



## **ISSUE**

The issue is whether appellant has met her burden of proof to establish greater than 16 percent permanent impairment of the left lower extremity, for which she previously received schedule award compensation.

## **FACTUAL HISTORY**

On April 11, 2006 appellant, then a 53-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that, on February 3, 2006, she injured her back, chest, and left ankle lifting heavy bags while in the performance of duty. OWCP accepted the claim for lumbar sprain, a sprain of the sternum, lumbar spinal stenosis, and left ankle sprain. Appellant stopped work on February 17, 2006 and did not return. OWCP paid her wage-loss compensation for total disability.

On December 20, 2006 appellant underwent a left ankle synovectomy and debridement of the joint with a partial bone resection.

By decision dated August 11, 2009, OWCP reduced appellant's wage-loss compensation, effective August 30, 2009, based on its determination that she had the capacity to earn wages as an accounting clerk. Appellant elected to receive retirement benefits from the Office of Personnel Management in lieu of workers' compensation benefits, effective January 10, 2010.

By decision dated March 4, 2010, OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity. By decision dated June 21, 2012, it granted her an additional schedule award, finding that she had a total of 16 percent permanent impairment of the left lower extremity.<sup>3</sup>

Appellant subsequently filed claims for an increased schedule award (Form CA-7), which OWCP denied by decisions dated February 4, 2014 and October 13, 2015.<sup>4</sup>

On July 28, 2017 appellant filed a claim for an increased schedule award (Form CA-7).

By development letter dated August 7, 2017, OWCP requested that appellant submit an impairment evaluation from her attending physician in accordance with the sixth edition of the

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<sup>3</sup> OWCP indicated that it had awarded appellant an additional 9 percent permanent impairment of the left lower extremity, or 17 percent total permanent impairment of the left lower extremity. However, it paid her schedule award compensation for an additional 7 percent permanent impairment of the left lower extremity, 20.16 weeks of schedule award compensation, for a total left lower extremity impairment of 16 percent. OWCP's medical adviser had determined that appellant was entitled to an additional seven percent permanent left lower extremity impairment, and thus it appears that OWCP's finding that she had an additional nine percent left lower extremity impairment was a typographical error.

<sup>4</sup> By decision dated February 28, 2014, OWCP denied appellant's request for reconsideration of the merits of its February 4, 2014 decision as she had not raised an argument or submitted evidence sufficient to warrant reopening her case for further merit review under 5 U.S.C. § 8128(a).

American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>5</sup> addressing the extent of her permanent impairment.

By decision dated October 23, 2017, OWCP denied appellant's claim for an increased schedule award. It found that she had not submitted evidence demonstrating greater permanent impairment than the 16 percent previously awarded for the left lower extremity.

In a January 15, 2018 impairment evaluation, Dr. Robert H. Sheinberg, Board-certified in reconstructive rear-foot/ankle surgery, related that appellant had left ankle pain with limited motion and diffuse swelling. He found an antalgic gait and indicated that x-rays revealed stage IV osteoarthritis. Dr. Sheinberg diagnosed severe left ankle osteoarthritis, subtalar joint with calcaneus in varus, genu recurvatum to compensate, and chronic pain. He related that appellant had no dorsiflexion of the left ankle and that it was "fixed in almost plantar flexion." Dr. Sheinberg recommended surgery. He found that, under the A.M.A., *Guides*, appellant had class 3 impairment based on her severe left foot and ankle deformity, which yielded 49 percent permanent impairment of the left lower extremity.

Appellant, on February 23, 2018, requested reconsideration.

On March 14, 2018 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser, reviewed the medical record and noted that Dr. Sheinberg had not identified the diagnosis or referred to specific tables of the A.M.A., *Guides* in his finding that appellant had 49 percent left lower extremity impairment. He advised that Table 16-2 on page 506 of the A.M.A., *Guides*, the foot and ankle regional grid, did not provide 49 percent as a possible permanent impairment rating for ankle arthritis and ankyloses. Dr. Katz further noted that the record did not contain x-rays showing the loss of cartilage interval as required under the A.M.A., *Guides* to assess impairment due to arthritis. He recommended that OWCP obtain a supplemental report from Dr. Sheinberg.

On March 21, 2018 OWCP requested that Dr. Sheinberg provide a supplemental report referencing the applicable tables and pages of the A.M.A., *Guides* that he used in reaching his impairment rating. He did not, however, respond to OWCP's request.

OWCP, on April 26, 2018, referred appellant to Dr. Clinton G. Bush, III, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent of her employment-related permanent impairment.

In a report dated May 18, 2018, Dr. Bush discussed appellant's history of a work injury moving baggage on February 3, 2006. He noted that a magnetic resonance imaging (MRI) scan of the left ankle obtained on February 28, 2006 showed evidence of probable prior fractures and end-stage arthritis at the tibiotalar joint with "osteophyte formation and full thickness articular cartilage loss." Dr. Bush further found that a lumbar MRI scan dated February 28, 2006 revealed degenerative disc disease with disc protrusions and osteophyte formation. He reviewed appellant's symptoms of back pain with intermittent radiation into the right lower extremity and occasional radiation into the left lower extremity and left ankle pain with reduced motion. Dr. Bush noted

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<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

that she had fractured her left ankle at the age of 15 and had undergone an open reduction and internal fixation.

On examination Dr. Bush measured normal left ankle plantar flexion, a loss of dorsiflexion, a loss of inversion and eversion, and found swelling “consistent with a combination of osteophyte formation, effusion, and synovitis.” He diagnosed a resolved thoracic wall injury, advanced and diffuse lumbar and lower thoracic spine degenerative disc disease and facet arthritis, resolved lumbosacral strain, resolved left ankle sprain/strain, severe post-traumatic arthritis of the left ankle, and right shoulder pain. Dr. Bush related that appellant had sustained soft tissue injuries to her back and left ankle on February 3, 2006 that should have resolved within six to eight weeks of the injury. He found that appellant had an essentially normal examination of the lumbar spine. Dr. Bush opined that her left ankle strain or sprain that had occurred on February 3, 2006 had “fully resolved leaving the claimant with her preexisting diagnosis of post-traumatic left ankle arthritis secondary to her ankle fracture at age 15.” He concluded that appellant had no permanent impairment of the left ankle causally related to the February 3, 2006 employment injury. Dr. Bush further indicated that she had no spinal impairment.

By decision dated May 29, 2018, OWCP denied modification of its October 23, 2017 decision. It found that Dr. Bush’s report constituted the weight of the evidence and established that appellant was not entitled to an increased schedule award.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>6</sup> and its implementing federal regulations,<sup>7</sup> 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 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.<sup>8</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>9</sup>

### **ANALYSIS**

The Board finds that appellant has not met her burden of proof to establish greater than 16 percent permanent impairment of the left lower extremity, for which she previously received schedule award compensation.

OWCP accepted that appellant sustained a left ankle sprain, lumbar sprain, lumbar spinal stenosis, and a sprain of the sternum due to a February 3, 2006 employment injury. It awarded her

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<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *Id.* at § 10.404(a).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

schedule awards totaling 16 percent permanent impairment of the left lower extremity as a result of her ankle injury.

Appellant, on July 28, 2017, requested an increased schedule award. She submitted a January 15, 2018 impairment evaluation from Dr. Sheinberg, who is Board-certified in reconstructive rear-foot/ankle surgery. Dr. Sheinberg indicated that x-rays revealed stage IV osteoarthritis. He opined that appellant had 49 percent permanent impairment of the left lower extremity due to loss of alignment of the left ankle and reduced motion. Dr. Sheinberg, however, failed to refer to the specific tables and charts in the A.M.A., *Guides* he used in reaching his impairment rating. His report thus lacks the probative value necessary to determine appellant's permanent impairment for schedule award purposes.<sup>10</sup>

In a May 18, 2018 report, Dr. Bush, an OWCP referral physician, diagnosed a resolved thoracic wall injury, advanced lumbar and lower thoracic spine degenerative joint disease and facet arthritis, resolved lumbar sprain, and a resolved left ankle sprain/strain. He determined that appellant had preexisting ankle post-traumatic arthritis due to a left ankle fracture when she was 15 years old, noting that a left ankle MRI scan obtained on February 28, 2006 showed evidence of prior fractures and end-stage arthritis at the tibiotalar joint with the loss of articular cartilage and osteophyte formation. Dr. Bush found that appellant's left ankle and back sprain due to her February 3, 2006 employment injury had resolved and that she had no permanent impairment resulting from her accepted employment injury.<sup>11</sup> His opinion is based on a complete history, a review of the medical evidence and the results of diagnostic studies, and findings on examination, and thus constitutes the weight of the evidence.<sup>12</sup> Accordingly, appellant has not established greater than the 16 percent permanent impairment of the left lower extremity previously awarded.

On appeal appellant asserts that she informed the employing establishment of her prior ankle injury and advises that she lifted bags that were heavier than those she was supposed to lift. She asks OWCP to obtain x-rays of her left foot and lower back. As noted, however, appellant has the burden of proof under FECA to establish an increased schedule award.<sup>13</sup> For the reasons set forth above, the Board finds that she has not met that burden of proof.

Appellant may request a schedule award or an increased schedule award at any time based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

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<sup>10</sup> *B.B.*, Docket No. 18-0782 (issued January 11, 2019).

<sup>11</sup> *M.D.*, Docket No. 18-0888 (issued November 29, 2018).

<sup>12</sup> *D.B.*, 17-0930 (issued July 11, 2018).

<sup>13</sup> *See G.S.*, Docket No. 18-0299 (issued June 12, 2018).

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish greater than 16 percent permanent impairment of the left lower extremity, for which she previously received schedule award compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 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