

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

S.H., Appellant)	
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)	
and)	Docket No. 19-1033
)	Issued: July 23, 2020
U.S. POSTAL SERVICE, CASTLE SHANNON)	
STATION, Pittsburgh, PA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 10, 2019 appellant, through counsel, filed a timely appeal from a February 22, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

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.*

FACTUAL HISTORY

On August 27, 2014 appellant, then a 29-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on August 25, 2014 she twisted her right ankle when she attempted to open a locked gate and fell against it while delivering mail in the performance of duty. She did not stop work, but began working in a light-duty position without wage loss. OWCP accepted appellant's claim for right ankle sprain (right spring ligament).

Appellant was treated by Dr. Alex J. Kline, a Board-certified orthopedist, who noted in a May 4, 2015 letter that appellant's right ankle/foot condition had reached maximum medical improvement (MMI). In a May 5, 2015 narrative report, Dr. Kline indicated that the findings on physical examination of the right ankle/foot revealed slight pes planus (symmetric to the contralateral side), no tenderness over the posterior tibial tendon and spring ligament, normal skin examination, intact strength upon right ankle range of motion (ROM), and grossly intact neurovascular examination. He released appellant to work her normal work hours.³

On January 11, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated February 16, 2016, OWCP requested that appellant submit a report from her attending physician which contained a rating of permanent impairment in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ It advised her that, if her physician was unable or unwilling to provide the required report, it would refer her to a second opinion physician. OWCP afforded appellant 30 days to submit the requested evidence.

Appellant did not submit the requested evidence within the afforded period and on August 31, 2016 OWCP referred her, along with a statement of accepted facts (SOAF), to Dr. Victoria M. Langa, a Board-certified orthopedic surgeon, for a second opinion examination and rating of permanent impairment utilizing the sixth edition of the A.M.A., *Guides*.

In a September 16, 2016 report, Dr. Langa discussed appellant's factual and medical history and summarized the medical reports of record. She provided findings on physical examination of the right ankle/foot which included lack of swelling or tenderness to palpation, 5/5 muscle strength, and full ROM of the ankle. Dr. Langa noted that appellant reported slightly altered sensation to touch throughout the right great toe, but she indicated that sensation was otherwise intact throughout the ankle/foot. She diagnosed status post right ankle sprain,⁵ and mild altered sensation of the right great toe (associated with the superficial peroneal nerve). Dr. Langa utilized the diagnosis-based impairment (DBI) rating method found at Table 16-12 (Peripheral Nerve Impairment) of the sixth edition of the A.M.A., *Guides*, beginning at page 534. She noted that appellant's superficial peroneal sensory deficit at page 535, represented a class of diagnosis (CDX) at the class 1 level with a default value of three percent permanent impairment of the right lower extremity. Dr. Langa advised that appellant had a grade modifier for functional history

³ On June 2, 2015 appellant returned to full-duty work without restrictions.

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ In connection with this diagnosis, Dr. Langa indicated that a magnetic resonance imaging (MRI) scan showed a partially torn anterior talofibular ligament and mild grade II sprain of the spring ligament.

(GMFH) of zero, and indicated that the grade modifier for physical examination (GMPE) and the grade modifier for clinical studies (GMCS) were not applicable. She reported that application of the net adjustment formula required movement one space to the left of the default value on Table 16-2, and concluded that appellant had two percent permanent impairment of the right lower extremity. Dr. Langa noted that appellant was at MMI on the date of her examination.

On February 15, 2018 OWCP referred appellant's case to Dr. Herbert White, Jr., a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), and requested that he review and comment on Dr. Langa's permanent impairment rating.

In a February 17, 2018 report, the DMA reviewed Dr. Langa's September 16, 2016 report and explained his disagreement with her impairment rating. He indicated that Dr. Langa calculated a right lower extremity permanent impairment of two percent for deficit of appellant's right superficial peroneal sensory nerve because she found decreased sensation in her right great toe. However, the DMA noted that, at the time of MMI, Dr. Kline indicated that appellant had a grossly intact neurovascular examination with no findings of decreased sensation to the right great toe. He further advised that the sixth edition of the A.M.A., *Guides* provides that, if multiple previous range of motion evaluations have been documented and there is inconsistency in the rating class between the findings of the two observers, the results are "considered invalid and cannot be used in the impairment rating." The DMA noted that the inconsistent findings were the grossly intact neurovascular examination reported by Dr. Kline and the decreased right great toe sensation observed by Dr. Langa. He applied the DBI rating method of Table 16-2 (Foot and Ankle Regional Grid) at page 501 and noted that, under a diagnosis category of strain/tendinitis/history of ruptured tendon, all other tendons, appellant's condition fell under a CDX of class 1 (based on radiographic findings) and warranted a default value of one percent permanent impairment. The DMA indicated that appellant had a GMFH of zero (due to normal gait) and a GMPE of zero (due to normal examination), and advised that the GMCS was excluded. Applying the net adjustment formula, he found that appellant had zero percent permanent impairment of the right lower extremity. The DMA indicated that appellant had reached MMI on May 5, 2016.

By decision dated March 21, 2018, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body. It found that the weight of the medical evidence rested with the opinion of the DMA.

On March 30, 2018 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Prior to a hearing being held, OWCP's hearing representative conducted a preliminary review and issued a June 7, 2018 decision which vacated the March 21, 2018 decision and remanded the case to OWCP for further development of the medical evidence. She found a conflict in the medical opinion evidence between Dr. Langa, OWCP's referral physician, and Dr. Kline, appellant's attending physician, with respect to the permanent impairment of appellant's right lower extremity. The hearing representative explained that there was a difference in their examination findings regarding sensory loss in appellant's right lower extremity. She directed OWCP to refer appellant to an impartial medical specialist in order to resolve the conflict in the medical opinion evidence.

On June 12, 2018 OWCP referred appellant to Dr. Victor J. Thomas, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the medical opinion evidence with respect to the permanent impairment of appellant's right lower extremity. It requested that Dr. Thomas provide a permanent impairment rating of appellant's right lower extremity under the sixth edition of the A.M.A., *Guides*.

In a July 16, 2018 report, Dr. Thomas reviewed a SOAF and discussed appellant's factual and medical history, including the previous findings for the accepted right ankle strain. He conducted a physical examination of her right ankle and found normal appearance without effusion, swelling, or tenderness, stable medial and lateral ligament complexes, full ROM, and intact strength. There was no atrophy of the right lower extremity and sensation to light touch was decreased over the dorsum of the great toe. Dr. Thomas performed an impairment rating evaluation utilizing the DBI rating method of Table 16-2 of the sixth edition of the A.M.A., *Guides*. Making reference to the accepted ligament injury to appellant's right ankle (CDX), he found that appellant had no objective abnormality and determined that her condition would fall under a class 0 with zero percent permanent impairment of the right lower extremity. Dr. Thomas noted that appellant complained of decreased sensation on the dorsum of her right great toe, but indicated that this finding was not supported by the medical records. He advised that, even assuming the decreased sensation on the right great toe was related to the accepted employment injury, it would be considered a minimal deficit which fell under class 0 for zero percent permanent impairment of the right lower extremity. Dr. Thomas further indicated that, utilizing the ROM impairment rating method pursuant to Table 16-25 on page 550, there was no ROM deficit of the right ankle. He opined that appellant had recovered from her work injuries and reached MMI on July 5, 2015. Dr. Thomas concluded that she had zero percent permanent impairment of her right lower extremity under the sixth edition of the A.M.A., *Guides*.

By decision dated August 29, 2018, OWCP denied appellant's schedule award claim. It based its determination on the opinion of Dr. Thomas, the impartial medical specialist, who determined that appellant sustained zero percent impairment of the right lower extremity.

On September 4, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on January 16, 2019, counsel argued that Dr. Thomas' opinion was not well rationalized.

By decision dated February 22, 2019, OWCP's hearing representative affirmed the August 29, 2018 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,⁶ and its implementing federal regulation,⁷ 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*

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

as the uniform standard applicable to all claimants.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.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 In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the ankle, the relevant portion of the leg for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.¹¹ After the CDX is determined from the Foot and Ankle Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹² Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹³

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.¹⁴ For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.¹⁵

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

Preliminarily, the Board finds that OWCP improperly determined that a conflict in the medical opinion evidence existed between Dr. Langa, OWCP's referral physician, and Dr. Kline, an attending physician, regarding the extent of the permanent impairment of appellant's right lower extremity due to her accepted employment condition, right ankle sprain (right spring ligament). There was no conflict in the medical opinion evidence regarding the extent of appellant's permanent impairment. Although Dr. Langa submitted a September 16, 2016 report containing an

⁸ *Id.* See also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, 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 See A.M.A., *Guides* 501-08, Table 16-2.

¹² *Id.* at 515-22.

¹³ *Id.* at 23-28.

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

¹⁵ *C.H.*, Docket No. 18-1065 (issued November 29, 2018).

opinion on permanent impairment under the sixth edition of the A.M.A., *Guides*, the case record does not contain a permanent impairment rating of Dr. Kline. Due to this lack of a conflict in the medical opinion evidence regarding permanent impairment, Dr. Thomas, on whose opinion OWCP relied, actually served as an OWCP referral physician rather than an impartial medical specialist.¹⁶

The Board finds that the weight of the medical evidence with respect to permanent impairment rests with the well-rationalized opinion of Dr. Thomas, OWCP's referral physician. In his July 16, 2018 report, Dr. Thomas discussed appellant's factual and medical history and provided examination findings of the right ankle, noting no effusion, swelling, or tenderness, full ROM without pain, intact strength, and stable medial and lateral ligament complexes. He also noted full ROM of all toes of the right foot, and reported decreased sensation to light touch over the dorsum of the right great toe. Dr. Thomas advised that there was no clinical manifestation on examination with respect to the accepted right ankle condition, and indicated that appellant had fully recovered from the condition with no employment-related impairment. Utilizing the DBI rating method of Table 16-2 of the sixth edition of the A.M.A., *Guides*, he performed a proper impairment rating for the right lower extremity.¹⁷ Making reference to the accepted ligament injury to appellant's right ankle, Dr. Thomas correctly determined that appellant had no objective abnormality and fell under class 0 for zero permanent impairment of the right lower extremity.¹⁸

In reaching his permanent impairment rating, Dr. Thomas noted that appellant complained of decreased sensation on the dorsum of her right great toe, but explained that this finding was not supported by the medical records. He further opined that, even assuming the decreased sensation on the right great toe was related to accepted employment injury, it would be considered a minimal deficit which fell under class 0 for zero percent permanent impairment of the right lower extremity. The Board notes that Dr. Thomas provided detailed examination findings and properly found that there was no clinical manifestation of appellant's accepted condition on which permanent impairment could be based. Dr. Thomas correctly concluded that, based on the lack of objective findings, the accepted employment condition caused no permanent impairment. The Board finds that his medical opinion is well rationalized and based upon a proper factual and medical background and thereby is entitled to the weight of the medical evidence with respect to appellant's permanent impairment.¹⁹

As Dr. Thomas's opinion represents the weight of the medical evidence with respect to permanent impairment, appellant has not established permanent impairment of a scheduled member or function of the body, warranting a schedule award. OWCP properly relied on Dr. Thomas' opinion to find that appellant had no permanent impairment. The Board finds that

¹⁶ See *R.H.*, Docket No. 17-1477 (issued March 14, 2018) (finding that, due to the lack of a conflict in the medical evidence at the time of the referral to the putative impartial medical specialist, the physician actually served as an OWCP referral physician rather than an impartial medical specialist).

¹⁷ A.M.A., *Guides* 501-08, Table 16-2.

¹⁸ Dr. Thomas opined that appellant reached MMI by July 5, 2015. He also noted that, utilizing the ROM impairment rating method pursuant to Table 16-25, there was no ROM deficit of the right ankle. The Board notes that this comment is superfluous to the underlying issue of this case as Table 16-2 does not allow for application of the ROM impairment rating method for appellant's accepted condition. *See id.*

¹⁹ See *E.H.*, Docket No. 19-1569 (issued April 2, 2020).

OWCP's permanent impairment determination must be affirmed, as modified to reflect that Dr. Thomas served as an OWCP referral physician rather than an impartial medical specialist.

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 her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: July 23, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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