United States Department of Labor
Employees' Compensation Appeals Board

K.K., Appellant	)	
and	)	**Docket No. 21-0712**
	)	**Issued: January 10, 2022**
DEPARTMENT OF AGRICULTURE, FOOD SAFETY & INSPECTION SERVICE, Springdale, AR, 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:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 9, 2021 appellant, through counsel, filed a timely appeal from a March 15, 2021 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 to consider the merits of this case.

[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*.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 11 percent permanent impairment of the left lower extremity for which he previously received a schedule award.

FACTUAL HISTORY

On July 17, 2013 appellant, then a 47-year-old consumer safety inspector, filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment caused or aggravated a left foot condition. He noted that he first became aware of his condition on December 7, 2012 and realized its relationship to his federal employment on July 10, 2013. Appellant stopped work on July 15, 2013. OWCP assigned the claim OWCP File No. xxxxxx358 and on August 1, 2013 accepted aggravation of left foot ulcer.[3] It paid appellant wage-loss compensation.

The record in appellant's prior claim, assigned OWCP File No. xxxxxx817, contained a February 2, 2016 medical report by Dr. Saad M. Al-Shathir, a Board-certified physiatrist and an OWCP referral physician. Dr. Al-Shathir referenced Table 16-25 on page 550 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] and identified a class 4 diagnosis (CDX) for left greater toe with 100 percent complete subluxation and loss of range of motion (ROM). According to Table 16-10 on page 530, he found 12 percent permanent impairment of the left lower limb due to left greater toe, which converted to 5 percent whole person impairment. Further, Dr. Al-Shathir identified a class 3 CDX for left foot ulcer under Table 16-2 on page 501. Based on Table 16-1 on page 495, he determined that appellant had 26 percent permanent impairment of the left lower extremity due to left foot ulcer, which converted to 11 percent whole person impairment.

Additionally, in appellant's prior claim assigned OWCP File No. xxxxxx817, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser, in a report dated March 25, 2016, utilized the sixth edition of the A.M.A., *Guides* and found that appellant had 10 percent permanent impairment of the left lower extremity due to left great toe metatarsophalangeal (MTP) joint dislocation and one percent permanent impairment of the left lower extremity due to left foot ulcer.

In an April 1, 2016 OWCP decision issued in OWCP File No. xxxxxx817, OWCP granted appellant a schedule award for 11 percent permanent impairment of the left lower extremity. The period of the award ran for 31.68 weeks from February 2 through September 10, 2016.

[3] Appellant has a prior claim involving his left lower extremity. OWCP accepted appellant's occupational disease claim assigned OWCP File No. xxxxxx817 for aggravation of left flat foot and aggravation of left Charcot foot. That claim has been administratively combined with the current claim OWCP File No. xxxxxx358 designated as the master file.

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

In the current claim, under OWCP File No. xxxxxx358, OWCP received an August 3, 2016 report by Dr. M. Stephen Wilson, an attending Board-certified orthopedic surgeon. Dr. Wilson described appellant's history of injury and medical treatment. He reported findings on physical and x-ray examination of the left foot. Dr. Wilson opined that appellant sustained a significant work-related left foot/ankle injury. He advised that appellant had reached maximum medical improvement (MMI). Dr. Wilson determined that he had one percent permanent impairment of the left lower extremity due to chronic recurrent left foot and ankle pain and weakness. He referenced Table 16-2 of the sixth edition of the A.M.A., *Guides* and identified a class 1 CDX for ulcerative lesion with a mid-range default value of one percent. Dr. Wilson applied a grade modifier of 1 for functional history (GMFH) under Table 16-6 secondary to a pain adjustment questionnaire score of 65. He noted that a grade modifier for physical examination (GMPE) under Table 16-7 was not applicable (N/A) because this was used to determine the CDX. Dr. Wilson applied a grade modifier of 1 for clinical studies (GMCS) under Table 16-8. He utilized the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1 - 1) + (N/A) + (1 - 1) = 0, leaving the default grade C one percent permanent impairment rating for the left lower extremity due to ulcerative lesion undisturbed. Dr. Wilson referenced Table 16-2 and identified a CDX of 2 for left Charcot foot with a mid-range default value of 16 percent impairment. He assigned a GMFH of 1 for the same reason as noted above for the diagnosis of ulcerative lesion. Dr. Wilson assigned a GMPE of 2 for moderate deformity under Table 16-7. He noted that a GMCS was N/A as this was used to determine the CDX. Dr. Wilson applied the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1 - 2) + (2 - 2) + (N/A) = -1, which shifted from grade C to a grade B, 15 percent permanent impairment of the left lower extremity due to Charcot foot. Using the Combined Values Chart on page 604, he found that appellant had 17 percent permanent impairment of the left lower extremity.

By letter dated December 16, 2016, OWCP informed appellant that Dr. Wilson's August 3, 2016 report was insufficient to establish a schedule award. It requested that he submit an impairment evaluation from his attending physician that addressed whether he had obtained MMI and to provide a permanent impairment rating in accordance with the sixth edition of the A.M.A., *Guides*. OWCP afforded appellant 30 days to submit the requested evidence.

On February 6, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

Subsequently, OWCP received a report dated February 1, 2017 from Dr. Wilson. Dr. Wilson advised that the date of MMI was August 3, 2016, the date of his impairment evaluation. He reiterated his prior calculations and opinion that appellant had one percent permanent impairment of the left lower extremity due to ulcerative lesion and 15 percent permanent impairment of the left lower extremity due to Charcot foot.

On March 29, 2018 OWCP routed Dr. Wilson's August 3, 2016 and February 1, 2017 reports, a statement of accepted facts (SOAF), and the case file to Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and a determination of permanent impairment of appellant's left lower extremity under the sixth edition of the A.M.A., *Guides*, and his date of MMI.

In a May 7, 2018 report, Dr. Slutsky reviewed the findings in Dr. Wilson's August 3, 2016 and February 1, 2017 reports. He opined that appellant had one percent permanent impairment of the left lower extremity due to an aggravation of left foot ulcer and three percent permanent impairment of the left lower extremity due to Charcot joint of the left foot in accordance with the sixth edition of the A.M.A., *Guides*. The DMA noted that the hallmark deformity associated with this condition is mid-foot collapse, described as a "rocker-bottom" foot, which appellant did not have and; therefore, there was inadequate documentation in the medical record to support the diagnosis of a Charcot joint of the mid-foot. He found that, according to Table 16-2 on page 501, appellant had a CDX of 1 for aggravation of left foot ulcer as demonstrated by consistent palpatory and/or radiographic findings, which resulted in a grade C default value of one percent. The DMA assigned a GMFH of 1 as there was no lower limb questionnaire and there was pain and weakness in the left foot/ankle. He assigned a GMPE of 1 due to a possible one by one centimeter skin breakdown on the lateral aspect of the foot. The DMA noted that, apparently, there was normal ankle motion. In addition, there was no documentation of inversion or eversion as a validated lower extremity ROM examination was not performed. There was an antalgic gait. The DMA assigned a GMCS of 1 due to severe hallux valgus deformity with moderate subluxation of the first MTP joint. He applied the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1 - 1) + (1 - 1) + (1 - 1) = 0, which resulted in a grade C, one percent permanent impairment of the left lower extremity due to an aggravation of left foot ulcer.

The DMA again referenced Table 16-2 and found a CDX of 1 for left foot Charcot joint that was nondisplaced with minimal findings, which represented a grade C default value of three percent. He assigned a GMFH of 1 and GMPE for the same reasons as noted above for the left foot ulcer. The DMA assigned a GMCS of 0 as there was no documented trans-tarsal subluxation or dislocation. He applied the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1 - 1) + (1 - 1) + (0 - 1) = -1, which resulted in movement one space to the left from the grade C default value, resulting in a grade B, three percent permanent impairment of the left lower extremity due to left foot Charcot joint. The DMA indicated that the ROM rating method could not be performed due to a lack of ROM measurements for the hind foot and mid-foot. He advised that appellant had reached MMI on August 3, 2016, the date of Dr. Wilson's initial impairment evaluation. The DMA noted that Dr. Wilson's finding that appellant had a class 2 impairment due to Charcot joint represented a default value of 16 percent that was associated with moderate-to-severe motion deficits and/or moderate malalignment/angulation. Additionally, he indicated that Dr. Wilson reported that appellant had normal ankle motion and did not report any transtarsal *i.e.*, navicular/cuboid malalignment. The DMA, therefore, advised that appellant had a class 1 impairment with a default value of three percent for nondisplaced Charcot joint.

On September 21, 2018 OWCP requested that Dr. Slutsky review additional medical records in OWCP File No. xxxxxx817, including the previous schedule award of 11 percent left lower extremity permanent impairment, and to provide an addendum report regarding the extent of appellant's left lower extremity permanent impairment.

In an October 31, 2018 report, Dr. Slutsky reviewed the additional medical records in OWCP File No. xxxxxx817. He reiterated his prior calculations and opinion that appellant had one percent permanent impairment of the left lower extremity due to an aggravation of left foot ulcer and three percent permanent impairment of the left lower extremity due to left foot Charcot joint. The DMA noted that Dr. Al-Shathir failed to explain how he arrived at his 12 percent

permanent left lower extremity impairment due to great toe impairment in accordance with the A.M.A., *Guides*. He related that Dr. Al-Shathir assigned a class 3 under Table 16-2 for left foot ulcer and found 26 percent impairment; however, there was no class 3 category in this table. The DMA indicated that there was only a class 1 category which had a maximum two percent impairment rating. He related that, while Dr. Berman determined that appellant had 10 percent left lower extremity permanent impairment due to great toe MTP joint dislocation, there was no x-ray documentation of this condition.

On January 29, 2019 OWCP requested that Dr. Slutsky clarify his October 31, 2018 report, noting that he did not identify or address appellant's prior schedule award of 11 percent permanent impairment of the left lower extremity. It requested that he provide an addendum report based on his review of the medical record and an updated SOAF.

In response, Dr. Slutsky submitted an amended October 27, 2018 report, noting that his one percent left lower extremity impairment rating for aggravation of left foot ulcer and three percent left lower extremity impairment rating for left foot Charcot joint included appellant's prior schedule award of 11 percent left lower extremity permanent impairment. He advised that appellant had no additional impairment.

By decision dated December 5, 2019, OWCP denied appellant's claim for an increased schedule award. It accorded the weight of the medical evidence to Dr. Slutsky, the DMA, who determined that appellant had no greater permanent impairment than the 11 percent previously awarded for the left lower extremity.

On December 12, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on April 15, 2020.

By decision dated June 22, 2020, the hearing representative affirmed OWCP's December 5, 2019 decision.

On December 15, 2020 and January 31, 2021 appellant, through counsel, requested reconsideration of the June 22, 2020 decision.

In a March 15, 2021 decision, OWCP denied modification of its June 22, 2020 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] and its implementing regulations[6] 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.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[7] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (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]

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]

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 accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[13]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 11 percent permanent impairment of the left lower extremity for which he previously received a schedule award.

Appellant submitted reports dated August 3, 2016 and February 1, 2017 from Dr. Wilson who diagnosed left foot ulcerative lesion and Charcot foot, and found that appellant had reached MMI due to his conditions. Utilizing Table 16-2,[14] Dr. Wilson determined that appellant had one percent permanent impairment of the left lower extremity due to ulcerative lesion and 15 percent

[7] *Id*. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[8] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *see also* Chapter 2.808.5(a) (March 2017).

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

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

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

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

[13] *See supra* note 8 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).

[14] *Supra* note 10 at 501, Table 16-2.

permanent impairment of the left lower extremity due to Charcot foot. Using the Combined Values Chart,[15] he found that appellant had 17 percent permanent impairment of the left lower extremity.

In accordance with its procedures, OWCP properly referred the medical record to Dr. Slutsky, a DMA,[16] who reviewed the clinical findings of Dr. Wilson on May 7, 2018 and concluded that appellant had one percent permanent impairment of the left lower extremity due to an aggravation of left foot ulcer and three percent permanent impairment of the left lower extremity due to left foot Charcot joint. Dr. Slutsky also determined that appellant had reached MMI on August 3, 2016. Regarding impairment due to appellant's aggravation of left foot ulcer, the DMA utilized Table 16-2[17] and determined that appellant had a CDX of 1, which represented a grade C impairment with a default value of one percent. The DMA assigned a grade modifier of 1 for GMFH, GMPE, and GMCS. He applied the net adjustment formula and concluded that appellant had one percent permanent impairment of the left lower extremity due to an aggravation of left foot ulcer. Although the DMA noted that the medical record did not support a diagnosis of left foot Charcot joint, he rated appellant's permanent impairment due to this condition. He again utilized Table 16-2[18] and determined that appellant had a CDX of 1 which represented a grade C impairment with a default value of three percent. The DMA assigned a grade modifier of 1 for GMFH and GMPE, and a grade modifier of 0 for GMCS. He applied the net adjustment formula and concluded that appellant had three percent permanent impairment of the left lower extremity due to left foot Charcot joint. The DMA related that the ROM rating method was not applicable in the absence of ROM measurements for the hind foot and mid-foot. He noted that Dr. Wilson's finding that appellant had a class 2 impairment due to Charcot joint represented a default value of 16 percent that was associated with moderate-to-severe motion deficits and/or moderate malalignment/angulation. The DMA related that Dr. Wilson reported normal ankle motion and did not report any transtarsal, *i.e.*, navicular/cuboid malalignment. He, therefore, advised that appellant had a class 1 impairment with a default value of three percent for nondisplaced Charcot joint.

OWCP subsequently requested that Dr. Slutsky review additional medical records in OWCP File No. xxxxxx817. On October 31, 2018 the DMA restated his prior calculations and opinion that appellant had one percent permanent impairment of the left lower extremity due to an aggravation of left foot ulcer and three percent permanent impairment of the left lower extremity due to left foot Charcot joint. He noted that Dr. Al-Shathir did not explain how he arrived at his 12 percent permanent left lower extremity impairment rating based on great toe impairment in accordance with the A.M.A., *Guides*. The DMA also noted that the physician assigned a CDX of 3 for left foot ulcer under Table 16-2, which represented a default value of 26 percent impairment, in the absence of such a class category. He related that there was only a class 1 category, which had a maximum two percent impairment rating.

[15] *Id*. at 604 to 606.

[16] *Supra* note 14.

[17] A.M.A., *Guides* 501, Table 16-2.

[18] *Id*.

On January 29, 2019 OWCP requested that Dr. Slutsky address appellant's prior schedule award of 11 percent left lower extremity permanent impairment. In an amended report dated October 27, 2018, the DMA advised that appellant had no additional impairment. He noted that his one percent left lower extremity impairment rating for aggravation of left foot ulcer and three percent left lower extremity impairment rating for left foot Charcot joint included appellant's prior schedule award of 11 percent left lower extremity permanent impairment.

The Board finds that the one percent left lower extremity impairment rating for aggravation of left foot ulcer and three percent left lower extremity impairment rating for left foot Charcot joint from the DMA represents the weight of the medical evidence in this case, as he properly applied the appropriate provisions of the A.M.A., *Guides* to the clinical findings of record.[19] There is no evidence establishing greater impairment in conformance with the A.M.A., *Guides*.

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 11 percent permanent impairment of the left lower extremity for which he previously received a schedule award.

[19] *K.M.*, Docket No. 19-1526 (issued January 22, 2020); *G.S.*, Docket No. 19-0277 (issued August 22, 2019); *J.H.*, Docket No. 18-1207 (issued June 20, 2019).

ORDER

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

Issued: January 10, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board