

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

_____)	
G.M., Appellant)	
)	
and)	Docket No. 19-1931
)	Issued: May 28, 2020
DEPARTMENT OF THE NAVY, SPACE & NAVAL WARFARE SYSTEMS CENTER, San Diego, CA, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 18, 2019 appellant filed a timely appeal from a July 12, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the July 12, 2019 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 her burden of proof to establish more than 13 percent permanent impairment of the right lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On February 6, 2017 appellant, then a 45-year-old material procurement officer, filed a traumatic injury claim (Form CA-1) alleging that on February 2, 2017 she injured her right ankle when she slipped and fell while in the performance of duty. OWCP accepted the claim for right ankle osteochondritis dissecans, right ankle instability, right peroneal tendon tear, right ankle anterior talofibular ligament (ATFL), and calcaneofibular ligament (CFL) tears. On September 8, 2017 appellant underwent an OWCP-authorized right ankle arthroscopic talar osteochondral defect debridement and microfracture procedure, tibial exostectomy, peroneal tendon tenosynovectomy, peroneal groove deepening, and lateral ligament reconstruction, which was performed by Dr. Joshua H. Lamb, a Board-certified orthopedic surgeon. OWCP paid her compensation on the supplemental rolls from September 8 through 22, 2017. Appellant returned to limited-duty work on September 25, 2017. On December 12, 2018 Dr. Lamb performed a right leg neurolysis of the superficial peroneal nerve, lateral cutaneous nerve, and medial cutaneous nerve with excision of hypertrophic scar. OWCP again paid appellant wage-loss compensation on the supplemental rolls from December 12, 2018 through January 9, 2019, she then returned to light-sedentary work on January 10, 2019. It expanded acceptance of the claim to include right lower leg laceration and right lower leg scar conditions and fibrosis of skin.

In a March 26, 2019 report, Dr. Lamb noted appellant's physical examination findings. He related that she had ankle motion without instability, dorsiflexion of 10 degrees, plantar flexion of 30 degrees, eversion of 15 degrees, and inversion of 25 degrees. Dr. Lamb also noted decreased sensation in the distribution of the sural, deep peroneal and superficial peroneal nerves. He opined that appellant reached maximum medical improvement (MMI) and that she had 38 percent permanent impairment of the right lower extremity.

On April 18, 2019 appellant filed a claim for a schedule award (Form CA-7).

In development letters of April 26 and May 29, 2019, OWCP requested that Dr. Lamb submit an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

In a May 30, 2019 report, Dr. Lamb opined that appellant had 15 percent whole person or 38 percent permanent impairment of the right lower extremity under the fifth edition of the A.M.A., *Guides*.⁴

³ A.M.A., *Guides* (6th ed. 2009).

⁴ *Id.* at (5th ed. 2001).

On June 20, 2019 OWCP referred appellant's case to a district medical adviser (DMA) to determine whether the medical evidence of record established permanent impairment of a scheduled member or function of the body causally related to appellant's accepted conditions.

On June 26, 2019 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as the DMA, reviewed the medical evidence of record and determined that appellant's MMI was March 26, 2019, the date of Dr. Lamb's examination. Utilizing the sixth edition of the A.M.A., *Guides*, the DMA found that under the diagnosis-based impairment (DBI) methodology appellant had 7 percent lower extremity impairment for peroneal tendon injury under Table 16-2, page 501, 3 percent lower extremity impairment for decreased sural nerve sensation under Table 16-12, page 535, and 3 percent lower extremity impairment for decreased superficial peroneal nerve sensation under Table 16-12, page 534, for a combined 13 percent permanent impairment of the right lower extremity. He advised that, for each of her diagnosed conditions, the range of motion (ROM) impairment methodology was not applicable under the sixth edition of the A.M.A., *Guides*. The DMA further explained that his impairment calculation was rendered under the sixth edition of the A.M.A., *Guides*, while Dr. Lamb provided an impairment rating based on the fifth edition of the A.M.A., *Guides*.

By decision dated July 12, 2019, OWCP granted appellant a schedule award for 13 percent permanent impairment of the right lower extremity. The award ran for 37.44 weeks for the period March 26 through December 13, 2019. OWCP afforded the weight of the medical evidence to the DMA's June 26, 2019 report.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body.⁵ 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 matter which rests in the sound 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.⁷

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health

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

⁶ See *B.T.*, Docket No. 19-0531 (issued August 19, 2019); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000). See also *id.* at § 8107.

⁷ See *B.T., id., D.T.*, Docket No. 12-0503 (issued August 21, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (March 2017); see also *id.* Chapter 3.700.2 and Exhibit 1 (January 2010).

(ICF).⁸ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX) condition, which is then adjusted by grade modifier functional history (GMFH), grade modifier physical examination (GMPE), and grade modifier clinical studies (GMCS).⁹ 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.¹⁰

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed 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.¹¹

ANALYSIS

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

In his March 26, 2019 report, Dr. Lamb opined that appellant had 38 percent permanent impairment of the right lower extremity. However, as he did not provide a detailed application of the A.M.A., *Guides*, OWCP advised him of the requirements of the sixth edition of the A.M.A., *Guides*. In his May 30, 2019 report, Dr. Lamb utilized the fifth edition of the A.M.A., *Guides*, rather than the sixth edition, to rate appellant's impairment of the right lower extremity.¹² Thus, his reports were of diminished probative value.

In accordance with its procedures, OWCP properly referred the evidence of record to a DMA, who, in a June 26, 2019 report, reviewed the medical record and determined that appellant's date of MMI was March 26, 2019, the date of Dr. Lamb's impairment examination. Utilizing the sixth edition of the A.M.A., *Guides*, the DMA found that she had 13 percent total permanent impairment under the DBI methodology and that the A.M.A., *Guides* did not allow for the impairment ratings to be calculated under the ROM methodology. He, however, did not document specific results of sensory testing in his impairment assessments for decreased sural nerve sensation under Table 16-2, page 534 and decreased superficial peroneal nerve sensation under Table 16-12, page 534. The DMA also did not explain how grade modifiers were applied to determine the default impairment rating for each of these diagnoses, or to reach seven percent permanent lower extremity impairment for peroneal tendon injury under Table 16-2, page 501.¹³ Thus, the Board finds that the DMA's report requires clarification.

⁸ A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

⁹ *Id.* at 494-531.

¹⁰ *See R.V.*, Docket No. 10-1827 (issued April 1, 2011); *id.* at 23-28.

¹¹ *See supra* note 7 at Chapter 2.808.6(f) (February 2013); *B.B.*, Docket No. 18-1053 (issued March 26, 2020).

¹² *See supra* note 7; *J.R.*, Docket No. 16-1904 (issued September 14, 2017).

¹³ *See supra* note 10.

It is well established that, proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁴ Once OWCP undertook development of the evidence by referring appellant's case file to an OWCP medical adviser, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.¹⁵ The Board will therefore set aside OWCP's July 12, 2019 decision and remand the case for to its DMA to conduct a proper analysis under the A.M.A., *Guides* in order to determine if she has greater than 13 percent permanent impairment of her right lower extremity. After such further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an increased schedule award.

¹⁴ See *W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁵ See *W.W.*, *id.*; *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: May 28, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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