

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

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<b>T.B., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0642</b>
	)	<b>Issued: September 30, 2020</b>
	)	
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>TRANSPORTATION SECURITY</b>	)	
<b>ADMINISTRATION, Aurora, CO, Employer</b>	)	
_____	)	

<i>Appearances:</i> Alan J. Shapiro Esq., for the appellant <sup>1</sup> Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
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**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On January 29, 2020 appellant, through counsel, filed a timely appeal from a December 26, 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.

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<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.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish more than six percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

## FACTUAL HISTORY

OWCP accepted that on August 14, 2010 appellant, then a 60-year-old transportation security officer (screener), sustained a temporary aggravation of a left ankle posterior tibial tendon tear and a temporary aggravation of the left pes planus while in the performance of duty.<sup>3</sup>

OWCP thereafter received an April 10, 2018 medical report by Dr. Jack L. Rook, an attending Board-certified physiatrist. Dr. Rook noted a history of the accepted August 14, 2010 employment injury and appellant's medical treatment. On physical examination, he reported that appellant ambulated with an antalgic gait into the examination room and otherwise noted that he did not demonstrate any chronic pain behaviors. On general examination with appellant standing, Dr. Rook noted that he had a collapse of his left longitudinal arch. There was muscle atrophy of the left foot intrinsic musculature compared to the right side. On evaluation of the left foot, Dr. Rook found tenderness of the plantar fascia adjacent to the left heel. There was no discomfort elicited with compression of the metatarsal heads. There was also tenderness along the medial foot extending to the medial ankle just below the medial malleolus. There was no swelling or deformity of the ankle joint. On range of motion (ROM) examination of the left ankle, Dr. Rook reported 10 degrees of dorsiflexion, 20 degrees of plantar flexion, 20 degrees of eversion, and 15 degrees of inversion measured three times. In view of the fact that the posterior tibial tendon tear was a permanent condition and appellant's foot and ankle problems had persisted for the past eight years, he recommended that his diagnoses be expanded to include permanent aggravation of a left ankle posterior tibial tendon tear and permanent aggravation of the left pes planus. Dr. Rook referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>4</sup> and utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 16-2 (Foot and Ankle Regional Grid), page 501, the class of diagnosis (CDX) for a torn posterior tibial tendon resulted in a class 1 impairment with a default value of five. Dr. Rook assigned a grade modifier for functional history (GMFH) of 2 based on appellant's chronic limp and need for a cane, modified footwear, and an Arizona brace. He assigned a grade modifier for physical examination (GMPE) of 1. Dr. Rook found that a grade modifier for clinical studies (GMCS) was not applicable as the clinical studies were used to establish the diagnosis and proper placement in the regional grid. He utilized the net adjustment formula  $(GMFH - CDX) + (GMPE - CDX) = (2 - 1) + (1 - 1) = +1$ , which resulted in a grade D or

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<sup>3</sup> Appellant had other claims accepted by OWCP. In a claim adjudicated by OWCP under File No. xxxxxx705, OWCP accepted appellant's April 24, 2010 traumatic injury claim for cervical sprain and temporary aggravation of cervical spondylosis with myelopathy. In a claim for a September 30, 2011 traumatic injury adjudicated by OWCP under File No. xxxxxx171, OWCP accepted neck sprain, cervical spondylosis without myelopathy, and various right shoulder conditions including bursitis and sprain. Appellant's claims in File Nos. xxxxxx705 and xxxxxx171 have been administratively combined with the present claim, File No. xxxxxx461, with File No. xxxxxx705 designated as the master file.

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

six percent permanent impairment of the left lower extremity. Dr. Rook also utilized the ROM rating method and referenced Table 16-20 (Hindfoot Motion Impairments) and Table 16-22 (Ankle Motion Impairments), page 549, to find two percent permanent impairment for inversion at 15 degrees, seven percent permanent impairment for plantar flexion at 20 degrees, and seven percent permanent impairment at 10 degrees of dorsiflexion. He combined these values to equal 16 percent permanent impairment of the left lower extremity. Dr. Rook concluded that appellant had 16 percent permanent impairment of the left lower extremity given that he had a higher rating for permanent impairment under the ROM rating method.

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

On September 11, 2018 OWCP routed Dr. Rook's April 10, 2018 report, a statement of accepted facts (SOAF), and the case file to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), for review and a determination of permanent impairment of the left lower extremity in accordance with the sixth edition of the A.M.A., *Guides* and the date of maximum medical improvement (MMI).

In a September 12, 2018 report, Dr. Harris reviewed the medical record, including the report of Dr. Rook. He found that the diagnosis of left ankle posterior tibial tendon tear had been established. Using the DBI method with reference to appellant's left ankle condition, the DMA found that, under the sixth edition of the A.M.A., *Guides*, Table 16-2, page 501, appellant had six percent permanent impairment of the left lower extremity. He noted that Dr. Rook had calculated appellant's impairment using both the DBI and ROM rating methods. The DMA explained that the A.M.A., *Guides* do not allow an impairment rating due to loss of ROM for the applicable diagnosis because the diagnosis did not contain an asterisk (\*) in the DBI grid, and thus the ROM method was not applicable. He concluded that appellant reached MMI on April 10, 2018, the date of Dr. Rook's impairment evaluation.

By decision dated June 19, 2019, OWCP granted appellant a schedule award for six percent permanent impairment of the left lower extremity. The period of the award ran for 17.28 weeks for the period April 10 through August 8, 2018, and was based on the opinions of Dr. Rook and the DMA.<sup>5</sup>

On July 3, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on October 10, 2019.

By decision dated December 26, 2019, OWCP's hearing representative affirmed the June 19, 2019 decision.

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<sup>5</sup> By separate decision on that same date OWCP expanded the acceptance of appellant's claim to include a permanent aggravation of a left ankle posterior tibial tendon tear and a permanent aggravation of left pes planus.

## LEGAL PRECEDENT

The schedule award provisions of FECA<sup>6</sup> and its implementing 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. 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>8</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>9</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>10</sup>

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 (ICF).<sup>11</sup> 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.<sup>12</sup> 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).<sup>13</sup> 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.<sup>14</sup>

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

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<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *Id.* See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>9</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

<sup>10</sup> *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>11</sup> A.M.A., *Guides*, page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

<sup>12</sup> See A.M.A., *Guides* 501-08, Table 16-2.

<sup>13</sup> *Id.* at 515-22.

<sup>14</sup> *Id.* at 23-28.

accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>15</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than six percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

Appellant submitted an April 10, 2018 report from Dr. Rook to support his claim for a schedule award. Dr. Rook reviewed appellant's history and conducted an examination. He reported a diagnosis of left ankle posterior tibial tendon tear. Utilizing the DBI methodology under Table 16-2, page 501 of the sixth edition of the A.M.A., *Guides*, Dr. Rook found that appellant had a class 1, grade C impairment for left ankle posterior tibial tendon tear. He assigned a grade modifiers and applied the net adjustment formula to find a net adjustment of +1, which yielded six percent left lower extremity permanent impairment. Dr. Rook also opined that appellant had 16 percent permanent impairment of the left lower extremity under the ROM methodology.

OWCP properly referred the evidence of record to a DMA, Dr. Harris. In his September 12, 2018 report, the DMA concurred with Dr. Rook's finding that appellant had six percent permanent impairment of the left lower extremity. However, the DMA disagreed with Dr. Rook's 16 percent left lower extremity impairment rating as it was based on the ROM methodology. He correctly explained that the A.M.A., *Guides* do not allow an impairment rating due to loss of ROM for the applicable diagnosis because the diagnosis did not contain an asterisk (\*) in the DBI grid, and thus the ROM method was not applicable.<sup>16</sup>

The Board finds that the DMA properly applied the A.M.A., *Guides* to find that appellant had no more than six percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation. Dr. Harris' report is detailed, well rationalized, and based on a proper factual background, and thus his opinion represents the weight of the medical evidence.<sup>17</sup> As such, the Board finds that appellant has not met his burden of proof to establish greater left lower extremity permanent impairment than what was previously awarded.

On appeal counsel contends that OWCP failed to give due deference to the findings of appellant's attending physician. The Board does not find that the assertion is meritorious. As explained above, appellant has not established greater than six percent permanent impairment of his left lower extremity.

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<sup>15</sup> See *supra* note 9 at Chapter 2.808.6(f) (March 2017). See also *P.W.*, Docket No. 19-1493 (issued August 12, 2020); *Frantz Ghassan*, 57 ECAB 349 (2006).

<sup>16</sup> See *V.S.*, Docket No. 19-1679 (issued July 8, 2020); *N.M.*, Docket No. 19-1925 (issued June 3, 2020); *T.F.*, Docket No. 19-0157 (issued April 21, 2020).

<sup>17</sup> See *id.*

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 his burden of proof to establish more than six percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 30, 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