United States Department of Labor
Employees' Compensation Appeals Board

M.I., Appellant	)	
and	)	**Docket No. 19-0287**
	)	**Issued: July 22, 2019**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Chicago, IL, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 20, 2018 appellant, through counsel, filed a timely appeal from a September 21, 2018 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 her burden of proof to establish more than six percent permanent impairment of the right lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On February 19, 2007 appellant, then a 39-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that on February 18, 2007 she sustained a right ankle sprain when her right foot slipped on salt and twisted over the edge of a handicapped ramp while in the performance of duty. She stopped work on February 22, 2007, returned to a modified work on January 15, 2008, and full-duty work on April 21, 2008. OWCP accepted the claim for closed right lateral malleolus ankle fracture and authorized right ankle tendon repair and ligament reconstruction, which occurred on November 20, 2007.

On October 29, 2011 appellant filed a claim for a schedule award (Form CA-7).

In support of her claim, appellant submitted a September 30, 2011 report from Dr. William N. Grant, a Board-certified internist, who diagnosed right lateral malleolus fracture, right ankle sprain, right ankle joint derangement, and right ankle ankylosis. Dr. Grant referenced the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] and provided examination findings. Using a diagnosis-based impairment (DBI) method, he determined that appellant had 60 percent right lower extremity permanent impairment.

On August 27, 2012 Dr. David H. Garelick, a district medical adviser (DMA) and Board-certified orthopedic surgeon, reviewed Dr. Grant's impairment rating. Using the A.M.A., *Guides*, Foot and Ankle Regional Grid,[4] he determined that appellant was not entitled to a schedule award due to the lack of any objective x-ray interpretations of record showing opening or widening varus stress.

By decision dated February 27, 2013, OWCP denied appellant's claim for a schedule award finding that she had not established a permanent impairment of a scheduled member.

On March 5, 2013 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on June 17, 2013.

In report dated June 6, 2013, Dr. Neil Allen, a Board-certified internist and neurologist, noted diagnoses of right lateral malleolus fracture, right joint derangement, right ankle and foot joint ankylosis, and right ankle sprain. He provided findings on physical examination and noted moderate right ankle tenderness, lacking plantar flexion in gait cycle, toes remained in dorsiflexion through gait cycle, and decreased muscle strength. Dr. Allen also noted range of motion findings.

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

[4] *Id.* at 502, Table 16-2.

Using the sixth edition of the A.M.A., *Guides*, he determined that appellant had 13 percent permanent impairment of the right lower extremity. Using Table 16-2 on page 503, Dr. Allen assigned class 1 for DBI, which yielded a default value of 10 percent. He assigned a grade modifier of 1 for functional history (GMFH) using Table 15-7 on page 406, a grade modifier of 2 for physical examination (GMPE) using Table 15-8 on page 408, and a grade modifier of 2 for clinical studies (GMCS) using Table 17-9 on page 581. Applying the net adjustment formula on page 521, Dr. Allen found that appellant had 13 percent permanent impairment of the right lower extremity.

By decision dated August 6, 2013, OWCP's hearing representative vacated the February 27, 2013 decision denying appellant's claim for a schedule award and remanded the case for further development of the record.

In a November 18, 2013 report, Dr. Christopher Gross, a Board-certified orthopedic surgeon, acting as OWCP's district medical adviser (DMA), opined that appellant's February 18, 2007 employment injury caused an ankle sprain and not an ankle fracture. He explained that Dr. Allen based his impairment rating on an ankle fracture, therefore his diagnosis could not be used for an impairment rating. Dr. Gross reviewed and concurred with Dr. Garelick's August 27, 2012 report finding no permanent impairment of appellant's right lower extremity.

By decision dated December 5, 2013, OWCP denied appellant's schedule award claim, finding that the medical evidence did not establish permanent impairment to a scheduled member resulting from the accepted employment injury.

On December 31, 2013 appellant, through counsel, requested a telephonic hearing, which was held before a representative of OWCP's Branch of Hearings and Review on July 10, 2014.

By decision dated October 4, 2014, OWCP's hearing representative vacated the December 5, 2013 decision denying a schedule award and remanded the case for further development of the record.

In a March 11, 2015 statement of accepted facts (SOAF), OWCP amended the accepted conditions to include severe right ankle sprain, right ankle peroneal tenosynovitis, and partial peroneus brevis tendon tear.

Dr. Garelick, in a March 16, 2015 report, reviewed the medical evidence of record and the updated March 11, 2015 SOAF. He disagreed with Dr. Allen's impairment rating as Dr. Allen based the impairment rating on a questionable fracture rather than residual ankle instability. Dr. Garelick concluded that appellant had zero percent right lower extremity permanent impairment using the sixth edition of the A.M.A., *Guides*.

OWCP, in a March 30, 2015 decision, explained that it had erroneously accepted appellant's claim for closed right lateral malleolus ankle fracture. It advised that her accepted conditions were severe right ankle sprain, right foot/ankle peroneal tenosynovitis, and right partial peroneal brevis tendon tear.

By decision dated March 30, 2015, OWCP denied appellant's schedule award claim.

On April 29, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on November 18, 2015.

On January 19, 2016 OWCP received a February 18, 2007 x-ray interpreted by Dr. Beverlee Brisbin, an orthopedic surgeon, who reported that the "x-ray today shows her fracture to be healing."

By decision dated February 2, 2016, OWCP's hearing representative vacated the March 30, 2015 decision denying appellant's schedule award claim and remanded for further development of the record.

In a February 21, 2016 addendum, Dr. Garelick reviewed a February 18, 2016 SOAF and appellant's February 18, 2007 right ankle x-ray. He again concluded that appellant had zero percent right lower extremity permanent impairment noting that February 18, 2007 x-ray found no fracture and the June 13, 2007 MRI scan described no finding supportive of a healing fracture.

By decision dated March 2, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish permanent impairment warranting a schedule award.

On March 11, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on November 9, 2016.

By decision dated January 15, 2017, OWCP's hearing representative vacated the March 2, 2016 decision which denied appellant's schedule award claim and remanded the case for additional development of the medical evidence regarding the correct accepted conditions and entitlement to a schedule award.

On remand OWCP prepared an updated SOAF dated February 2, 2017 listing the amended accepted conditions. Subsequently, on February 8, 2017 OWCP referred appellant to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a March 3, 2017 report, Dr. Brecher, examined appellant and reviewed the February 2, 2017 SOAF and medical record. He found no evidence of a right lateral malleolus fracture based on review of x-ray interpretations and MRI scans. Dr. Brecher found no permanent impairment due to the right ankle sprain based on the lack of diagnostic testing showing instability and he explained that appellant's physical examination showed no instability. He determined that the diagnoses of right ankle sprain and peroneal tendon injury were supported by his examination and appellant's medical records. Using Table 16-2, page 502 of the sixth edition of the A.M.A., *Guides*, Dr. Brecher found no permanent impairment. He concurred with Dr. Garelick's opinion that appellant had no permanent impairment of her right lower extremity.

By decision dated March 22, 2017, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish permanent impairment of his right lower extremity warranting a schedule award.

On March 30, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on October 16, 2017.

In a November 7, 2017 report, Dr. Allen diagnosed right lateral malleolus fracture, right ankle sprain, right ankle and foot joint ankylosis, and right joint derangement. He reviewed medical reports and diagnostic tests. Dr. Allen provided three separate range of motion (ROM) measurement for appellant's right ankle. Based on appellant's ROM measurements, he calculated seven percent loss of dorsiflexion, zero percent loss of plantar flexion, zero percent loss of eversion, and two percent loss of inversion using Table 16-20 and Table 16-22 on page 549 of the A.M.A., *Guides.* Dr. Allen opined that the ROM impairment resulted in nine percent right lower extremity permanent impairment. He applied a grade modifier of 1 for range of motion using Table 16-17[5] on page 545, and a grade modifier of 3 for functional history[6] using Table 16-6 on page 516. Dr. Allen explained that he used the ROM method instead of the DBI method as the ROM method reflected a more accurate impairment.

By decision dated December 28, 2017, OWCP's hearing representative vacated the March 22, 2017 decision denying a schedule award and remanded the case for referral of Dr. Allen's November 7, 2017 report to a DMA for review.

In a report dated January 26, 2018, Dr. Arthur S. Harris, a DMA and Board-certified orthopedic surgeon, concluded that appellant had six percent permanent impairment of the right lower extremity. He explained that the A.M.A., *Guides* did not allow a ROM impairment rating for the accepted ankle diagnosis. Using Table 16-2 on page 501, Dr. Harris assigned class 1 for residual problems post peroneus brevis tendon repair with documented mild motion deficits. Next he assigned a GMFH of 3 for functional history based on subjective complaints and AAOS lower limb questionnaire score, a GMPE of 1 for physical examination findings of mild motion deficits, and a GMCS of 1 for clinical studies resulting in a net adjustment of 2, which equaled a class E and six percent right lower extremity permanent impairment.

By decision dated March 9, 2018, OWCP granted appellant a schedule award for six percent permanent impairment of the right lower extremity.

On March 27, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 30, 2018. By decision dated September 21, 2018, OWCP's hearing representative affirmed the March 9, 2018 schedule award decision.

LEGAL PRECEDENT

The schedule award provisions 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For

[5] *Id.* at 545, Table 16-17.

[6] *Id.* at 516, Table 16-6.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

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.[9] For decisions issued after May 1, 2009, the sixth edition will be used.[10]

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class of diagnosis (CDX) condition, which is then adjusted by GMFH, GMPE, and GMCS.[11] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[12]

With respect to a foot or ankle impairment, the A.M.A., *Guides* provides a regional grid at Table 16-2.[13] The CDX is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for functional history (GMFH) Table 16-6, physical examination (GMPE) Table 16-7, and clinical studies (GMCS) Table 16-8. The adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[14]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.[15]

ANALYSIS

The Board finds that appellant has established seven percent permanent impairment of the right lower extremity.

OWCP rescinded acceptance of appellant's right ankle fracture diagnosis as it found it was not supported by the medical evidence. It therefore found that the accepted conditions were right ankle sprain, right ankle and foot joint derangement, right ankle and foot ankylosis, right nontraumatic tendon rupture, and right ankle and foot tenosynovitis. It is well established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, employment-related and preexisting impairments of

[9] *Id*. at § 10.404(a).

[10] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017).

[11] A.M.A., *Guides* 494-531; *see D.S.*, Docket No. 17-0419 (issued August 8, 2018).

[12] *Id.* at 521.

[13] *Id.* at 501.

[14] The net adjustment is up to +2 (grade E). .

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017); *see B.B.*, Docket No. 18-0782 (issued January 11, 2019).

the body are to be included.[16] As Dr. Grant's September 30, 2011 permanent impairment rating, as well as Dr. Allen's June 6, 2013 rating, were based upon the rescinded diagnosis, these reports were of no probative medical value.

In support of his claim, appellant submitted a November 7, 2017 report from Dr. Allen who opined that appellant had 13 percent right lower extremity permanent impairment using the ROM method for rating permanent impairment. However, Dr. Allen did not provide rationale, supported by the A.M.A., *Guides*, to establish that the ROM method should be used to rate permanent impairment of the ankle. Thus, the Board finds Dr. Allen's report was not based upon a correct application of the A.M.A., *Guides*.[17]

Dr. Harris, the DMA, explained why the ROM method could not be used to evaluate appellant's right ankle condition of post peroneus brevis tendon repair with documented mild motion deficits. He referred to the appropriate table and sections under the A.M.A., *Guides*. Dr. Harris assigned a grade modifier of 3 for functional history, a grade modifier of 1 for physical examination findings, and a grade modifier of 1 for clinical studies resulting in a net adjustment of 2, which he reported equaled a class E and six percent right lower extremity permanent impairment. The Board finds however that the default class C rating for residual problems post peroneus brevis tendon repair with documented mild motion deficits is five percent and the class E rating, after the net adjustment of two, results in a default impairment of seven percent not six percent.

The Board accordingly finds that, based on the probative medical evidence of record, appellant has seven percent permanent impairment of the right lower extremity pursuant to the A.M.A., *Guides*. On return of the case record, OWCP shall issue a schedule award for an additional one percent permanent impairment.[18]

CONCLUSION

The Board finds that appellant has established seven percent permanent impairment of his right lower extremity under the A.M.A., *Guides*.

[16] *See generally J.J.*, Docket No. 18-1615 (issued March 5, 2019); *id.* at Chapter 3.700.3(a)(3) (January 2010). *See also Raymond E. Gwynn*, 35 ECAB 247, 253 (1983).

[17] *Supra* note 3 at 497 to 500.

[18] When the evidence establishes the percentage of permanent impairment, the Board will modify OWCP decision and have OWCP issue a schedule award on return of the case record. *See A.G.*, Docket No. 17-0710 (issued July 17, 2017); *R.K.*, Docket No. 11-0359 (issued November 21, 2011).

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: July 22, 2019
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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