United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	**Docket No. 19-0369**
	)	**Issued: June 11, 2019**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Pollock, LA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 10, 2018 appellant filed a timely appeal from a November 13, 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 greater than one percent permanent impairment of the right lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

On June 19, 2015 appellant, then a 31-year-old materials handler supervisor, filed a traumatic injury claim (Form CA-1) alleging that on that date he twisted his right ankle and injured

[1] 5 U.S.C. § 8101 *et seq.*

his right big toe and right Achilles tendon while in the performance of duty. He stopped work on June 19, 2015 and returned to modified work on July 31, 2015. OWCP accepted the claim for tenosynovitis of the right foot and ankle.

A magnetic resonance imaging (MRI) scan of appellant's right foot obtained on August 26, 2015 revealed a fragmented sesamoid bone.

On September 14, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated October 17, 2016, OWCP advised appellant of the evidence needed to support his schedule award claim, including an impairment evaluation from his attending physician providing a rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2] It afforded him 30 days to provide additional evidence.

An occupational therapist provided an impairment rating dated December 1, 2016. Dr. Angela Mayeux-Herbert, a Board-certified orthopedic surgeon, cosigned the report on April 18, 2017. She discussed appellant's complaints of mild right great toe discomfort and pain in his right foot with extensive standing. Dr. Mayeux-Herbert noted that he had resumed his usual work duties. She measured normal right ankle joint range of motion (ROM) and ROM of the right great toe of 30 to 0 at the metatarsalphalangeal (MTP) joint and 10 to 50 at the interphalangeal (IP) joint. Dr. Mayeux-Herbert advised that appellant had hyperextension of the right great toe "at the MTP joint with flexion at the IP joint." She identified the class of diagnosis (CDX) as 1 fragmented sesamoid bone with right great toe pain and a mild motion deficit, which she found yielded two percent impairment of the right lower extremity. Dr. Mayeux-Herbert applied grade modifiers of two for functional history (GMFH), one for physical examination (GMPE), and one for clinical studies (GMCS), noting that an MRI scan had verified the sesamoid bone fragmentation. She found no adjustment from the default value and opined that appellant had two percent right lower extremity impairment.

On July 28, 2017 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed the findings of Dr. Mayeux-Herbert. He identified CDX 1 sesamoid fracture using the foot/ankle regional grid set forth at Table 16-2 on page 505 of the A.M.A., *Guides*, which yielded a default value of one percent. Dr. Katz modified Dr. Mayeux-Herbert's grade modifiers in accordance with Table 16-6 through Table 16-8, finding a GMFH of 1, a GMPE of 1, and a GMCS of 2. He applied the net adjustment formula, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or (1-1) + (1-1) + (2-1) to find a net "adjustment of one," which yielded "two" percent impairment. Dr. Katz concluded that appellant had "one" percent permanent impairment of the right lower extremity and had reached maximum medical improvement on December 1, 2016.

In a letter dated October 24, 2017, OWCP requested that appellant's attending physician review and comment on Dr. Katz' findings.

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

In a November 15, 2017 response, Dr. Mayeux-Herbert advised that her prior determination had not altered. She enclosed a February 8, 2017 report in which she reviewed appellant's impairment rating and noted that he had two percent permanent impairment of the right lower extremity.

By decision dated November 13, 2018, OWCP granted appellant a schedule award for one percent permanent impairment of the right lower extremity.[3] The period of the award ran for 2.88 weeks from December 1 to 21, 2016.

LEGAL PRECEDENT

The schedule award provisions of FECA,[4] and its implementing federal regulation,[5] 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.[6] 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.[7]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).[8] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] Evaluators are directed to provide reasons

[3] OWCP initially issued a schedule award decision on September 20, 2018; however, on November 13, 2018 it issued an amended schedule award decision.

[4] *Id*.

[5] 20 C.F.R. § 10.404.

[6] 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); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[7] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

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

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

[10] *Id*. at 411.

for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

ANALYSIS

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

On December 1, 2016 Dr. Mayeux-Herbert measured ROM of the right ankle and right great toe and found that appellant had hyperextension of the right great toe at the MTP and IP joint with flexion. She used CDX 1 for a fractured sesamoid bone with abnormal examination findings of right great toe pain and mildly reduced motion. Dr. Mayeux-Herbert applied a GMFH of 2, a GMPE of 1, and a GMCS of 1, noting that the right foot MRI scan study verified the diagnosis of the seasmoid bone fragmentation. She concluded that appellant had two percent right lower extremity permanent impairment. In a supplemental report dated November 15, 2017, Dr. Mayeux-Herbert advised that there were no changes from her prior findings. The Board notes that she utilized clinical studies to identify the diagnosis of a fractured seasmoid bone and also applied a GMCS in reaching her impairment determination. However, the A.M.A., *Guides* provides that a GMCS is not applicable when clinical studies are used to identify the diagnosis.[12]

On July 28, 2017 Dr. Michael M. Katz, a DMA, concurred with Dr. Mayeux-Herbert's finding of CDX 1 for a seasmoid fracture according to Table 16-2 on page 505, which he found yielded a default value of one percent. He also agreed with her application of a GMPE of 1. Dr. Katz determined, however, that appellant had a GMFH of 1 rather than 2, and a GMCS of 2 rather than 1. He applied the net adjustment formula, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or (1-1) + (1-1) + (2-1) to find a net adjustment of one, and a two percent permanent impairment.[13] Again, however, the Board notes that if clinical studies is used to identify the diagnosis, it is not used as a grade modifier.[14] Further, Dr. Katz has not explained his finding that appellant had a GMFH of one rather than two. OWCP's procedures provide that if the medical evidence fails to provide rationale for the percentage of impairment specified, the claims examiner should request a clarifying report from the DMA.[15] It should therefore request that its medical adviser clarify appellant's impairment rating. After such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

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

[12] A.M.A., *Guides* 500; *see also P.A.*, Docket No. 17-0075 (issued April 10, 2017).

[13] Dr. Katz concluded that appellant had one percent permanent impairment of the right lower extremity, however, this appears to be a typographical error.

[14] *See supra* note 11; *see also R.A.*, Docket No. 18-0499 (issued July 20, 2018).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017); *see also W.G.*, Docket No. 17-1258 (issued July 12, 2018).

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 11, 2019
Washington, DC

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

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

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