration on May 19, 2015. He submitted an April 28, 2015 report in which Dr. Gallagher described appellant's surgical history. Dr. Gallagher noted that, following the below-knee amputation, appellant developed an ulcer that required subsequent surgical revision.[4] He reiterated his conclusion that appellant was 100 percent impaired. Dr. Gallagher maintained that factors that justified this rating included that appellant had been unable to work for 5-1/2 years, he was unable to drive a vehicle with a standard shift, he continued to struggle with wound-healing problems, and his prolonged healing led to deconditioning.

By decision dated August 13, 2015, OWCP denied modification of its prior decision because appellant had not submitted a rationalized medical evaluation in conformance with the sixth edition of the A.M.A., *Guides*.

[4] A copy of the operative report dated January 27, 2015 was submitted to OWCP on March 7, 2016.

On October 5, 2015 appellant requested reconsideration. He submitted no additional relevant evidence or argument.[5] By decision dated December 8, 2015, OWCP denied his request for reconsideration of the merits of his claim.

Appellant next filed a schedule award claim (Form CA-7) on July 1, 2016. He submitted a May 9, 2016 report in which Dr. Gallagher continued to advise that appellant had 100 percent impairment of the left lower extremity. Dr. Gallagher concluded that appellant continued to be entitled to an additional 30 percent award.

On July 22, 2016 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the record including Dr. Gallagher's reports. He agreed with Dr. Katz's analysis that, in accordance with the amputation table found on page 542 of the A.M.A., *Guides*, appellant had 70 percent permanent impairment, not 100 percent which would require a hip disarticulation or above-knee proximal level of amputation.

On December 14 and 30, 2016 and January 18, 2017 appellant had left lower extremity amputation stump drainage, revision, and debridement procedures. Additional medical evidence submitted includes records of these hospitalizations. Dr. Gallagher submitted work capacity evaluations (OWCP-5c) dated January 10 to May 15, 2017 in which he advised that appellant was totally disabled. He also submitted a January 11, 2016 treatment note in which he noted a draining sore on appellant's below-knee amputation stump. On May 10, 2017 Dr. Gallagher advised that appellant would need a new socket for proper fit and function of a new left leg prosthesis.

In an April 1, 2017 report, Dr. Berman reiterated his conclusion that appellant was entitled to 70 percent left lower extremity permanent impairment. He noted that, as appellant had previously received a schedule award totaling 70 percent, he was not entitled to an additional award.

By decision dated May 25, 2017 OWCP denied modification of its prior schedule award decisions. OWCP found the medical evidence of record did not establish that appellant was entitled to a permanent impairment of the left lower extremity greater than the total 70 percent previously awarded. Because the May 25, 2017 decision contained an incorrect history of injury, OWCP issued a corrected decision on June 22, 2017.

LEGAL PRECEDENT

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of any employment injury.[6]

[5] The only evidence submitted was an emergency department report dated January 25, 2015 and treatment notes from Dr. Gallagher dated January 5 to May 13, 2015 regarding appellant's stump condition and surgical revision. None of the reports discussed an impairment rating.

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

The schedule award provision of FECA[7] and its implementing federal 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. The statute provides that, if a leg is amputated above the ankle, "compensation is the same as for the loss of the … leg…."[9] Fr 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.[10] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[11]

ANALYSIS

OWCP accepted a closed fracture of the left tibia with fibula, and closed fracture of the medial malleolus of the left ankle.[12] On May 8, 2012 appellant was granted a schedule award for 50 percent impairment of the left lower extremity. A left below-knee amputation was performed on February 28, 2014. Appellant again filed a schedule award claim, and, by decision dated February 19, 2015, he was granted an additional 20 percent impairment, for a total 70 percent permanent impairment of the left lower extremity. He thereafter requested reconsideration on two occasions and again filed a schedule award on July 1, 2016. By decisions dated August 13, 2015 and June 22, 2017, OWCP denied modification of its prior decision.

The Board finds that appellant is entitled to a schedule award for 100 percent permanent impairment of the left leg. Section 8107(c)(16) of FECA provides that, if an arm or leg is amputated above the wrist or ankle, compensation is the same as for loss of the arm or leg, respectively.[13] Appellant underwent an amputation of his left leg below the knee that was causally related to his employment. Therefore, as the statute supersedes the A.M.A., *Guides*, he is entitled to impairment equal to that of the loss of a leg.[14] OWCP's June 22, 2017 decision, consequently, is reversed and the case remanded for an award to appellant of an additional 30 percent permanent impairment of the left leg due to his leg amputation above the ankle.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] 5 U.S.C. § 8107(c)(16); *Chris J. Stasinopoulos*, Docket No. 05-0074 (issued June 23, 2005).

[10] *Supra* note 8 at § 10.404(a).

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

[12] OWCP additionally accepted temporary aggravation of acute myocardial infarction and temporary aggravation of renal failure from September 4 to 19, 2009.

[13] 5 U.S.C. § 8106(c)(16).

[14] *Id.; T.S.*, Docket No. 13-0281 (issued March 22, 2013).

CONCLUSION

The Board finds that appellant is entitled to a schedule award for 100 percent permanent impairment of the left lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 8, 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