United States Department of Labor
Employees' Compensation Appeals Board

H.B., Appellant	)	
and	)	**Docket No. 19-0926**
	)	**Issued: September 10, 2020**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, 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, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 27, 2019 appellant, through counsel, filed a timely appeal from a March 11, 2019 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish more than two percent permanent impairment of her left lower extremity, for which she previously received 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 June 6, 2010 appellant, then a 49-year-old custodian/laborer, filed a traumatic injury claim (Form CA-1) alleging that on the same date she sustained an injury when a metal trash can fell on her left foot and toes while she was in the performance of duty. OWCP accepted her claim for dislocated interphalangeal (IP) joints of the third and fourth digits of the left foot.[3] On June 11, 2010 appellant underwent OWCP-authorized open reduction surgery with wire fixation of the third and fourth digits of the left foot. On September 17, 2014 she underwent OWCP-authorized surgical removal of a Morton's neuroma from the third interspace of the left foot.

In an October 8, 2014 note, Dr. Mitchell Needleman, a podiatrist, advised that appellant's left foot condition had reached maximum medical improvement (MMI).

On November 28, 2014 appellant filed a claim for a schedule award (Form CA-7) due to her accepted employment conditions.

In an April 16, 2015 report, Dr. Neil Allen, a Board-certified internist and neurologist, detailed the findings of his February 10, 2015 physical examination of appellant's left foot/ankle, noting that she had mild palpatory findings in the forefoot, and full range of motion (ROM) of the left toes/ankle without instability, loss of muscle strength, or crepitus of the phalanges. Appellant exhibited an altered gait, but there was no sensory loss in the lower extremities or atrophy of the left lower extremity relative to the right. Dr. Allen rated the permanent impairment of her left lower extremity under the diagnosis-based impairment (DBI) rating method of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] Utilizing Table 16-2 (Foot and Ankle Regional Grid) on page 505, he found that appellant's left foot condition of displaced or fragmented phalanx fell under a class of diagnosis (CDX) of class 1 with a default value of five percent. Dr. Allen determined that she had a grade modifier for functional history (GMFH) of 1 (due to *Quick*DASH score of 72, antalgic gait, and regular use of orthotics), grade modifier for physical examination (GMPE) of 1 (due to mild palpatory findings without observed abnormalities), and grade modifier for clinical studies (GMCS) of 0 (due to unavailability of studies). The result of applying the net adjustment formula (-1) required movement one place to the left of the default value on Table 16-2 to the four percent value. Dr. Allen therefore concluded that the total permanent impairment of appellant's left lower extremity was four percent.

On May 20, 2015 OWCP requested that Dr. Michael Mellman, a Board-certified internist serving as an OWCP district medical adviser (DMA), provide an opinion as to permanent impairment of appellant's left lower extremity under the standards of the sixth edition of the A.M.A., *Guides*.

In a June 11, 2015 report, the DMA advised that he agreed with Dr. Allen's determinations regarding the CDX, grade modifiers, and net adjustment of -1, but he concluded that appellant had two percent permanent impairment of her left lower extremity. He indicated that the date of MMI

[3] Appellant stopped work on June 7, 2010 and returned to full-duty work on August 9, 2010. OWCP paid her appropriate wage-loss compensation benefits on the supplemental rolls for disability from work.

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

was when appellant was discharged from physical therapy and fitted with orthotics, but he reported that he was unable to determine this date from the available documentation.

By decision dated March 16, 2016, OWCP granted appellant a schedule award for two percent permanent impairment of her left lower extremity. The award ran for 5.76 weeks from April 16 to May 26, 2015 and was based on the June 11, 2015 opinion of the DMA.

On April 7, 2016 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.[5]

Prior to a hearing being held, OWCP's hearing representative issued a September 23, 2016 decision setting aside the March 16, 2016 decision and remanding the case to OWCP for further development. The representative found that clarification was needed regarding the discrepancy between the permanent impairment conclusions of Dr. Allen and the DMA, and she directed OWCP to conduct additional development, including referral of the case for further evaluation by a DMA.

On September 30, 2016 OWCP received an August 18, 2016 report of Dr. Stephen Wilson, a Board-certified physical medicine and rehabilitation physician, who reported examination findings for the left foot including tenderness to palpation between the third and fourth metatarsals, decreased ROM of the toes, and weakness against resistance of the great toe. He noted that, utilizing Table 16-2 of the sixth edition of the A.M.A., *Guides*, appellant's left foot/ankle dislocation condition (metatarsal/tarsal) fell under a CDX of class 1 with a default value of seven percent. Appellant had a GMFH of 2 (due to *Quick*DASH score of 82) and GMCS of 1, and the GMPE was not applicable because physical examination findings were used to determine class. Dr. Wilson advised that application of the net adjustment formula required movement one place to the right of the default value on Table 16-2 and resulted in eight percent permanent impairment of the left lower extremity for the dislocation condition. He utilized Table 16-2 to rate a second left foot condition, Morton's neuroma with associated pain/weakness (soft issue injury), which fell under class 1 with a default value of one percent. Application of the net adjustment formula with the above-noted modifiers resulted in two percent permanent impairment of the left lower extremity for this condition. Dr. Wilson utilized the Combined Values Chart on page 604 of the A.M.A., *Guides* to combine these two impairment values and concluded that the total permanent impairment of appellant's left lower extremity was 10 percent.

On January 21, 2017 OWCP requested that Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as a DMA, provide an opinion on the permanent impairment of appellant's left lower extremity under the standards of the sixth edition of the A.M.A., *Guides*. It directed the DMA to consider Dr. Wilson's August 18, 2016 report as part of his evaluation.

In a January 27, 2017 report, the DMA indicated that, utilizing Table 16-2, appellant's left foot condition (two currently nondisplaced phalanges with abnormal findings) fell under a CDX of class 1 with a default value of one percent. For the third toe phalanx, he found that she had a GMFH of 1 and GMPE of 1 (due to a mild problem for both modifiers), and that the GMCS was not applicable because clinical studies were used to determine the class. Application of the net adjustment formula resulted in no movement from the default value and the DMA therefore

[5] On June 21, 2016 appellant filed a Form CA-7 claim for an increased schedule award compensation.

concluded that appellant had one percent permanent impairment of her left lower extremity due to the third toe phalanx condition. For the fourth toe phalanx, he found that she had a GMPE of 1 (due to a mild problem). The GMCS was not applicable because clinical studies were used to determine the class, and the GMFH was not applicable because it could only be used once in a lower extremity impairment rating and it had already been used for the third toe phalanx condition. Application of the net adjustment formula resulted in no movement from the default value and therefore appellant had one percent permanent impairment of her left lower extremity due to the fourth toe phalanx condition. The DMA combined these values to conclude that she had two percent permanent impairment of her left lower extremity.

The DMA further explained that Dr. Wilson's August 18, 2016 calculation of permanent impairment was improper because he rated two conditions which could not serve as a basis for an impairment rating at the time of his examination. He explained that Dr. Wilson improperly found eight percent permanent impairment for a left foot/ankle condition (metatarsal/tarsal) because appellant did not have a documented employment-related injury to the upper left foot or ankle, and improperly found two percent for a Morton's neuroma because objective neurological residuals of the neuroma were not adequately documented.

By decision dated March 28, 2017, OWCP determined that appellant had not met her burden of proof to establish more than two percent permanent impairment of her left lower extremity, for which she previously received schedule award compensation. It found that the DMA properly applied the standards of the A.M.A., *Guides* on January 27, 2017 to determine that she was not entitled to additional schedule award compensation. OWCP noted that the DMA had properly determined that Dr. Wilson's August 18, 2016 calculation of permanent impairment was not conducted in accordance with the relevant standards.

On April 3, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on October 10, 2017, counsel argued that Dr. Wilson's August 18, 2016 report established appellant's entitlement to increased schedule award compensation.

By decision dated December 22, 2017, OWCP's hearing representative set aside OWCP's March 28, 2017 decision. The representative remanded the case to OWCP for further development, to include providing Dr. Allen an opportunity to submit a supplemental report regarding permanent impairment of appellant's left lower extremity.

On January 11, 2018 OWCP requested that Dr. Allen provide a supplemental report regarding permanent impairment under the standards of the sixth edition of the A.M.A., *Guides.* In a March 14, 2018 supplemental report, Dr. Allen provided an opinion regarding the permanent impairment of appellant's left lower extremity based on physical examination findings that he had obtained on February 10, 2015. He utilized Table 16-2 to apply the DBI rating method and determined that her left foot condition of displaced or fragmented phalanx fell under a CDX of class 1 with a default value of five percent. Dr. Allen determined that appellant had a GMFH of 1 (due to *Quick*DASH score of 72, antalgic gait, and regular use of orthotics), and GMPE of 1 (due to mild palpatory findings without observed abnormalities), and that the GMCS was not applicable (due to unavailability of studies). Application the net adjustment formula required no movement from the default value on Table 16-2. Dr. Allen therefore concluded that the total permanent impairment of appellant's left lower extremity was five percent.

OWCP requested that the DMA review Dr. Allen's March 14, 2018 report and provide an opinion regarding the permanent impairment of appellant's left lower extremity. In a report dated March 30, 2018, the DMA discussed Dr. Allen's March 14, 2018 report (with its examination findings from February 10, 2015) and maintained that he rated her left lower extremity permanent impairment using an incorrect diagnosis. He explained that the correct, most impairing diagnosed condition of the left foot (two currently nondisplaced phalanges with abnormal findings) fell under a CDX of class 1 with a default value of one percent. The DMA then utilized the same rating method as provided in his January 27, 2017 report to determine that, for the combined impairments of the third and fourth toe phalanges, appellant had a total permanent impairment of her left lower extremity of two percent.

Given the lack of current detailed physical examination findings, OWCP then referred appellant for a second opinion examination to Dr. Richard Katz, Board-certified in physical medicine and rehabilitation. It requested that Dr. Katz provide an opinion regarding the permanent impairment of her left lower extremity.

In an April 9, 2018 report, Dr. Katz discussed appellant's factual and medical history and indicated that she complained of pain in the tips of the third and fourth toes of her left foot. He reported the findings of the physical examination he conducted on the same date, noting that she did not exhibit clawing or toe instability in her left foot and that there was normal hallucis alignment. Dr. Katz observed that appellant had mild numbness in the tips of the third and fourth toes and he performed ROM testing of the left ankle and toe joints. He carried out a DBI rating under the sixth edition of the A.M.A., *Guides* and determined that, utilizing Table 16-2 on page 502, the most appropriate diagnosis for rating purposes for her third and fourth toes was joint instability/ligamentous laxity (traumatic) of the metatarsophalangeal (MTP) joint. Dr. Katz rated the third and fourth toes separately in the same manner, noting that each toe fell under a CDX of 1 with a default value of four percent, and that the GMPE was 1 and the GMFH was 1 (due to the score of the American Association of Orthopedic Surgeons (AAOS) lower limb questionnaire). Application of the net adjustment formula did not require movement from the four percent default value for each toe and combining the impairment percentages for the third and fourth toes yielded eight percent permanent impairment of the left lower extremity. Dr. Katz then provided a rating for the Morton's neuroma surgery, noting that there was no specific rating category for this condition. He posited that it was most appropriately rated under Table 16-12 (Peripheral Nerve Impairment -- Lower Extremity Impairments) on page 536 and found that the mild sensory impairment of appellant's medial plantar nerve warranted a finding of one percent permanent impairment of the left lower extremity. Dr. Katz combined that above-noted eight and one percent values and concluded that the total permanent impairment of appellant's left lower extremity was nine percent.[6]

On April 17, 2018 OWCP requested that the DMA review Dr. Katz' April 9, 2018 report and provide an opinion regarding the permanent impairment of appellant's left lower extremity. On April 30, 2018 the DMA indicated that Dr. Katz based part of his rating on MTP joint instability or ligamentous laxity, but had specifically reported in his April 9, 2018 examination findings that she had no clawing or toe instability in her left foot. He recommended that Dr. Katz be asked to comment on this circumstance and noted that, if he "is in error, then he needs to obtain a more

[6] Dr. Katz indicated that appellant reached MMI by October 7, 2014.

appropriate diagnosis (if one exists) to rate the third and fourth toes" under Table 16-2 of the sixth edition of the A.M.A., *Guides.*

OWCP then requested that Dr. Katz provide clarification of his April 9, 2018 report per the concerns raised by the DMA. In a June 14, 2018 supplemental report, Dr. Katz noted that he had been asked to discuss how the MTP joints of the left third and fourth toes could be rated for joint instability when there were no documented findings on examination. He indicated that, as one of the editors of the A.M.A., *Guides*, he understood that there was not a diagnosis-related estimated impairment for every possible diagnosis, but again posited that the most closely related diagnosis he could find was joint instability in light of appellant's toe dislocation. Dr. Katz advised that he could not "fathom the argument" that the lack of a precise rating regimen in the A.M.A., *Guides* for a given condition should result in no impairment rating. He noted that there was no precise rating method for appellant's Morton's neuroma, but he maintained that one could have pain from this condition without sensory deficit and he asserted that he used the most similar rating category.

On July 16, 2018 OWCP requested that the DMA review Dr. Katz' impairment rating reports (dated April 9 and June 14, 2018) and provide an opinion on the permanent impairment of appellant's left lower extremity. In an August 4, 2018 report, the DMA discussed Dr. Katz' June 14, 2018 report and continued to maintain that it was improper for Dr. Katz to base part of his rating on MTP joint instability or ligamentous laxity because he had not reported in his April 9, 2018 examination findings that appellant had such instability or ligamentous laxity in her left foot. The DMA then applied the DBI rating method utilizing Table 16-2 of the sixth edition of the A.M.A., *Guides*. He advised that the symptomatic Morton's neuroma affecting appellant's third and fourth toes of the left foot constituted the most impairing diagnosis and fell under the diagnostic category of soft tissue mass (ganglion). The DMA indicated that use of this condition was appropriate because numbness related to the Morton's neuroma was the only clinical abnormality Dr. Katz found during his April 9, 2018 examination.[7] He found that, for the symptomatic third and fourth toes, the Morton's neuroma condition warranted the finding of a CDX of class 1 with a default impairment value of one percent. The DMA determined that, for both toes, appellant had a GMFH of 1 due to her AAOS lower limb questionnaire score showing mild symptoms. Appellant had a GMPE of 0 based on Dr. Katz' ROM findings and the fact that no other objective findings warranted a higher rating. The DMA found that the GMCS was not applicable because no clinical studies were presented at MMI which were specific to the left foot condition being rated. Application of the net adjustment formula to each toe resulted in movement one space to the left of the default impairment value on Table 16-2, but still yielded one percent permanent impairment of the left lower extremity for each toe. The DMA used the combined values chart on page 604 to combine the one percent impairment value for each toe and therefore concluded that appellant had two percent permanent impairment of her left lower extremity.[8]

On August 16, 2018 OWCP requested that the DMA review Dr. Allen's March 14, 2018 report and Dr. Katz' impairment rating reports (dated April 9 and June 14, 2018) and provide an

[7] The DMA referenced Dr. Katz' lack of discussion of sensory testing in his April 9, 2018 report as further justification for rating the Morton's neuroma under the DBI rating method of Table 16-2.

[8] The DMA determined that the date of MMI was April 9, 2018, the date of Dr. Katz' examination.

opinion regarding the permanent impairment of appellant's left lower extremity.[9] In an August 23, 2018 report, the DMA indicated that Dr. Allen provided an improper assessment of her permanent impairment, including in his March 14, 2018 report, because he rated a left foot condition that did not exist, *i.e.*, injury to the MTP joints. He noted that Dr. Katz could not rate appellant under the category of MTP joint instability or ligamentous laxity because she did not sustain an MTP joint injury and Dr. Katz specifically reported in his April 9, 2018 examination findings that she had no such instability or laxity in her left foot. The DMA then performed the same impairment rating calculation that was contained in his August 4, 2018 report and he concluded that the total permanent impairment of her left lower extremity was two percent.

By decision dated August 28, 2018, OWCP determined that appellant had not met her burden of proof to establish more than two percent permanent impairment of her left lower extremity, for which she previously received schedule award compensation. It found that the DMA properly concluded that appellant had no more than two percent permanent impairment of her left lower extremity.

On September 5, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on February 8, 2019, counsel argued that the impairment ratings of appellant's attending physicians established entitlement to increased schedule award compensation.

By decision dated March 11, 2019, OWCP's hearing representative affirmed the August 28, 2018 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,[10] and its implementing federal regulations,[11] 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* as the uniform standard applicable to all claimants.[12] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[13]

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 foot/ankle, the relevant portion of the leg for the present case,

[9] It is unclear why OWCP requested that the DMA review Dr. Allen's March 14, 2018 report and Dr. Katz' April 9 and June 14, 2018 reports as he had already reviewed them and provided comments.

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] *Id*. at § 10.404(a).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.[14] 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).[15] 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.[16]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[17] This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[18] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist 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.[19]

ANALYSIS

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

The Board notes that Dr. Allen for the appellant and both Dr. Katz and Dr. Slutsky, for the government, each utilized the DBI methodology, but relied upon a different diagnosis classification for appellant's properly ratable condition. As set forth above, when there is disagreement between a DMA or other physician chosen by the government and appellant's physician, OWCP must appoint a third physician who shall make an examination.[20] For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.[21] The Board finds that the medical opinions of Dr. Allen and Dr. Katz and Dr. Slutsky are of equal weight as they each present viable diagnoses and rationale for the choice of a proper diagnosis. The dispute between these physicians centers on their use of a diagnosis for a condition in Table 16-2, which ostensibly supported their respective opinions and each explained the basis for his choice of the diagnosis upon which to base a DBI rating. The Board finds that there is an unresolved conflict as to the extent of permanent impairment, if any, related to appellant's right

[14] *See* A.M.A., *Guides* (6th ed. 2009) 501-08.

[15] *Id.* at 515-22.

[16] *Id.* at 23-28.

[17] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[18] 20 C.F.R. § 10.321.

[19] *S.S.*, Docket No. 19-0766 (issued December 23, 2019); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[20] *Supra* note 17; *see Y.A.*, 59 ECAB 701 (2008).

[21] *Supra* note 19; *see also P.R.*, Docket No. 18-0022 (issued April 9, 2018).

lower extremity between Dr. Allen and Dr. Katz and Dr. Slutsky based upon the proper diagnosis to be utilized within Table 16-2 for a DBI impairment rating.

Because there remains an unresolved conflict in medical opinion regarding the extent of appellant's right lower extremity impairment, pursuant to 5 U.S.C. § 8123(a), the case will be remanded to OWCP for referral of appellant, together with the medical record and a statement of accepted facts, to an appropriate Board-certified specialist for an impartial medical examination to determine the extent and degree of appellant's right lower extremity permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2019 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: September 10, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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