United States Department of Labor
Employees' Compensation Appeals Board

D.V., Appellant	)	
and	)	**Docket No. 19-0499**
	)	**Issued: August 15, 2019**
DEPARTMENT OF JUSTICE, U.S. MARSHALS SERVICE, Cleveland, OH, 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 January 8, 2019 appellant filed a timely appeal from a December 18, 2018 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 this case.

ISSUE

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

FACTUAL HISTORY

On April 18, 2013 appellant, then a 39-year-old Deputy U.S. Marshal, filed a notice of traumatic injury (Form CA-1) alleging that on April 15, 2013 he ruptured his right Achilles tendon while playing basketball, as part of an approved physical fitness regimen, while in the performance

[1] 5 U.S.C. § 8101 *et seq.*

of duty. OWCP accepted the claim for a ruptured right Achilles tendon. On April 17, 2013 appellant underwent an approved surgical repair of the accepted condition. He returned to full-time limited-duty work on June 3, 2013, and full-time full-duty work on July 29, 2013.

On May 25, 2018 appellant filed a claim for a schedule award (Form CA-7).

On June 4, 2018 OWCP referred appellant to Dr. Kimberly Togliatti-Trickett, Board-certified in physical medicine and rehabilitation, for a second opinion evaluation pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2]

In a July 20, 2018 report, Dr. Togliatti-Trickett noted appellant's medical and surgical history, reported her findings upon physical examination, and provided an impairment rating. She explained that appellant's permanent impairment rating was based on the diagnosis of a ruptured right Achilles tendon and surgical repair. Dr. Togliatti-Trickett found decreased girth measurement of the right calf compared to the left calf and decreased speed, strength, and mobility of approximately 10 percent. Utilizing the diagnosis-based impairment (DBI) methodology she referred to Table 16-2 on page 502 of the A.M.A., *Guides*[3] and determined that appellant had one percent permanent impairment of his right lower extremity. Dr. Togliatti-Trickett referred to Table 16-10 on page 530 and noted that this corresponded to one percent whole person impairment. She advised that appellant reached maximum medical improvement (MMI) on July 29, 2013.

On August 8, 2018 OWCP forwarded Dr. Togliatti-Trickett's July 20, 2018 report to Dr. Kevin Kuhn, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA).

In an August 16, 2018 report, the DMA explained that appellant had two percent permanent impairment, pursuant to the DBI method set forth at A.M.A., *Guides*, Table 16-2 on page 501, based upon his diagnosis of ruptured Achilles tendon. He noted that Dr. Togliatti-Trickett had not provided three range of motion (ROM) measurements.

On August 21, 2018 OWCP requested an addendum from Dr. Togliatti-Trickett which provided separate calculations using the ROM and DBI methodologies.

In a September 20, 2018 addendum, Dr. Togliatti-Trickett increased her DBI computation from one percent to five percent. For ROM she indicated that appellant had a right lower extremity impairment rating of seven percent. Dr. Togliatti-Trickett did not provide measurements or explain how she arrived at her calculations, other than to refer to Figure 16-12 on page 534 of the A.M.A., *Guides*.

On October 1, 2018 OWCP provided Dr. Togliatti-Trickett's addendum reports to the DMA. In an October 9, 2018 response, he explained that Dr. Togliatti-Trickett had not provided sufficient information to support the increase in the DBI impairment rating to five percent. The DMA referred to the A.M.A., *Guides* and indicated that the DBI rating of appellant's right lower

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

[3] *Id*.

extremity was two percent. He explained that he did not agree with Dr. Togliatti-Trickett's findings because the clinical documentation provided did not support a default percentage of 5 percent, as her notes reported 10 percent decrease in strength and objective ROM compared to the contralateral side, and the default should be 2 percent pursuant to Table 16-2 on page 501. The DMA further noted that Dr. Togliatti-Trickett's clinical notes included three sets of measurements for ROM and referred to the A.M.A., *Guides* at Table 16-2 on page 501, Table 16-22 on page 549, Table 16-25 on page 550, and Table 16-17 on page 545. He explained that the ROM method also resulted in a finding of two percent right lower extremity permanent impairment.

In an October 16, 2018 report, Dr. Matthew E. Levy, a Board-certified orthopedic surgeon, determined that appellant had 13 percent permanent impairment of the right lower extremity. He referred to Table 16-5 on page 515 of the A.M.A., *Guides* and noted that appellant's Achilles' tendon injury "results in a class 1 problem" based on the foot and ankle regional grid. Dr. Levy explained that functional history resulted in a grade 1 modifier (GMFH) based on gait derangement. He found 4.5 centimeters of calf atrophy and indicated that appellant had a grade IV physical examination modifier (GMPE) based on calf atrophy. Dr. Levy indicated that the modifier based on clinical studies (GMCS) was not available due to an absence of imaging. He explained that "the grade of lower extremity impairment is moved two spots to the right resulting in 13 [percent] lower extremity impairment." Dr. Levy referred to Table 16.1 on page 495 and explained that this resulted in five percent whole person impairment.

On November 16, 2018 OWCP referred Dr. Levy's October 16, 2018 report to the DMA and requested that he update the permanent impairment rating for appellant's right lower extremity based upon the physical examination findings of Dr. Levy.

In a November 21, 2018 report, the DMA noted that he reviewed the new report from Dr. Levy and that he disagreed with his impairment rating. He utilized the A.M.A., *Guides* and explained that appellant had a normal gait, 4.5 centimeters of atrophy, and clinical studies conforming a mild pathology. The DMA also noted that appellant's motion deficits had improved and therefore based on Table 16-22 on page 549 of the A.M.A., *Guides* would be rated as mild. He utilized the DBI method and explained that the default rating would be five percent based on Table 16-2 on page 501. The DMA also noted that for an Achilles tendon rupture,[4] appellant had a class 1 impairment for a mild ROM finding and a default impairment rating of five percent. He referred to Table 16-6 on page 516 and explained that appellant had a GMFH of 0 as there was no gait derangement. The DMA referred to Table 16-7 on page 517 and explained that for severe atrophy appellant had a GMPE of a grade 4. He referred to Table 16-8 on page 519 and found that appellant had a GMCS of grade 1. The DMA utilized the net adjustment formula and determined

[4] While the DMA indicated left Achilles tendon rupture, this appears to be a typographical error, as he indicates the claim is accepted for a right Achilles tendon rupture in the initial paragraph of his report.

that it yielded an adjustment of 1 (for a grade E). He found that this resulted in seven percent right lower extremity impairment. The DMA determined that appellant reached MMI on July 20, 2018.

On December 18, 2018 OWCP granted appellant a schedule award for seven percent permanent impairment of the right lower extremity. The award covered a period of 20.16 weeks from July 20 to December 8, 2018.

LEGAL PRECEDENT

The schedule award provisions of FECA,[5] and its implementing federal regulation,[6] 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a 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,* published in 2009.[7] 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.[8]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).[9] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by GMFH, GMPE, and GMCS.[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[12]

---

[5] *See supra* note 1.

[6] 20 C.F.R. § 10.404.

[7] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[8] *See J.G.,* Docket No. 19-0369 (issued June 11, 2019); *P.R.,* Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera,* 12 ECAB 348 (1961).

[9] A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[10] *Id.* at 494-531.

[11] *Id.* at 521.

[12] *R.R.,* Docket No. 17-1947 (issued December 19, 2018); *R.V.,* Docket No. 10-1827 (issued April 1, 2011).

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[13]

ANALYSIS

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

OWCP referred appellant for a second opinion evaluation with Dr. Togliatti-Trickett. In reports dated July 20 and September 20, 2018, Dr. Togliatti-Trickett found that appellant had five percent permanent impairment of the right lower extremity. These reports do not support a finding of more than seven percent permanent impairment of the right lower extremity. While Dr. Togliatti-Trickett also related that appellant had one percent whole person impairment, a whole person impairment rating is of no probative value as a whole person permanent impairment rating is not permitted under FECA.[14]

In support of his claim, appellant submitted an October 16, 2018 report from Dr. Levy, who determined that appellant had 13 percent permanent impairment of the right lower extremity. Dr. Levy referred to Table 16-5 on page 515 of the A.M.A.*, Guides,* and determined that appellant had a "class 1 problem" based on the foot and ankle regional grid. He selected a GMPE of 1 based on gait derangement. However, the basis for this grade modifier is unclear as Dr. Levy indicated that appellant "is a healthy fit appearing gentleman with a normal gait pattern." He indicated that the GMCS was not available due to an absence of imaging. Medical evidence of record however indicated that clinical studies revealed mild pathology. As Dr. Levy's report was not based on accurate medical findings, his report was insufficient to establish appellant's permanent impairment of the right lower extremity.[15] While Dr. Levy also provided a whole person permanent impairment, as previously explained, a whole person permanent impairment rating is not permitted under FECA.[16]

Thereafter OWCP pursuant to its procedures routed the medical reports of record to the DMA, Dr. Kuhn for evaluation of appellant's right lower extremity permanent impairment.[17]

In a November 21, 2018 report, the DMA properly applied the A.M.A., *Guides* to Dr. Levy's findings. He explained that gait derangement could not be utilized as a modifier, as appellant's gait was normal. The DMA noted that the clinical studies of record confirmed a mild pathology, however appellant's range of motion deficits had improved compared to previous

---

[13] *See supra* note 7 at Chapter 2.808.6(f) (March 2017). *See J.J.,* Docket 18-1615 (issued March 5, 2019).

[14] *E.R.,* Docket No. 18-1646 (issued May 17, 2019); *Marilyn S. Freeland,* 57 ECAB 607 (2006).

[15] *F.T.,* Docket No. 16-1236 (issued March 12, 2018).

[16] *Supra* note 14.

[17] *Supra* note 13.

documented examinations. He utilized the net adjustment formula and determined that appellant had a seven percent right lower extremity impairment. The Board finds that the DMA accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions about appellant's condition which comported with his findings, and with the appropriate tables of the A.M.A., *Guides*.[18] His report therefore carries the weight that appellant has seven percent permanent impairment of the right lower extremity and constitutes the weight of the medical evidence.[19]

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 more than seven percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2019
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

[18] *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

[19] *F.T., supra* note 15.