United States Department of Labor
Employees' Compensation Appeals Board

M.F., Appellant	)	
and	)	**Docket No. 20-1434**
	)	**Issued: April 26, 2021**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, McAllen, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 7, 2020 appellant filed a timely appeal from February 10 and March 4, 2020 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 26 percent permanent impairment of his left lower extremity for which he previously received a schedule award.

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that following the March 4, 2020 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*.

FACTUAL HISTORY

On August 29, 2004 appellant, then a 35-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on that day he accidentally shot himself in the left foot with a rifle while in the performance of duty. He stopped work on August 29, 2004.

On September 10, 2004 OWCP accepted appellant's claim for open wound to the left foot. It paid her wage-loss compensation on the periodic rolls commencing October 31, 2004.

Appellant returned to work on February 24, 2005.

On September 22, 2005 appellant filed a claim for a schedule award (Form CA-7).

On March 30, 2006 OWCP referred appellant's case, along with a statement of accepted facts (SOAF), for a schedule award impairment rating with Dr. Ronald Blum, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA). In an April 6, 2006 report, Dr. Blum noted his review of Dr. Anzaldua's March 3, 2006 report, the SOAF and medical record. Utilizing the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] he found that appellant had two percent permanent impairment of the great toe under Table 17-14, page 537. Dr. Blum further determined that appellant had six percent permanent impairment for ankylosis of the second, third, fourth, and fifth toes under Table 17-30, page 543. He therefore found that appellant had eight percent permanent impairment of the lower left extremity. Dr. Blum opined that appellant reached maximum medical improvement (MMI) on March 2, 2005.

By decision dated October 11, 2006, OWCP granted appellant a schedule award for eight percent permanent impairment of the left lower extremity based on the opinion of the DMA. The award ran for 23.04 weeks for the period March 2 through August 10, 2005.

On January 30, 2014 appellant filed a claim for an increased schedule award (Form CA-7).

In support of his claim, appellant submitted an August 24, 2013 report from Dr. Gustavo Buentello, a Board-certified pediatrician, who reported appellant's medical history. Dr. Buentello examined appellant and diagnosed foot pain, metatarsal fracture, and open wound in the left foot with tendon involvement. Utilizing the diagnosis-based impairment (DBI) method of the sixth edition of the A.M.A., *Guides*,[4] he identified the class of diagnosis (CDX) as a class 2 impairment for the diagnosis of metatarsal fracture under Table 16-2, page 504. Dr. Buentello assigned a grade modifier for functional history (GMFH) of 2, a grade modifier for physical examination (GMPE) of 4, and a grade modifier for clinical studies (GMCS) of 4. He calculated that appellant had a net adjustment of four, corresponding to 25 percent impairment of the left lower extremity. Dr. Buentello opined that appellant had reached MMI on July 28, 2013.

On January 31, 2014 OWCP referred the case record and a SOAF to Dr. Blum, the DMA, for a schedule award impairment rating. In a February 4, 2014 report, Dr. Blum reviewed the SOAF and medical record. Utilizing the DBI method of the sixth edition of the A.M.A., *Guides*,

[3] A.M.A., *Guides* (5th ed. 2001).

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

he identified the CDX as a class 2 impairment for the diagnosis of metatarsal fracture under Table 16-2, page 504. Dr. Blum assigned a GMFH of 4, a GMPE of 4, and a GMCS of 4. He calculated that appellant had a net adjustment of four, resulting in movement from the default class of C to E and corresponding to 18 percent impairment of the left lower extremity. Dr. Blum opined that appellant had reached MMI on August 24, 2013.

By decision dated April 25, 2014, OWCP granted appellant an additional schedule award for 18 percent permanent impairment of the left lower extremity based on the opinion of the DMA. The award ran for 51.84 weeks for the period August 24, 2013 through August 21, 2014.

Appellant underwent OWCP-authorized partial amputation of the left fourth toe on May 1, 2018.

On August 17, 2018 appellant filed a claim for an increased schedule award (Form CA-7).

In support of his claim, appellant submitted a June 12, 2018 report from Dr. Buentello who noted that appellant developed an infection in his left foot, which resulted in the amputation of the fourth digit of his left foot. Dr. Buentello examined appellant and diagnosed acquired absence of the left toe, pain in the left foot, open wound of the left foot, and left foot strain of intrinsic muscle and tendon. Utilizing the DBI method of the sixth edition of the A.M.A., *Guides*, he identified the CDX as a class 1 impairment for the diagnosis of amputation of the lesser toe at the metatarsophalangeal (MTP) joint under Table 16-16, page 542. Dr. Buentello assigned a GMFH of 1, a GMPE of 2, and a GMCS of 4. He calculated that appellant had a net adjustment of four, resulting in movement from the default class of C to E and corresponding to four percent impairment of the left lower extremity. Dr. Buentello opined that appellant had reached MMI.

OWCP expanded its acceptance of the claim to include infection and reaction to orthopedic hardware, osteoarthritis of the left ankle/foot, left malunion of fracture, left hammer toe, left foot wound, and other bone involvement.[5]

On August 24, 2018 OWCP referred the case record and a SOAF to Dr. Ari Kaz, a Board-certified orthopedic surgeon serving as the DMA, for a schedule award impairment rating. In a September 3, 2018 report, Dr. Kaz reviewed the SOAF and medical record. He noted that a range of motion (ROM) rating could not be calculated as Dr. Buentello did not perform any ROM measurements. Utilizing the DBI method of the sixth edition of the A.M.A., *Guides*, Dr. Kaz identified the CDX as a class one impairment for the diagnosis of amputation of the lesser toe at the MTP joint under Table 16-16, page 542. He assigned a GMFH of 1 as appellant used an orthopedic shoe and had a normal gait. Dr. Kaz reported a GMPE of 1 as appellant had mild pain to palpation at the site of the amputation stump. He found a GMCS of 0 as there were no available clinical studies in the medical record. Dr. Kaz noted that Dr. Buentello assigned a GMCS of four without referencing any imaging studies or providing an explanation. He calculated that appellant had a net adjustment of -1, resulting in movement from the default class of C to B and

[5] Appellant underwent OWCP-authorized debridement and wire fixation of the left foot on August 29, 2004; debridement of an ulcer of the left foot on September 27, 2004; left shoulder arthroscopy on September 29, 2004; removal of k-wires in the left foot on November 8, 2004; osteotomy on the dorsal aspect of the left foot on April 13, 2005; osteotomy of the second metatarsal of the left foot on November 19, 2007; removal of k-wires in the left foot on January 14, 2008; and partial amputation of the third toe and correction of hammer toe on August 5, 2010.

corresponding to two percent impairment of the left lower extremity. Dr. Kaz opined that appellant had reached MMI on June 12, 2018.

In a November 19, 2019 report, Dr. Buentello amended his impairment rating. He examined appellant and reported that his ROM of his left ankle showed 15 degrees, 16 degrees, and 12 degrees of plantar flexion; 20 degrees, 20 degrees, and 23 degrees of dorsiflexion; 25 degrees, 20 degrees, and 23 degrees of inversion; and 9 degrees, 6 degrees, and 10 degrees of eversion. Utilizing the ROM method of the A.M.A., *Guides*, Dr. Buentello indicated that appellant had two percent lower extremity impairment for 10 degrees of eversion under Table 16-20, page 549 and seven percent lower extremity impairment for 16 degrees of plantar flexion under Table 16-22, page 549. He added the two impairments for a total of nine percent permanent impairment of the left lower extremity. Utilizing the DBI method of the A.M.A., *Guides*, Dr. Buentello identified the CDX as a class 1 impairment for the diagnosis of amputation of the lesser toe at the MTP joint under Table 16-16, page 542. He assigned a GMFH of 1 as appellant had corrective footwear. Dr. Buentello reported a GMPE of 3 as appellant had severe palpatory findings, including difficulty with shoe wear and hypersensitivity. He noted that a GMCS was not used. Dr. Buentello calculated that appellant had a net adjustment of two, resulting in movement from the default class of C to E and corresponding to four percent permanent impairment of the left lower extremity. He opined that appellant had reached MMI on November 19, 2019.

On December 19, 2019 OWCP referred the case to Dr. Kaz, the DMA, for a schedule award impairment rating. In a January 11, 2020 report, Dr. Kaz reviewed the SOAF and medical record. Utilizing the ROM method of the A.M.A., *Guides*, he concurred with Dr. Buentello's assessment that appellant had two percent lower extremity impairment for 10 degrees of eversion under Table 16-20, page 549 and seven percent lower extremity impairment for 16 degrees of plantar flexion under Table 16-22, page 549 for a total of nine percent permanent impairment of the left lower extremity. Utilizing the DBI method of the A.M.A., *Guides*, Dr. Kaz identified the CDX as a class 1 impairment for the diagnosis of amputation of the lesser toe at the MTP joint under Table 16-16, page 542. He assigned a GMFH of 1, a GMPE of 2, and a GMCS of 3. Dr. Kaz calculated that appellant had a net adjustment of two, resulting in movement from the default class of C to E and corresponding to four percent permanent impairment of the left lower extremity. He noted that in amputation cases, ROM impairments of adjacent joints may be combined with amputation impairments per Appendix A, page 604. Dr. Kaz therefore found that appellant had a combined 13 percent permanent impairment of the left lower extremity. He reviewed Dr. Buentello's November 19, 2019 report and indicated that there were no discrepancies. Dr. Kaz opined that appellant had reached MMI on December 13, 2019.

On January 29, 2020 OWCP requested clarification from Dr. Kaz on whether his impairment rating included the 26 percent impairment of the left lower extremity that was previously awarded. In a January 31, 2020 supplemental report, Dr. Kaz clarified that since appellant's present impairment did not exceed the prior overlapping awards totaling 26 percent impairment of the left lower extremity, no additional award was due.

By decision dated February 10, 2020, OWCP determined that appellant had not met his burden of proof to establish greater than 26 percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

By decision dated March 4, 2020, an OWCP again denied appellant's additional schedule award claim.

LEGAL PRECEDENT

The schedule award provisions of FECA,[6] and its implementing federal regulations,[7] 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.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9] 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.[10]

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).[11] Under the sixth edition, the evaluator identifies the CDX, which is then adjusted by the GMFH, GMPE, and GMCS.[12] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[13] Evaluators are directed to provide reasons for their impairment rating, including the choice of diagnoses from regional grids, and the calculation of the modifier score.[14]

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 permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[15]

ANALYSIS

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

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[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id.* at § 10.404(a).

[9] 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).

[10] *See S.C.*, Docket No. 20-0769 (issued January 12, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

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

[12] *Id.* at 493-556.

[13] *Id.* at 521.

[14] *E.W.*, Docket No. 19-1720 (issued November 25, 2020); *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[15] *See supra* note 9 at Chapter 2.808.6(f) (March 2017).

In a November 19, 2019 report, Dr. Buentello provided a rating of permanent impairment based upon the sixth edition of the A.M.A., *Guides*. Utilizing the ROM method, he noted that appellant had a two percent lower extremity impairment for 10 degrees of eversion under Table 16-20, page 549 and a seven percent lower extremity impairment for 16 degrees of plantar flexion under Table 16-22, page 549 for a total of nine percent permanent impairment of the left lower extremity. Utilizing the DBI method, Dr. Buentello identified the CDX as a class 1 impairment for the diagnosis of amputation of the lesser toe at the MTP joint under Table 16-16, page 542. He assigned a GMFH of 1 and a GMPE of 3. Dr. Buentello noted that a GMCS was not used. He calculated that appellant had a net adjustment of two, resulting in movement from the default class of C to E and corresponding to four percent permanent impairment of the left lower extremity. Dr. Buentello opined that appellant had reached MMI.

Consistent with its procedures, 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*.[16]

In a January 11, 2020 report, Dr. Kaz, serving as the DMA, reviewed Dr. Buentello's impairment report. Utilizing the ROM method of the A.M.A., *Guides*, he concurred with Dr. Buentello's assessment that appellant had nine percent permanent impairment of the left lower extremity. Utilizing the DBI method of the A.M.A., *Guides*, the DMA determined that appellant had four percent permanent impairment of the left lower extremity for the diagnosis of amputation of the lesser toe at the MTP joint. He explained that in amputation cases, ROM impairments of adjacent joints may be combined with amputation impairments per Appendix A, page 604. The DMA therefore concurred with Dr. Buentello's impairment rating and found that appellant had a combined 13 percent permanent impairment of the left lower extremity. In a January 31, 2020 supplemental report, he explained that since appellant's present impairment did not exceed the prior overlapping awards totaling 26 percent impairment of the left lower extremity, no additional award was due.

The DMA advised that appellant was not entitled to an additional schedule award because of his previous overlapping awards totaling 26 percent. However, a claimant is not precluded from an additional schedule award solely because he or she received a greater award to the same scheduled member from another claim.[17] The Board has held that simply comparing the prior percentage of permanent impairment awarded to the current impairment for the same member is not always sufficient to deny an increased schedule award claim.[18] The issue is not whether the current permanent impairment rating is greater than the prior impairment ratings, but whether it duplicates in whole or in part the prior impairment rating.[19] This is a medical issue that is resolved by medical evidence.[20] Accordingly, as there is no medical evidence of record explaining how the

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[16] *See S.C.*, *supra* note 10.

[17] *See D.P.*, Docket No. 19-1514 (issued October 21, 2020); *S.M.*, Docket No. 17-1826 (issued February 26, 2018); *J.K.*, Docket No. 16-1361 (issued April 18, 2017).

[18] *Id.*

[19] *Id.*

[20] *Id.*

current permanent impairment duplicated the prior impairment, the Board finds that OWCP has not properly analyzed appellant's entitlement to an additional schedule award in the present claim.

The case is therefore remanded to OWCP to analyze appellant's entitlement to an additional schedule award. After such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2020 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: April 26, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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