# United States Department of Labor
# Employees' Compensation Appeals Board

| | | |
|---|---|---|
| **J.B., Appellant** | ) | |
| **and** | ) | **Docket No. 18-0247** |
| | ) | **Issued: May 24, 2019** |
| **U.S. POSTAL SERVICE, POST OFFICE, Sacramento, CA, 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:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

## ***JURISDICTION***

On November 15, 2017 appellant, through counsel, filed a timely appeal from a September 8, 2017 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.[3]

[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.*

[3] The Board notes that following the September 8, 2017 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 two percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

## ***FACTUAL HISTORY***

On December 8, 2011 appellant, then a 42-year-old city carrier, filed an occupational disease claim (Form CA-2), alleging that he sustained a right calf and right foot injuries due to casing mail, standing, twisting, turning, reaching, pushing, and pulling as part of his federal employment duties. OWCP accepted the claim for right calf sprain, bilateral mild plantar fibromatosis, right third metatarsophalangeal joint sprain, and right second metatarsophalangeal joint capsulitis and plantar plate inflammation. It authorized two right foot surgeries, which appellant underwent on July 16, 2012 and November 18, 2013. Appellant returned to full-time modified duty on May 16, 2014.

On December 30, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a January 14, 2016 development letter, OWCP advised appellant of the deficiencies of his claim. It provided instructions to obtain an impairment rating report from his attending physician. OWCP afforded appellant afforded 30 days to submit additional evidence.

In a December 16, 2015 report, Dr. Kevin A. Kirby, appellant's podiatrist, indicated that he had reached maximum medical improvement (MMI).[4]

On April 15, 2016 Dr. Michael E. Hebrard, a Board-certified physiatrist, diagnosed sprain of other specified parts of right knee, plantar fascial fibromatosis, sprain of metatarsophalangeal joint of right lesser toe(s), and right ankle osteophyte. He opined to a reasonable degree of medical certainty on a more probable than not basis that appellant's ongoing condition was still present and medically disabling and there was residual functional metatarsal angulation and tenting of the second and third metatarsal of the right foot with the well-healed surgical scars. Dr. Hebrard determined that appellant's ongoing condition involving the metatarsal phalangeal joints of the right foot had residual problems, which led to a permanent metatarsalgia and multiple metatarsal angulation of the second and third digits of the right foot. Utilizing Table 16-2, page 504 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[5] he calculated that appellant had 12 percent permanent impairment of the right lower extremity, based on Table 16-2, page 504. Dr. Hebrard determined that appellant had reached MMI as of April 15, 2016. Utilizing the diagnosis-based impairment (DBI) methodology, based appellant's diagnosis of multiple metatarsal with angulation and metatarsalgia (fracture/dislocation -- metatarsal(s)), he assigned a class 1 impairment. Dr. Hebrard assigned a grade modifier of 2 for physical examination (GMPE), 1 for functional history (GMFH), and did

[4] Dr. Kirby performed both of appellant's OWCP-authorized right foot osteotomies.

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

not assign a grade modifier for clinical studies (GMCS), resulting in a net adjustment of 1. He concluded that appellant had 12 percent permanent impairment of the right lower extremity.

On September 12, 2016 Dr. Jovito B. Estaris, a Board-certified occupational medicine specialist and OWCP's district medical adviser (DMA), reviewed the medical evidence of record and determined that appellant had reached MMI as of April 15, 2016, the date of Dr. Hebrard's examination. He disagreed with Dr. Hebrard's rating based upon the use of an alternate diagnosis. The DMA explained that Dr. Hebrard had based his impairment rating on a fracture of metatarsals diagnosis when appellant's claim had not been accepted for a diagnosed fracture. Instead, he rated appellant's impairment based on the accepted diagnosis of metatarsophalangeal strains (muscle/ tendon -- strain, tendinitis with mild motion deficits).[6] The DMA found a class 1 diagnosis and assigned a GMFH of 1 due to appellant's antalgic gait and GMPE of 2 due to his persistent tenderness in the right foot. He found that a GMCS was not applicable in this case because there were no clinical studies to confirm a strain. Based on the net adjustment of 1, the DMA determined that appellant had a class 1, grade D impairment for his metatarsophalangeal strains, equaling 2 percent permanent impairment of the right lower extremity under the sixth edition of the A.M.A., *Guides*.

By decision dated January 26, 2017, OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity. The award ran for 5.76 weeks for the period April 15 to May 25, 2016.

On February 7, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on July 12, 2017. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence as to the extent of his permanent impairment. No additional documentation relating to the extent of appellant's permanent impairment was received.

By decision dated September 8, 2017, OWCP's hearing representative affirmed the January 26, 2017 schedule award decision.

## ***LEGAL PRECEDENT***

The schedule award provisions of FECA[7] provide for compensation to employees sustaining impairment from loss or loss of use of specified members 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 determination is a mater which rests in the sound discretion of the 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board

[6] A.M.A., *Guides* 501, Table 16-2.

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

has concurred in such adoption.[8] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[9]

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).[10] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[12]

## ***ANALYSIS***

The Board finds that appellant has not met his burden of proof to establish more than two percent permanent impairment of the right lower extremity, for which he previously received a schedule award. Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Hebrard calculated that appellant had 12 percent permanent impairment of the right lower extremity, based on Table 16-2, page 504. He based appellant's impairment rating on the diagnosis of multiple metatarsal with angulation and metatarsalgia. Dr. Hebrard assigned a GMPE of 2 and a GMFH of 1, resulting in a net adjustment of 1. He concluded that appellant had a class 1, grade D impairment, equating to 12 percent permanent impairment of the right lower extremity.

In accordance with its procedures, OWCP properly referred the evidence of record to its DMA, Dr. Estaris. On September 12, 2016 the DMA reviewed the medical evidence of record and noted that he disagreed with Dr. Hebrard's impairment rating because it was based on an unaccepted diagnosis. He explained that Dr. Hebrard had based his rating on a fracture of metatarsals diagnosis when appellant's claim had not been accepted for a fracture. The DMA rated appellant's impairment based on the accepted diagnosis of metatarsophalangeal strains. He assigned a GMFH of 1 for due to appellant's antalgic gait and a GMPE of 2 due to his persistent tenderness in the right foot. The DMA found that a GMCS was not applicable in this case because there were no clinical studies to confirm a strain. Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), the DMA calculated that appellant had a net adjustment of (1-1) + (2-1) + (n/a) = 1, which equated to a class 1, grade D impairment or two percent permanent impairment of the right lower extremity.

The Board finds that OWCP's DMA correctly applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to Dr. Hebrard's clinical findings. The DMA's

[8] *See Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000). *See also* 5 U.S.C. § 8107.

[9] *See D.T.*, Docket No. 12-503 (issued August 21, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] 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*.

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

[12] *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

calculations were mathematically accurate. There is no medical evidence of record, utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides,* demonstrating a greater percentage of permanent impairment. Accordingly, the Board finds that OWCP properly relied on the DMA's assessment of two percent permanent impairment of the right lower extremity, in granting appellant's schedule award.

As appellant has not met his burden of proof to establish more than two percent permanent impairment of his right lower extremity he has not established that he is entitled to a schedule award greater than that previously received.

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 8, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 24, 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