

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

J.G., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF PRISONS, Pollock, LA, Employer**

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**Docket No. 21-1304
Issued: February 10, 2022**

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

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 24, 2021 appellant filed a timely appeal from a June 15, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 his burden of proof to establish greater than five percent permanent impairment of the right lower extremity, for which he received schedule award compensation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 19, 2015 appellant, then a 31-year-old materials handler supervisor, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right ankle, Achilles tendon, and big toe when an inmate pushed a food service cart and struck him while in the performance of duty. He stopped work on June 19, 2015 and returned to modified-duty employment on July 31, 2015. OWCP accepted the claim for tenosynovitis of the right foot and ankle.

A magnetic resonance imaging (MRI) scan of appellant's right foot, obtained on August 26, 2015, revealed a fragmented sesamoid bone.

On September 14, 2016 appellant filed a claim for compensation (Form CA-7) for a schedule award.

Appellant submitted a December 1, 2016 impairment evaluation, performed by an occupational therapist and cosigned by Dr. Angela Mayeux-Herbert, a Board-certified orthopedic surgeon. Dr. Mayeux-Herbert noted that he experienced mild discomfort in the right great toe and right foot pain with extensive standing. She measured normal range of motion (ROM) of the right ankle. Dr. Mayeux-Herbert identified the class of diagnosis (CDX) as 1 for a fragmented sesamoid bone with right great toe pain and a mild motion deficit, which she found yielded two percent impairment of the right lower extremity. She applied a grade modifier for functional history (GMFH) of one, a grade modifier for physical examination (GMPE) of one, and a grade modifier for clinical studies (GMCS) of one, noting that an MRI scan study had verified the sesamoid bone fragmentation. Dr. Mayeux-Herbert found no adjustment from the default value and opined that appellant had two percent right lower extremity permanent impairment.

On July 28, 2017 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed the findings of Dr. Mayeux-Herbert. He identified CDX as 1 for a nondisplaced sesamoid fracture using the foot/ankle regional grid set forth at Table 16-2 on page 505 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ which yielded a default value of one percent. The DMA found that Dr. Mayeux-Herbert had applied a GMFH and GMPE of one, and a GMCS of two. He recommended a permanent impairment rating of one percent for the right lower extremity and opined that appellant had reached maximum medical improvement (MMI) on December 1, 2016.

² Docket No. 19-0369 (issued June 11, 2019); Docket No. 20-0285 (issued December 2, 2020).

³ A.M.A., *Guides* (6th ed. 2009).

On October 24, 2017 OWCP requested that Dr. Mayeux-Herbert review and comment on the DMA's findings.

In a November 15, 2017 response, Dr. Mayeux-Herbert advised that her prior determination had not altered. She enclosed a February 8, 2017 report in which she reviewed appellant's impairment rating and noted that he had two percent permanent impairment of the right lower extremity.

By decision dated November 13, 2018, OWCP granted appellant a schedule award for one percent permanent impairment of the right lower extremity. The award ran for 2.88 weeks for the period December 1 to 21, 2016.

Appellant appealed to the Board. By decision dated June 11, 2019, the Board set aside the November 13, 2018 decision.⁴ The Board noted that both Dr. Mayeux-Herbert and the DMA had applied a GMCS even though the diagnostic testing results had been used to identify the diagnosis. The Board further found that the DMA had failed to explain his finding of a GMFH of one in concluding that appellant had one percent permanent impairment of the right lower extremity. The Board remanded the case for OWCP to obtain a supplemental report from the DMA.

On July 27, 2019 the DMA again identified a CDX as 1 for a sesamoid fracture under Table 16-2 on page 501, which yielded a default value of one percent. He applied GMFH and GMPE of one, noting that a GMCS was not applicable. The DMA advised that Dr. Mayeux-Herbert had erred in applying the net adjustment formula and finding an adjustment of one when the value after the net adjustment was zero. He advised that appellant had no adjustment from the default value of one percent.

By decision dated August 27, 2019, OWCP granted appellant a schedule award for one percent permanent impairment of the right lower extremity. The award ran for 2.88 weeks for the period December 1 to 21, 2016.

Appellant again appealed to the Board. By decision dated December 2, 2020, the Board set aside the August 27, 2019 decision.⁵ The Board found that both Dr. Mayeux-Herbert and the DMA had rated the extent of appellant's permanent impairment using the diagnosis of a nondisplaced sesamoid bone. The Board noted that the August 26, 2015 MRI scan of the right foot, however, had shown a fragmented sesamoid bone, which yielded a default value of five percent rather than one percent according to Table 16-2 on page 505 of the A.M.A., *Guides*. The Board remanded the case for OWCP to refer appellant, together with the results of the MRI scan and an updated statement of accepted facts, to an appropriate specialist for an impairment evaluation.

On February 10, 2021 OWCP referred appellant to Dr. Shawn P. Granger, a Board-certified orthopedic surgeon, for a second opinion examination.

⁴ Docket No. 19-0369 (issued June 11, 2019).

⁵ Docket No. 20-0285 (issued December 2, 2020).

In an impairment evaluation dated April 6, 2021, Dr. Granger discussed appellant's history of injury and his symptoms of foot pain with activity. On examination of the right foot, he found intact sensation, reduced motion with crepitus, and mild swelling under the medial sesamoid. Dr. Granger advised that x-rays revealed "evidence of a medial sesamoid prior fracture with a large segmented gap at the medial sesamoid" and that an August 26, 2015 MRI scan demonstrated a fragmented medial sesamoid bone. He opined that appellant had a "right foot medial sesamoid fracture from 2015 resulting in post-traumatic osteoarthritic change of the metatarsal phalangeal joint and a healed elongated abnormal or displaced sesamoid appearance with continued pain from [t]enosynovitis." Dr. Granger diagnosed an unspecified fracture of the right foot with sequela, post-traumatic osteoarthritis of the right foot and ankle, and other synovitis and tenosynovitis of the right ankle and foot. He opined that appellant had reached MMI on March 28, 2016. Dr. Granger identified the CDX as a class 1 fragmented or displaced sesamoid fracture under Table 16-2 on page 505 of the A.M.A., *Guides*. He applied a GMFH of one based on the results of a lower extremity questionnaire showing a mild problem, a GMPE of one due to appellant's limited ROM of the great toe, plantar keratosis, and mild tenderness, and a GMCS of one for early arthritis changes. Dr. Granger concluded that he had a Grade C or five percent permanent impairment of the right lower extremity.

On June 9, 2021 Dr. Katz reviewed Dr. Granger's report and concurred with his finding of five percent permanent impairment of the right lower extremity. He identified the CDX as a fragmented sesamoid fracture, which yielded a default value of five percent according to Table 16-2 on page 505 of the A.M.A., *Guides*. Dr. Katz applied a GMFH and a GMPE of one and found that a GMCS was not applicable, which yielded no change from the default value after utilizing the net adjustment formula. He noted that appellant had previously received a one percent permanent impairment, which duplicated the current impairment rating. Dr. Katz further advised that ROM was not an alternative method of impairment calculation for the diagnosed condition. He opined that appellant had four percent additional impairment of the right lower extremity, for a total right lower extremity impairment of five percent.

By decision dated June 15, 2021, OWCP granted appellant a schedule award for an additional four percent permanent impairment of the right lower extremity which, added to the prior schedule award of one percent, yielded a total five percent permanent impairment. The award ran for 11.52 weeks for the period April 6 to June 25, 2021.

LEGAL PRECEDENT

The schedule award provision of FECA,⁶ and its implementing federal regulation,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. 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

⁶ *Supra* note 2.

⁷ 20 C.F.R. § 10.404.

degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁸ 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.⁹

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: A Contemporary Model of Disablement* (ICF).¹⁰ Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by GMFH, GMPE, and GMCS.¹¹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹² Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹³

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than five percent permanent impairment of the right lower extremity, for which he received schedule award compensation.

In the most recent appeal, the Board found that both the DMA and appellant's physician, Dr. Mayeux-Herbert, had rated permanent impairment using the CDX of a nondisplaced sesamoid bone fracture, which yielded a default value of one percent. The Board noted that the MRI scan had shown a fragmented sesamoid fracture, which yielded a default value of five percent according to Table 16-2 on page 505 of the A.M.A., *Guides*. The Board remanded the case for OWCP to refer appellant for a second opinion examination.

In a report dated April 6, 2021, Dr. Granger, an OWCP referral physician, found that appellant had reduced right foot motion and pain. He advised that x-rays had revealed evidence of a prior medial sesamoid fracture and an MRI scan dated August 26, 2015 had shown a fragmented sesamoid bone. Dr. Granger diagnosed a right foot fracture with sequela, post-traumatic osteoarthritis of the right foot and ankle, and other synovitis and tenosynovitis of the right ankle and foot. He identified the CDX as a class 1 fragmented or displaced sesamoid fracture using Table 16-2 on page 505, which yielded a default value of five percent. Dr. Granger found a GMFH, GMPE, and GMCS of one, which yielded no change from the default value.

⁸ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

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

¹⁰ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3.

¹¹ *Id.* at 494-531.

¹² *Id.* 411.

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

On June 9, 2021 Dr. Katz reviewed Dr. Granger's findings. He noted that rating the impairment using ROM was not permitted as an alternative rating method for the diagnosis under Table 16-2. Dr. Katz identified the CDX as a class 1 fragmented sesamoid fracture. He applied a GMFH and GMPE of one and found that a GMCS was inapplicable. Utilizing the net adjustment formula yielded no change from the default value of five percent.¹⁴ The Board finds that the evidence supports that appellant has no more than five percent permanent impairment of the right lower extremity. There is no current medical evidence of record, in conformance with the A.M. A., *Guides*, establishing a greater permanent impairment.¹⁵

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 greater than five percent permanent impairment of the right lower extremity, for which he received schedule award compensation.

¹⁴ Utilizing the net adjustment formula discussed above, $(GMFH - CDX) + (GMPE - CDX)$, or $(1-1) + (1-1) = 0$, yielded a zero adjustment.

¹⁵ See *A.T.*, Docket No. 20-0370 (issued September 27, 2021).

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2022
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