United States Department of Labor
Employees' Compensation Appeals Board

K.J., Appellant	)	
and	)	**Docket No. 19-0901**
	)	**Issued: December 6, 2019**
U.S. POSTAL SERVICE, CHICAGO INTERNATIONAL SERVICE CENTER, 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
JANICE B. ASKIN, Judge

JURISDICTION

On March 26, 2019 appellant filed a timely appeal from an October 17, 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.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the October 17, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

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

FACTUAL HISTORY

On October 14, 2017 appellant, then a 45-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on October 11, 2017 a bulk mail center (BMC) loader (forklift) struck his left toe while in the performance of duty. He stopped work on October 14, 2017. On November 8, 2017 appellant underwent an open reduction internal fixation left hallux fracture, which was performed by Dr. Jonathan L. Hook, a podiatrist specializing in orthopedic surgery. OWCP accepted the claim for commuted, displaced, closed fracture of left hallux. OWCP paid appellant wage-loss compensation on the supplemental rolls from November 28, 2017 through January 14, 2018.

On January 28, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated January 30, 2018, OWCP noted that the medical evidence of record did not indicate that appellant's condition had reached maximum medical improvement (MMI). It informed him of the requirements necessary to establish a schedule award and requested that he submit a permanent impairment evaluation from his attending physician in accordance with the sixth edition of American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] when his condition reached MMI.

In a February 9, 2018 report, Dr. Hook indicated that appellant still had some residual stiffness, but minimal pain. He related that appellant had returned to work, but had difficulty utilizing heavy standing machinery. Dr. Hook described appellant's physical examination findings which included moderate edema at the left hallux, and limited range of motion at the hallux interphalangeal joint.

On February 23, 2018 appellant informed OWCP that Dr. Hook was unwilling to provide a permanent impairment rating.

OWCP subsequently referred appellant to Dr. James Elmes, a Board-certified orthopedic surgeon, for a second opinion permanent impairment evaluation. In a May 10, 2018 report, Dr. Elmes reviewed a Statement of Accepted Facts (SOAF) and the medical record. Appellant's physical examination demonstrated diminished sensation of the left great toe interphalangeal joint (IP) with normal metacarpophalangeal (MP) joint motion with normal gait mechanics. Dr. Elmes opined that appellant reached MMI on February 9, 2018, when Dr. Hook last evaluated him. Under Table 16-2, Foot and Ankle Regional Grid, of the A.M.A, *Guides*,[4] he opined that appellant had five percent left lower extremity impairment based on the diagnosed-based impairment (DBI)

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

[4] *Id.* at 505.

method. For the diagnosis of fractured phalanx, he opined that appellant had a class of diagnosis (CDX) of 1 with default lower extremity impairment value of five percent. Dr. Elmes assigned a functional history grade modifier (GMFH) of 1 under Table 16-6 as appellant reported discomfort following long periods of walking, long-standing, squatting, and stairs, but was doing his normal work activity satisfactory. He assigned a physical examination grade modifier (GMPE) of 1 under Table 16-7 as there was mild-to-moderate decreased range of motion with 10 degrees active flexion and 40 degrees active IP flexion on the right. Dr. Elmes found clinical studies grade modifier (GMCS) not applicable as x-rays were used to establish the diagnosis. Utilizing the net adjustment formula, Dr. Elmes found 0 net adjustment, which provided a final lower extremity impairment value of five percent. He indicated that the A.M.A, *Guides* did not allow for an alternative range of motion (ROM) impairment rating as the diagnosis in the particular regional grid was not followed by an asterisk.

On June 5, 2018 OWCP routed a SOAF and Dr. Elmes' report to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a District Medical Adviser (DMA). In a June 7, 2018 report, the DMA concurred with Dr. Elmes' DBI impairment calculations that appellant had five percent left lower extremity impairment for fracture of the left hallux (great toe) proximal phalanx under Table 16-2. He also agreed that impairment could not be calculated by the ROM method as there was no asterisk next to the diagnosis under Table 16-2. The DMA, however, opined that appellant reached MMI on May 10, 2018, when Dr. Elmes conducted his permanent impairment evaluation. He noted that the case file did not contain medical records that documented MMI on February 9, 2018 or any time prior to Dr. Elmes' May 10, 2018 impairment evaluation.

On July 10, 2018 OWCP requested that Dr. Elmes clarify his impairment rating for the left lower extremity as it appeared to be based only on appellant's left great toe. In a September 2, 2018 addendum, Dr. Elmes explained that Table 16-2 did not provide an option for an impairment rating of the toe alone.

By decision dated October 17, 2018, OWCP granted appellant a schedule award for five percent permanent impairment of the left lower extremity, finding that the weight of the medical evidence rested with the DMA, who correctly applied the A.M.A., *Guides* to Dr. Elmes' May 10, 2018 examination findings. The date of MMI was found to be May 10, 2018. The award covered a period of 14.4 weeks from May 10 through August 18, 2018.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations 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.[5] 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. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate

[5] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

standard for evaluating schedule losses.[6] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (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]

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 toe, the relevant portion of the foot for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.[9] After the 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 GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[10] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[11]

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 permanent impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[12]

ANALYSIS

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

As appellant was unable to obtain an impairment rating from his treating physician, Dr. Hook, OWCP referred appellant to Dr. Elmes for a second opinion permanent impairment evaluation. In his May 10, 2018 report, Dr. Elmes calculated five percent permanent impairment of the left lower extremity for appellant's accepted left big toe condition based on DBI methodology using the formulas set forth above. He indicated that ROM impairment methodology was not an option under the A.M.A., *Guides*, as Table 16-2 did not allow the ROM methodology

[6] 20 C.F.R. § 10.404; *S.J.*, Docket No. 19-0623 (issued October 28, 2019); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[8] *See G.S.*, Docket No. 19-0277 (issued August 22, 2019).

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

[10] *Id.* at 515-22

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

[12] *See supra* note 7 at Chapter 2.808.6(e) (March 2017).

be used as an alternative rating method.[13] Dr. Elmes provided clinical findings and explained how those objective elements warranted the percentage assessed. He further explained, in a September 2, 2018 addendum, that the A.M.A., *Guides* did not provide an option for impairment rating of the toe alone, but rather was ratable under Table 16-2, the Foot and Ankle Regional Grid.[14]

OWCP's DMA, Dr. Harris, concurred with Dr. Elmes' five percent left lower extremity permanent impairment rating and methodology, noting that the ROM impairment methodology was not an option in this case. He differed on the date MMI was reached finding instead that it occurred on May 10, 2018, the date of Dr. Elmes' impairment evaluation.

The Board finds that OWCP properly found that the impairment ratings by the DMA constituted the weight of the medical evidence.[15] Dr. Elmes' opinion was based on an accurate SOAF and the complete medical record. He provided a thorough impairment rating, utilizing the appropriate portions of the A.M.A., *Guides*. Dr. Elmes' described how the objective clinical findings and physical examination warranted the specified percentage of impairment. As noted, the DMA concurred with Dr. Elmes' five percent left lower extremity permanent impairment rating and methodology. There is no probative medical evidence of record demonstrating greater impairment than that previously awarded.[16]

The Board further finds that the DMA properly assigned the date of MMI. A schedule award is appropriate where the physical condition of an injured member has stabilized, despite the possibility of an eventual change in the degree of functional impairment in the member.[17] It is well established that the period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the employment injury. The Board has defined MMI as meaning that the physical condition of the injured member of the body has stabilized and will not improve further. The question of when MMI has been reached is a factual one that depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.[18] The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.[19] While Dr. Elmes' had noted February 9, 2018 to be the date of MMI, the DMA properly found, based on the medical record, that the date of MMI was May 10, 2018, the date of Dr. Elmes' evaluation.

[13] *See* A.M.A., *Guides* 543; *see also A.R.*, Docket No. 19-0250 (issued May 6, 2019).

[14] *J.M.*, Docket No. 13-0299 (issued May 8, 2013).

[15] *J.H.*, Docket No. 18-1207 (issued June 20, 2019).

[16] *See J.M.*, Docket No. 18-1334 (issued March 7, 2019).

[17] *See T.C.*, Docket No. 17-1906 (issued May 25, 2018).

[18] *C.R.*, Docket No. 17-1872 (issued March 8, 2018); *Peter C. Belkind*, 56 ECAB 580 (2005); *Marie J. Born*, 27 ECAB 623 (1976).

[19] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (January 2010).

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 five percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board