

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

K.R., Appellant)	
)	
and)	Docket No. 20-1660
)	Issued: June 30, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Richmond, VA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 September 24, 2020 appellant, through counsel, filed a timely appeal from an August 4, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

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.*

³ The Board notes that appellant submitted additional evidence to OWCP following the August 4, 2020 decision. 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 greater than two percent permanent impairment of her right lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On December 5, 2017 appellant, then a 27-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right ankle sprain when she fell while delivering mail in the performance of duty.⁴ On May 1, 2018 OWCP accepted the claim for a right ankle sprain.

On October 25, 2018 appellant underwent OWCP-authorized right ankle arthroscopy with debridement and lateral ligament repair, performed by Dr. Tejas T. Patel, a Board-certified orthopedic surgeon. OWCP paid appellant wage-loss compensation on the supplemental rolls for disability from work commencing October 26, 2018. Dr. Patel submitted periodic progress notes during appellant's recuperation.

Appellant returned to full-time light-duty work on January 30, 2019 and to full-duty work on April 9, 2019.

In an April 23, 2019 report, Dr. Patel opined that appellant had attained maximum medical improvement (MMI). On examination of the right ankle, he observed good alignment and perifibular tenderness. Dr. Patel measured dorsiflexion at 5 degrees and plantar flexion at 50 degrees.

In a July 31, 2019 note, Dr. Patel reiterated that appellant had attained MMI on April 23, 2019.

On August 8, 2019 appellant filed a claim for a schedule award (Form CA-7) due to her accepted employment conditions.

In a development letter dated August 19, 2019, OWCP requested an impairment rating based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ which provided appropriate measurements, findings, and a recommended percentage of permanent impairment of the affected member or members based on the applicable tables of the A.M.A., *Guides*. It afforded 30 days for appellant to submit the requested evidence. No response was received.

⁴ A January 11, 2018 magnetic resonance imaging (MRI) scan of the right foot demonstrated a partial tear of the deltoid ligament, thickening and increased signal in the spring ligament, complete tears of the anterior talofibular ligament and calcaneofibular ligaments, bone contusions of the talus and distal fibula/medial malleolus, and fluid within the peroneal tendon sheath indicative of a calcaneofibular ligament injury.

⁵ A.M.A., *Guides* (6th ed. 2009).

By decision dated October 29, 2019, OWCP denied appellant's schedule award claim as the medical evidence of record did not establish a ratable permanent impairment of a scheduled member.

On November 5, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. She submitted an October 28, 2019 impairment rating by Dr. Joshua B. Macht, a Board-certified internist. Dr. Macht provided a history of injury and treatment. He found that appellant had attained MMI as of April 23, 2019. Dr. Macht noted that appellant experienced continued pain and swelling in the right ankle, diminished endurance for standing, walking, squatting, and stair climbing, and had difficulty walking on inclines. During his October 25, 2019 examination of the right ankle, he observed arthroscopy scars, 1 centimeter swelling, tenderness to palpation over the anterior and lateral aspect, grade IV motor weakness in dorsiflexion, a normal sensory examination, and no instability. Dr. Macht recorded three trials of right ankle range of motion measurements as follows: dorsiflexion at 12/10/10 degrees; plantar flexion at 50/48/46 degrees; inversion at 20/20/18 degrees; eversion at 20/20/20 degrees. He reviewed the American Academy of Orthopedic Surgeons (AAOS) Lower Limb Questionnaire completed by appellant with a score of 63. Dr. Macht referred to the A.M.A., *Guides* and utilized the diagnosis-based impairment (DBI) method. He found a grade modifier for functional history (GMFH) of 1 based on the AAOS Lower Limb Questionnaire score, and a grade modifier for findings on physical examination (GMPE) of 1. Dr. Macht noted that there was no applicable grade modifier for clinical studies (GMCS) as they were used to define the impairment class. He utilized the net adjustment formula $GMFH - (CDX) + (GMPE - CDX) + (GMCS - CDX) = (1-1) + (1-1) = \text{zero}$, leaving the default grade C undisturbed. Dr. Macht concluded that according to Table 16-2, page 501 of the A.M.A., *Guides* Foot and Ankle Regional (Grid), appellant had a class 1, grade C impairment class of diagnosis (CDX) for right ankle strain, equaling two percent permanent impairment right lower extremity. He also utilized the range of motion (ROM) assessment method. Dr. Macht noted that there were no applicable net grade modifiers as the GMFH equaled the ROM impairment class. He found that according to Table 16-20, page 549 Hindfoot Motion Impairments), appellant had two percent permanent impairment of the right lower extremity for ankle inversion limited from 10 to 20 degrees, and seven percent permanent impairment for dorsiflexion from 0 to 10 degrees according to Table 16-22, page 549 Ankle Motion Impairments). Dr. Macht added these impairments to calculate nine percent permanent impairment of the right lower extremity based on the ROM rating method. He concluded that the ROM method should be utilized as it resulted in a higher percentage of impairment.

By decision dated February 6, 2020, OWCP's hearing representative set aside the October 29, 2019 OWCP decision and remanded the case to OWCP for referral of Dr. Macht's impairment rating to a district medical adviser (DMA) for evaluation.

On remand, OWCP referred Dr. Macht's impairment rating and a statement of accepted facts (SOAF) to Dr. Morley Slutsky, Board-certified in occupational medicine and serving as an OWCP DMA. In a March 1, 2020 report, Dr. Slutsky concurred with Dr. Macht's assessment of two percent permanent lower extremity impairment for limited ankle inversion, but found that he erred in assigning seven percent permanent impairment for 12 degrees eversion. He explained that according to Table 16-22, 12 degrees eversion equaled zero percent impairment of the right lower extremity. Dr. Slutsky calculated that appellant had two percent permanent impairment of the right lower extremity based on either the ROM or DBI method.

By decision dated April 2, 2020, OWCP granted appellant a schedule award for two percent permanent impairment of her right lower extremity. The award ran for 5.76 weeks from October 28 to December 7, 2019 and was based on the October 28, 2019 clinical findings of Dr. Macht and the March 1, 2010 report of Dr. Slutsky, serving as DMA.

On April 7, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 26, 2020.

By decision dated August 4, 2020, OWCP's hearing representative affirmed the April 2, 2020 schedule award determination, finding that OWCP properly accorded Dr. Slutsky's review of Dr. Macht's opinion the weight of the medical evidence.

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

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 501.¹⁰ 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 utilizing GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ Under Chapter 2.3, evaluators are directed to provide reasons for their impairment choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹²

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* See also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); see also *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ See A.M.A., *Guides* 501-08 (6th ed. 2009).

¹¹ *Id.* at 515-22.

¹² *Id.* at 23-28.

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*.¹³

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than two percent permanent impairment of her right lower extremity, for which she previously received a schedule award.

The Board finds that OWCP properly relied on the opinion of Dr. Slutsky, a DMA, in determining that appellant had no greater than two percent permanent impairment of her right lower extremity.

In an October 28, 2019 report, Dr. Macht discussed appellant's factual and medical history with regard to the accepted December 5, 2017 right ankle injury. He reported the findings of his October 25, 2019 physical examination. Dr. Macht properly referred to the sixth edition of the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 16-2 on page 501, the CDX for appellant's right ankle condition resulted in a Class 1 impairment with a default value of two percent.¹⁴ He assigned a GMFH of 1 based on appellant's Lower Limb Questionnaire score. Dr. Macht assigned a GMPE of 1. Dr. Macht found that a GMCS was not applicable as the clinical studies were used to establish the diagnostic criteria and define the class. He utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) - (1-1) + (1-1) = \text{zero}$, which left the default grade of C in place, to equal two percent permanent impairment of the right lower extremity.¹⁵

Dr. Macht also offered an impairment rating based on the ROM method. He assessed two percent right lower extremity impairment for ankle inversion limited from 10 to 20 degrees according to Table 16-20, page 549, and seven percent impairment for dorsiflexion limited from 0 to 10 degrees according to Table 16-22, page 549.

OWCP properly routed Dr. Macht's report to its DMA, Dr. Slutsky.¹⁶ In a March 1, 2020 report, Dr. Slutsky concurred with Dr. Macht's calculation of two percent permanent impairment of the right lower extremity utilizing the DBI method for right ankle inversion limited to 20 degrees. He opined, however, that Dr. Macht erred in assessing seven percent permanent impairment of the right lower extremity for 12 degrees dorsiflexion, as Table 16-22 provided that dorsiflexion greater than 10 degrees did not constitute an impairment.

The Board finds that the DMA's opinion constitutes the weight of the medical evidence with respect to the permanent impairment of appellant's right lower extremity because he properly

¹³ *Supra* note 9 at Chapter 2.808.6(e) (March 2017); *see also* A.K., Docket No. 19-1927 (issued March 31, 2021); K.S., Docket No. 20-1397 issued March 19, 2021); *Tommy R. Martin*, 56 ECAB 273 (2005).

¹⁴ *See supra* note 10 at 501, Table 16-2.

¹⁵ Dr. Macht determined that appellant's date of MMI was April 23, 2019.

¹⁶ *See supra* note 13.

applied the appropriate standards of the A.M.A., *Guides*.¹⁷ For these reasons, appellant has not met her burden of proof to establish greater than two percent permanent impairment of her right lower extremity, for which she previously received a schedule award.

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 her burden of proof to establish greater than two percent permanent impairment of her right lower extremity, for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 30, 2021
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

¹⁷ *A.K.*, *supra* note 13. *See O.F.*, Docket No. 19-0986 (issued February 12, 2020); *M.C.*, Docket No. 15-1757 (issued March 17, 2016) (the only medical evidence that demonstrated a proper application of the A.M.A., *Guides* was the report of the DMA).