

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

V.H., Appellant	)	
	)	
and	)	<b>Docket No. 20-0012</b>
	)	<b>Issued: November 5, 2020</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Baltimore, MD, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On October 2, 2019 appellant, through counsel, filed a timely appeal from a July 1, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (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.

---

<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as presented in the prior appeal are incorporated herein by reference. The relevant facts are as follows.

On January 14, 2011 appellant, then a 44-year-old city carrier, filed a traumatic injury claim alleging that, on that date, she twisted her left foot and ankle when she slipped on an icy surface while in the performance of duty. On April 6, 2011 OWCP accepted the claim for left ankle sprain and left foot sprain and paid her wage-loss compensation benefits on the periodic rolls.

A magnetic resonance imaging (MRI) scan of the left foot dated March 18, 2011 revealed *pes planus* with dorsal hypertrophic changes involving the talonavicular joint, plantar calcaneal spur, slight edema in the fibulotalar ligament and posterior tibiotalar ligament compatible with a mild strain, and bone bruise in the plantar aspect of the talus at the talocalcaneal joint. A September 6, 2011 electromyogram (EMG) was unremarkable.

In a March 1, 2017 report, Dr. Joshua B. Macht, a Board-certified internist, noted appellant's history of injury and treatment. He examined appellant and determined maximum medical improvement (MMI) as of February 24, 2017. Dr. Macht noted diffuse tenderness to palpation of the left ankle, decreased sensation throughout the left ankle and foot, and grade IV weakness of the ankle joint. Range of motion (ROM) for the left ankle for dorsiflexion was -10 degrees, plantar flexion 35 degrees, eversion 15 degrees, and inversion 25 degrees. Dr. Macht noted that the ROM measurements were repeated at least three times for accuracy and to meet the criteria for validity with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>4</sup> Utilizing the A.M.A., *Guides* he identified the class of diagnosis (CDX), in Table 16-2,<sup>5</sup> as a Class 1 strain; tendinitis involving the posterior tibial, anterior tibial, Achilles, or peroneal tendon, which yielded a default value of 10 percent. Pursuant to Table 16-2, page 501, appellant's CDX was a Class 1 impairment for moderate motion deficits. Dr. Macht assigned a grade modifier functional history (GMFH) of 1 and a grade modifier physical examination (GMPE) of 3 based on the lower limb questionnaire score of 29 out of 100 points. He noted that because appellant's adjustment score was two higher than her impairment class it could not be used for grade modification. Dr. Macht noted grade modifier clinical studies (GMCS) of zero, to find no change from the default value of 10 percent. He opined that appellant had 10 percent permanent impairment of the left lower extremity (LLE).

On March 31, 2017 appellant filed a claim for a schedule award (Form CA-7).

---

<sup>3</sup> Docket No. 17-0382 (issued June 26, 2018). On February 22, 2016 OWCP terminated appellant's compensation, effective that date, finding that she no longer had any employment-related residuals or disability. By decision dated November 2, 2016, OWCP's hearing representative affirmed the February 22, 2016 termination decision. On December 12, 2016 appellant, through counsel, appealed to the Board. By decision dated June 26, 2018, the Board affirmed OWCP's decision dated November 2, 2016.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>5</sup> *Id.* at 509.

On April 7, 2017 OWCP referred appellant's case, along with a statement of accepted facts (SOAF), and the case record to its district medical adviser (DMA). In an April 30, 2017 report, Dr. Jovito Estaris, an occupational medicine specialist serving as a DMA, reviewed the record and noted appellant's history of injury and treatment. He determined that appellant had one percent permanent impairment of the LLE. The DMA noted that the MRI scan of the left ankle revealed slight edema in the fibulotalar ligament and in the posterior tibiotalar ligament compatible with a mild strain. Using Table 16-2, Foot and Ankle Regional Grid, page 501 of the A.M.A., *Guides* for a strain, all other tendons, appellant's CDX was a Class 1 impairment, with a default value of two for mild motion deficits. Pursuant to Table 16-6, page 516 of the A.M.A., *Guides*, the DMA noted GMFH was zero, no antalgic gait. He noted GMPE of one for mild limitation of ROM, pursuant to the A.M.A., *Guides*, Table 16-7, page 517. The DMA noted that grade modifier for GMCS was not used as clinical studies were used in proper classification of the DBI grid. He applied the net adjustment formula and found a net adjustment of -1, "class B," for an impairment rating of one percent of the LLE. The DMA noted that his calculation differed from Dr. Macht because he used the diagnosis ankle sprain "involving posterior tibial, anterior tibial, Achilles, or peroneal;" however, the MRI scan showed the involved tendons were posterior fibulotalar and tibiotalar ligaments which were classified as "all other tendons."

In a letter dated May 3, 2017, OWCP requested that Dr. Macht review the DMA's conclusion and provide a new opinion on permanent impairment.

On May 19, 2017 Dr. Macht reviewed the April 30, 2017 report of the DMA, and asserted that he stood by his initial impairment evaluation of 10 percent permanent impairment of the LLE as a result of her accepted left ankle injury. He noted discrepancies in his ROM measurements and that of the DMA, but asserted that his measurements were performed in accordance with the A.M.A., *Guides*. Dr. Macht also indicated that when a diagnosis does not quite fit the DBI model, the A.M.A., *Guides* instruct to use the closest corollary diagnosis.

On June 5, 2017 OWCP requested the DMA review the supplemental report from Dr. Macht dated May 19, 2017, and address the discrepancies between the two impairment ratings.

On June 30, 2017 the DMA advised that since there was inconsistency in the examination between two providers he recommended having an "independent medical examination" by a Board-certified orthopedic surgeon who routinely performed impairment ratings using both the DBI and ROM method according to the A.M.A., *Guides*.

On July 6, 2017 OWCP determined that a conflict existed between the opinion of Dr. Macht, appellant's treating physician who opined that appellant had 10 percent permanent impairment, and Dr. Estaris, the DMA, who opined that appellant had 1 percent LLE impairment. It referred appellant for an impartial medical examination with Dr. Mark A. Peterson, a Board-certified orthopedic surgeon, selected as the impartial medical examiner (IME).

In an October 18, 2017 report, Dr. Peterson noted appellant's history of injury, treatment, and examination findings. He reported normal examination findings of the lower extremities. Dr. Peterson advised that appellant reached MMI and was ready to return to work in July 2011. He found no objective physical finding to explain her continued complaints of pain and inability to ambulate without discomfort. Dr. Peterson noted that the EMG and nerve conduction velocity (NCV) studies of the lower extremities were normal. An MRI scan of the foot and ankle were consistent with a mild ankle sprain. Dr. Peterson further noted that the physical examination was

unremarkable. He advised that pursuant to the A.M.A., *Guides*, appellant was a CDX for ankle strain with a class zero for no significant abnormal findings of muscle or tendon injury.

On March 19, 2018 OWCP requested clarification from Dr. Peterson noting that he did not address or resolve the conflict of medical opinion between Dr. Macht and Dr. Estaris.

In an undated supplemental report, Dr. Peterson noted that at the time of his examination he found no significant objective findings to provide a permanent impairment rating. He noted that after reviewing the A.M.A., *Guides* he concurred with the DMA's impairment rating. Dr. Peterson noted a CDX of Class 1, grade C, default value of 1 for mild motion deficits. Applying the modifiers Dr. Peterson noted GMPE of zero, GMFH of zero and there was no GMCS. Applying the net adjustment formula, he found a net adjustment of -2 or one percent permanent impairment of the LLE. Dr. Peterson disagreed with the findings of Dr. Macht's March 1, 2017 report and noted that he found mild problems as her ankle motion was symmetric and without limitation.

By decision dated May 22, 2018, OWCP granted appellant a schedule award for one percent permanent impairment of the LLE. The award was for 2.88 weeks to run during the period from March 1 to 21, 2017.

On May 30, 2018 counsel requested a telephonic hearing before an OWCP hearing representative.

By decision dated October 3, 2018, OWCP's hearing representative set aside the decision dated May 22, 2018 and remanded the case for further medical development. It found that OWCP improperly declared a conflict of opinion between Dr. Macht who assigned 10 percent impairment of the LLE, and Dr. Estaris who assigned 1 percent impairment of the LLE. The hearing representative indicated that Dr. Estaris' addendum report of June 30, 2017, did not offer a rating, rather, he recommended additional medical development with a Board-certified specialist who performed rating examinations in accordance with the A.M.A., *Guides*. Based on this it was improper to declare a conflict, instead OWCP should have referred appellant for a second opinion examination. The hearing representative indicated that the opinion of Dr. Peterson could not be afforded the special weight of the medical evidence as an IME, but that of a second opinion physician. It further found that the opinion of Dr. Peterson, in his reports of October 18, 2017 and April 23, 2018, were in direct conflict with Dr. Macht's reports of March 1 and 19, 2017. Therefore, the hearing representative instructed that the case be remanded to OWCP for referral of appellant to an IME for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).

On October 11, 2018 OWCP referred appellant to an IME. In a November 15, 2018 report, Dr. Gary W. Pushkin, a Board-certified orthopedist serving as an IME, discussed appellant's history of injury and reviewed her medical records. Upon examination of appellant's LLE, Dr. Pushkin noted no visible deformity or defect, the skin was warm and dry, there was no atrophy, there was tenderness along the medial and lateral malleoli and anteromedial and anterolateral joint lines, and negative anterior drawer test. He found the ROM measurements were unreliable, dorsiflexion measured -5 degrees to +5 degrees, plantar flexion was 25 to 30 degrees, eversion was zero, and inversion was 5 degrees. Dr. Pushkin noted that appellant walked with an antalgic gait, which was not consistent when walking forward and backward. He diagnosed ankle and foot sprain post-traumatic, resolved and symptom magnification. Upon review of the medical records,

Dr. Pushkin opined that appellant showed a lot of inconsistency in ROM measurements by several providers and also demonstrated different gait patterns. Pursuant to the A.M.A., *Guides*, page 517-18 he found her ROM measurements unreliable. Dr. Pushkin noted that according to Table 16-2, page 501, appellant was a Class 1 impairment with a default grade of 1 percent. He noted a GMFH of zero pursuant to Table 16-6 as her gait was inconsistent when walking forward and backward; the GMPE of zero pursuant to Table 16-7 as her ROM measurements were inconsistent; and the GMCS was one pursuant to Table 16-8 for mild pathology, bone bruises, and edema on the MRI scan. Dr. Pushkin applied the net adjustment formula and found a net adjustment of -2, Class 1, Grade A for an impairment rating of zero percent permanent impairment of the LLE.

By decision dated December 6, 2018, OWCP denied appellant's claim for a schedule award. It noted that the schedule award determination was based on the November 15, 2018 report of Dr. Pushkin, the IME.

On December 11, 2018 counsel requested a telephonic oral hearing before an OWCP hearing representative, which was held on April 17, 2019.

By decision dated July 1, 2019, an OWCP hearing representative affirmed the decision dated December 6, 2018.

### **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. 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 specified edition of the A.M.A., *Guides*, published in 2009.<sup>8</sup> 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.<sup>9</sup>

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).<sup>10</sup> Under the sixth edition, the evaluator identifies the impairment CDX, which

---

<sup>6</sup> *Supra* note 2.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

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

<sup>10</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

is then adjusted by GMFH, GMPE, and GMCS.<sup>11</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>12</sup> Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>13</sup>

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>14</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.<sup>15</sup> Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>16</sup>

### ANALYSIS

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

OWCP determined that a conflict in the medical opinion evidence existed between Dr. Macht, a treating physician, and Dr. Estaris, the DMA, with regard to permanent impairment of the LLE and referred appellant to Dr. Peterson, an IME. OWCP subsequently found that when Dr. Peterson was selected as the IME to resolve the conflict in medical opinion, a conflict did not exist in the medical opinion evidence. The referral to Dr. Peterson is therefore considered to be for a second opinion evaluation.<sup>17</sup> It properly referred appellant's case to Dr. Pushkin pursuant to 5 U.S.C. § 8123(a) for an IME in order to resolve the conflict in medical opinion. In his November 15, 2018 report, Dr. Pushkin reviewed appellant's history of injury, the relevant medical evidence, including appellant's March 18, 2011 MRI scan of the left foot, and September 6, 2011 EMG/NCV study, and provided physical examination findings. Upon examination of appellant's LLE, Dr. Pushkin noted no visible deformity or defect, the skin was warm and dry, there was no atrophy, there was tenderness along the medial and lateral malleoli and anteromedial and anterolateral joint lines, and negative anterior drawer test. He found the

---

<sup>11</sup> *Id.* at 494-531.

<sup>12</sup> *Id.* at 521.

<sup>13</sup> *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>14</sup> 5 U.S.C. § 8123(a). *See R.C.*, Docket No. 18-0463 (issued February 7, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016).

<sup>15</sup> *See M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

<sup>16</sup> *Id.*

<sup>17</sup> *See S.M.*, Docket No. 19-0397 (issued August 7, 2019) (the Board found that at the time of the referral for an IME there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); *see also Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (the Board found that, as there was no conflict in medical opinion evidence, the report of the physician designated as the IME was not afforded the special weight of the evidence, but instead considered for its own intrinsic value as he was a second opinion specialist).

ROM measurements unreliable and inconsistent and noted that she also demonstrated different gait patterns. Dr. Pushkin diagnosed ankle and foot sprain post-traumatic, resolved and symptom magnification. He noted that according to Table 16-2, page 501, appellant was a Class 1 impairment with a default grade C for 1 percent impairment. Dr. Pushkin noted a GMFH of zero pursuant to Table 16-6 as her gait was inconsistent when walking forward and backward, the GMPE of zero pursuant to Table 16-7 as her ROM measurements were inconsistent and she had less than 1 centimeter of muscle atrophy, and the GMCS was one pursuant to Table 16-8 for mild pathology, bone bruises, and edema. Dr. Pushkin applied the net adjustment formula and found zero percent permanent impairment of the LLE.

As noted above, when a case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>18</sup> The Board finds that Dr. Pushkin's November 15, 2018 report is entitled to special weight and established that appellant had no ratable impairment of the LLE.<sup>19</sup> Dr. Pushkin's opinion was based on a proper factual and medical history, which he reviewed, and on the proper tables and procedures in the A.M.A., *Guides*. He referenced the A.M.A., *Guides* and explained his opinion as to why appellant had no ratable permanent impairment of the LLE. Dr. Pushkin based his impairment rating on the medical evidence in the record, correctly applied the A.M.A., *Guides* and provided medical rationale for his impairment rating.<sup>20</sup> As such, the Board finds that she has not established permanent impairment of her LLE due to her accepted left ankle sprain and left foot sprain.

Appellant may request a schedule award or 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.

### **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.

---

<sup>18</sup> *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>19</sup> *D.S.*, Docket No. 18-0336 (issued May 29, 2019); *T.C.*, Docket No. 17-1741 (issued October 9, 2018).

<sup>20</sup> *See D.B.*, Docket No. 17-0930 (issued July 11, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 1, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 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