

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

X.Y., Appellant)	
)	
and)	Docket No. 19-1290
)	Issued: January 24, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Fort Worth, TX, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 16, 2019 appellant filed a timely appeal from a November 20, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees'

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from November 20, 2018, the date of OWCP's last decision, was May 19, 2019. As this fell on a Sunday, appellant had until the following business day, Monday, May 20, 2019, to file the appeal. Since using May 21, 2019, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is May 16, 2019, rendering the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUE

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

FACTUAL HISTORY

On October 15, 2014 appellant, then a 47-year-old supervisor of maintenance operations, filed an occupational disease claim (Form CA-2) alleging that she developed pain in both feet causally related to factors of her federal employment. OWCP accepted the claim for bilateral acquired hallux valgus. Appellant underwent a left foot bunionectomy and osteotomy of the first metatarsal and phalanx on January 12, 2016 and a removal of internal hardware from the left first metatarsal and proximal phalanx of the great toe on January 31, 2017. She stopped work on January 12, 2016 and returned to modified work on August 5, 2017.

In an impairment evaluation dated March 5, 2018, Dr. Greg Gardner, an osteopath, reviewed appellant's history of injury and resultant surgeries. He diagnosed bilateral hallux valgus. With regard to the left side, on examination, Dr. Gardner found moderate tenderness to palpation of the left foot. He measured range of motion (ROM) of the left great toe three times, with the highest measurement demonstrating 30 degrees flexion of the metatarsophalangeal (MTP) joint, 25 degrees hyperextension of the MTP joint, and 20 degrees flexion of the interphalangeal (IP) joint. Dr. Gardner found that 25 degrees extension of the MTP joint yielded two percent impairment and 20 degrees flexion of the IP joint yielded two percent impairment according to Table 16-17 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ For the right great toe, he measured 45 degrees flexion of the MTP joint, which yielded no impairment, 25 degrees hyperextension of the MTP joint, which yielded two percent impairment, and 40 degrees flexion of the IP joint, which yielded no impairment. Dr. Gardner noted that the A.M.A., *Guides* provided that the diagnosis-based impairment (DBI) method was preferred over ROM for calculating impairment and that ROM measurements were used as an adjustment factor. He found hyperesthesia of the left sacral superficial peroneal nerve with full strength of the lower extremities. Dr. Gardner opined that appellant had reached maximum medical improvement (MMI). Using the foot and ankle regional grid set forth in Table 16-2 on page 507, he identified the diagnosis of the left lower extremity as

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the November 20, 2018 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.*

⁴ A.M.A., *Guides* (6th ed. 2009).

class 1 first MTP joint arthritis, which yielded a default value of five percent. For functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS), Dr. Gardner applied grade modifiers of one to find no adjustment from the default value of five percent.

Regarding the right lower extremity, Dr. Gardner found that appellant had two percent permanent impairment due to loss of ROM, noting that Table 16-2 provided no relevant diagnosis. He concluded that she had five percent permanent impairment of the left lower extremity and two percent permanent impairment of the right lower extremity.

On March 22, 2018 appellant filed a schedule award claim (Form CA-7).

On April 20, 2018 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), identified the diagnosis for the left lower extremity as residual problems after hallux valgus surgery. For the right lower extremity, he opined that the A.M.A., *Guides* did not allow a rating for ROM for the diagnosis of residual problems with hallux valgus deformity. Dr. Harris found that appellant had five percent permanent impairment due to residual problems after hallux valgus surgery and two percent permanent impairment due to residual problems due to a hallux valgus deformity using Table 16-2 on page 502 of the A.M.A., *Guides*. He asserted that she had reached MMI on March 5, 2018.

On August 21, 2018 OWCP requested that Dr. Harris clarify whether appellant's impairment was for the toes, feet, or lower extremities.

In a supplemental report dated September 5, 2018, Dr. Harris advised that appellant had two percent permanent impairment of the right lower extremity and five percent permanent impairment of the left lower extremity.

By decision dated November 20, 2018, OWCP granted appellant a schedule award for five percent permanent impairment of the left lower extremity and two percent permanent impairment of the right lower extremity. The period of the award ran for 20.16 weeks from March 5 to July 24, 2018.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁵ and its implementing federal regulation,⁶ 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

⁵ *Supra* note 2.

⁶ 20 C.F.R. § 10.404.

specified edition of the A.M.A., *Guides*, published in 2009.⁷ 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.⁸

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).⁹ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹²

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 accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹³

ANALYSIS

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

In a March 5, 2018 report, Dr. Gardner measured ROM of the great toes and found moderate tenderness to palpation of the left foot. Utilizing the diagnosis of class 1 first MTP joint arthritis of the left foot under Table 16-2 on page 501, he found five percent permanent impairment of the left lower extremity after applying grade modifiers. For the right lower extremity, Dr. Gardner indicated that he could not rate the impairment using the DBI method as there was no applicable diagnosis. He used ROM to find two percent permanent impairment of the right lower extremity.

⁷ 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 Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, ICF: A Contemporary Model of Disablement.

¹⁰ *Id.* at 494-531.

¹¹ *Id.* 411.

¹² *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹³ *See supra* note 6 at Chapter 2.808.6(f) (March 2017).

Consistent with its procedures,¹⁴ OWCP properly referred the matter to a DMA for an opinion regarding appellant's permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.¹⁵

In an April 20, 2018 report, Dr. Harris identified the applicable diagnosis for the left lower extremity as status post hallux valgus surgery with residuals and for the right lower extremity as hallux valgus deformity pursuant to Table 16-2 on page 502 of the A.M.A., *Guides*. He disagreed with Dr. Gardner's use of ROM to rate appellant's right lower extremity impairment, noting that Table 16-2 did not provide that such a diagnosis could be alternatively rated using the ROM method. Dr. Harris found that she had five percent permanent impairment of the left lower extremity due to residual problems after hallux valgus surgery and two percent permanent impairment due to residuals problems due to a hallux valgus deformity using Table 16-2 on page 502 of the A.M.A., *Guides*. However, Table 16-2 on page 502 does not provide a specific impairment rating for a hallux valgus deformity, and thus it is unclear what diagnosis he used in reaching his impairment rating. Additionally, Dr. Harris failed to apply grade modifiers or the net adjustment formula in determining the extent of permanent impairment as required by the A.M.A., *Guides*.¹⁶

The Board, consequently, will remand the case for the DMA to clarify his use of Table 16-2 and to apply grade modifiers in rating appellant's permanent impairment of both lower extremities.¹⁷ Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁴ *Id.*

¹⁵ *J.J.*, Docket No. 18-1615 (issued March 5, 2019).

¹⁶ See section 16.3, A.M.A., *Guides* at 515-30; see also *C.P.*, Docket No. 19-0151 (issued May 21, 2019).

¹⁷ See *C.P., id.; D.G.*, Docket No. 17-0600 (issued July 5, 2017).

ORDER

IT IS HEREBY ORDERED THAT the November 20, 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: January 24, 2020
Washington, DC

Patricia H. Fitzgerald, Deputy 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