United States Department of Labor
Employees' Compensation Appeals Board

M.K., Appellant	)	
and	)	**Docket No. 18-1614**
	)	**Issued: March 25, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Santa Ana, CA, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 22, 2018 appellant filed a timely appeal from an August 9, 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 a permanent impairment of his right lower extremity entitling him to a schedule award.

FACTUAL HISTORY

On December 16, 2006 appellant, then a 48-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on December 15, 2006 he sustained a right foot fracture when his foot was squeezed, twisted, and bent between a powered pallet jack and a very heavy stationary

[1] 5 U.S.C. § 8101 *et seq.*

all-purpose container while in the performance of duty. On August 19, 2008 OWCP accepted the claim for fracture of the right dorsal mid foot.

On February 2, 2018 appellant filed a claim for a schedule award (Form CA-7).

In support of his claim, appellant submitted a July 12, 2007 medical report from Dr. David Chang, a Board-certified orthopedic surgeon. Dr. Chang provided findings on physical examination and reviewed diagnostic testing. He reported that a December 26, 2006 computerized tomography (CT) scan of the right foot revealed multiple chip fractures of the dorsal mid-foot. Dr. Chang noted no evidence of subluxation, dislocation, or ligamentous injury. He further reported that a January 15, 2007 magnetic resonance imaging (MRI) scan of the right foot demonstrated no evidence of acute fractures or dislocation. However, Dr. Chang explained that the MRI scan was relatively insensitive for detection of subtle fractures and if indicated, a CT scan could be obtained. He further noted that the MRI scan revealed areas of subtle marrow edema seen involving the cuboid fourth metatarsal articulation, as well as the navicular bone. Dr. Chang opined that these findings could represent areas of stress reaction, degenerative changes, or contusion. He diagnosed stable right dorsal mid-foot fractures and reported that appellant sustained two percent whole person impairment as a result of his injury.

By development letter dated February 12, 2018, OWCP requested that appellant submit an impairment evaluation from his attending physician, based on a current medical evaluation, which provides a narrative discussion as to the calculation of permanent impairment pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2] It noted that it had received Dr. Chang's July 12, 2007 report which was insufficient to support appellant's claim because the impairment rating was not based on a current examination. OWCP afforded appellant 30 days to submit the requested impairment evaluation.

In a March 24, 2018 report, Sebastian Juarado, a physical therapist, provided range of motion (ROM) measurements of appellant's feet and ankles in accordance with the sixth edition of the A.M.A., *Guides.*

By decision dated June 11, 2018, OWCP denied appellant's claim for a schedule award finding that the evidence submitted was insufficient to establish permanent impairment of his right lower extremity. It noted that he had not provided an impairment rating from a physician based upon a current examination.

On June 19, 2018 appellant requested reconsideration. In support of his claim, he submitted a March 16, 2018 MRI scan of the right foot from Dr. Eric Chen, a Board-certified diagnostic radiologist.

Appellant also submitted a March 24, 2018 permanent impairment evaluation from Dr. Charles Xeller, a Board-certified orthopedic surgeon. Dr. Xeller discussed appellant's employment duties as a mail handler for the employing establishment since 1987. He reported that, on December 15, 2006, appellant injured his right foot when he was lifting a pallet of mail using a forklift and his foot got caught between the forklift and another all-purpose container.

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

Dr. Xeller reported that appellant was taken off work for six weeks and was casted. Appellant sought treatment for his condition with Dr. Chang through 2010. Dr. Xeller reported that current x-rays showed arthritic degeneration throughout his mid-foot in the metatarsal tarsal area, as well as involvement of his cuboid extending into the articulation with the navicular bone in his foot. He noted no flat footedness. Dr. Xeller diagnosed right fracture of foot, phalanx closed.

Dr. Xeller determined that appellant's right lower extremity impairment would be rated based on a diagnosis of arthritic degeneration as demonstrated on the x-ray and MRI scan. Using Table 16-2, Foot and Ankle Regional Grid, of the sixth edition of the A.M.A., *Guides*, he diagnosed class 1 cuboid arthritic generation with one millimeter of remaining cartilage at a grade C default value of five percent.[3] Dr. Xeller reported that the clinical studies *via* appellant's right foot x-ray and MRI scan revealed arthritis, that the functional history showed avoidance of impact loading, difficulty running, and pain with use of foot, and that the physical examination revealed no overt deformity of the foot. He opined that the grade modifiers did not warrant adjustment of the default impairment value, resulting in five percent permanent impairment of the right lower extremity.

On July 18, 2018 OWCP routed Dr. Xeller's report, a statement of accepted facts (SOAF), and the case file to Dr. Ari Kaz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and determination regarding whether appellant sustained a permanent impairment and the date of maximum medical improvement (MMI) pursuant to the A.M.A., *Guides.*

In a July 29, 2018 medical report, Dr. Kaz reviewed the case file and disagreed with Dr. Xeller's impairment rating and diagnosis for calcaneal cuboid arthritic changes. The DMA noted that the March 16, 2018 right foot MRI scan failed to establish significant arthritic changes. He differed with Dr. Xeller's interpretation of the March 16, 2018 study and also noted that the radiologist had provided contradictory interpretations of the MRI scan. Dr. Kaz indicated that, if there was arthritis significant enough to cause joint space narrowing, one would expect to see marrow edema, subcortical cysts, or some other identifiable bony or cartilage pathology by the MRI scan. However, the MRI scan report indicated minimal mid-foot arthrosis and no marrow edema. Dr. Xeller reported that current x-rays of the right foot showed arthritic degeneration throughout the mid-foot in the metatarsal tarsal area, as well as involvement of his cuboid extending into the articulation with the navicular bone in his foot. Dr. Kaz noted that the MRI scan findings revealed no arthritic changes and contradicted Dr. Xeller's interpretation of the x-ray reports. He indicated that MRI scan testing was more sensitive for joint space narrowing and arthritic changes than seen on plain x-rays, and should thus carry more weight as support for no significant arthritic changes.

Dr. Kaz further explained that Dr. Xeller had failed to adequately assign grade modifiers when assessing permanent impairment. He noted that because the MRI scan revealed minimal mid-foot arthrosis and did not document a loss of cartilage interval, appellant had no permanent impairment of the right foot.

[3] *Id.* at 507, Table 16-2.

Dr. Kaz further opined that regardless of the diagnosis chosen in Table 16-2, a normal cartilage interval resulted in zero percent permanent impairment.[4] He reported that there was also no impairment to the right foot using the ROM methodology. Dr. Kaz noted that the only observed abnormality of the right lower extremity was seven degrees of ankle dorsiflexion.[5] However, the uninjured left side also measured seven degrees of ankle dorsiflexion. Dr. Kaz explained that the A.M.A., *Guides* provide that, if the contralateral joint is uninjured, it may serve as defining normal for the individual.[6] He reported that seven degrees of dorsiflexion was symmetric bilaterally, indicating normal results and no ratable impairment based for a loss of ROM. Dr. Kaz concluded that MMI had been reached on March 24, 2018, the date of Dr. Xeller's examination.

By decision dated August 9, 2018, OWCP denied modification of the June 11, 2018 decision denying appellant's claim for a schedule award. It found that the medical evidence of record established zero percent permanent impairment as a result of the December 15, 2006 work injury.

LEGAL PRECEDENT

The schedule award provision 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.[7] 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 standard for evaluating schedule losses.[8]

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[9] 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.[10]

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

[4] *Id.* at 501, Table 16-2.

[5] *Id.* at 549, Table 16-20 and Table 16-22.

[6] *Id.* at 544.

[7] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[8] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[9] *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 2.808.6a (March 2017).

[10] *Isidoro Rivera*, 12 ECAB 348 (1961).

accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[11]

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[12] For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[13]

ANALYSIS

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

OWCP accepted appellant's claim for right dorsal mid-foot fracture as a result of his December 15, 2006 employment injury. In support of his claim for a schedule award, appellant submitted a March 24, 2018 impairment evaluation from Dr. Xeller, a Board-certified orthopedic surgeon. Dr. Xeller calculated five percent permanent impairment of the right lower extremity based on a class 1 diagnosis of cuboid arthritic degeneration with one millimeter of remaining cartilage.[14] He noted that appellant's current right foot x-ray revealed arthritic degeneration throughout the mid foot in the metatarsal tarsal area, as well as involvement of his cuboid extending into the articulation with the navicular bone in his foot. Dr. Xeller determined that appellant's permanent impairment should be rated based on the diagnosis of arthritic degeneration which was supported by both x-ray and MRI scan of the right foot. The record also reflects that an earlier January 15, 2007 MRI scan as interpreted in Dr. Chang's July 12, 2007 report supports Dr. Xeller's findings and assessment.

Dr. Kaz, serving as a DMA, reviewed Dr. Xeller's report and disagreed with his findings pertaining to arthritic changes of the right foot. He observed that the radiologist provided contradictory interpretations of the March 24, 2018 right foot MRI scan. Dr. Kaz noted that, if there was arthritis sufficiently significant to cause joint space narrowing, one would expect to see marrow edema, subcortical cysts, or some other identifiable bony or cartilage pathology by the MRI scan. However, the radiologist indicated minimal mid-foot arthrosis and no marrow edema. Dr. Kaz further noted that Dr. Xeller's x-ray findings of cuboid arthritic degeneration was contradicted by the MRI scan which revealed minimal mid-foot arthrosis. He noted that the findings of the MRI scan should carry more weight as it was more sensitive for joint space narrowing and arthritic changes than seen on plain x-rays. Dr. Kaz noted that there were no arthritic changes and opined that regardless of the diagnosis chosen for use in Table 16-2, a normal

[11] *See supra* note 9 at Chapter 2.808.6(e) (March 2017).

[12] 5 U.S.C. § 8123(a); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

[13] *C.H.*, Docket No. 18-1065 (issued November 29, 2018).

[14] *Supra* note 3.

cartilage interval qualified for zero percent permanent impairment.[15] He further reported that the ROM method also failed to establish a ratable permanent impairment to the right lower extremity.

The Board finds that there remains an unresolved conflict in the medical evidence between Dr. Xeller, appellant's treating physician, and Dr. Kaz, the DMA, regarding whether appellant's diagnostic testing revealed arthritic changes for consideration of his right lower extremity impairment.[16]

OWCP procedures provide that impairment ratings for schedule awards include those conditions accepted by OWCP as employment related and any preexisting permanent impairment of the same member or function.[17] If the work-related injury has affected the residual usefulness in whole or in part, a schedule award may be appropriate as there is no apportionment.[18] As there is an unresolved conflict in the medical evidence regarding whether appellant has established permanent impairment of the right lower extremity, the case must be remanded to OWCP for referral to an impartial medical specialist for resolution of the conflict in accordance with 5 U.S.C. § 8123(a).[19]

The Board will remand the case to OWCP for further medical development. OWCP shall refer appellant and the case file to an impartial medical examiner (IME) to properly determine the extent of permanent impairment of the right lower extremity based on a current examination, the accepted employment injury, and use the proper tables and figures of the A.M.A., *Guides*.[20] It should instruct the IME to discuss the findings of the diagnostic studies and whether they demonstrate arthritic changes as a result of the accepted right dorsal mid-foot fracture. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[15] *Supra* note 4.

[16] *P.E.*, Docket No. 17-0961 (issued March 14, 2018).

[17] *R.R.*, Docket No. 16-0589 (issued February 3, 2017).

[18] *B.K.*, 59 ECAB 228 (2007). *See also supra* note 9 at Chapter 2.808.5(d) (March 2017) (schedule awards may include preexisting impairments as there is no apportionment under FECA).

[19] *See C.S.*, Docket No. 14-1085 (issued August 27, 2014) (finding that when the medical adviser does not provide sufficient explanation for his rating that his report is not entitled to constitute the weight of the medical opinion evidence).

[20] *G.W.*, Docket No. 17-0957 (issued June 19, 2017).

ORDER

IT IS HEREBY ORDERED THAT the August 9, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: March 25, 2019
Washington, DC

Christopher J. Godfrey, 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