

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

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R.M., Appellant)	
)	
and)	Docket No. 21-1336
)	Issued: March 11, 2022
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. CUSTOMS & BORDER PROTECTION,)	
Porthill, ID, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 4, 2021 appellant filed a timely appeal from March 16 and August 30, 2021 merit decisions 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 permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On July 30, 2019 appellant, then a 54-year-old customs and border patrol officer, filed an occupational disease claim (Form CA-2) alleging that he sustained Valley Fever (coccidioidomycosis) causally related to factors of his federal employment while deployed to the

¹ 5 U.S.C. § 8101 *et seq.*

southern border. He noted that he first became aware of his claimed condition and its relation to his federal employment on July 12, 2019. On July 12, 2019 Dr. Jonathan Klaucke, a Board-certified orthopedic surgeon, performed left ankle surgery, later authorized by OWCP, which included incision, drainage, and washing out of the left subtalar and tibiotalar joints. Appellant stopped work on the date of the surgery and returned to work in late-July 2019 in a light-duty position. Dr. Klaucke provided follow-up care until late-December 2019. After development of the evidence, OWCP accepted appellant's claim for Valley Fever and septic arthritis of the left ankle.

On May 3, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award due to his accepted work-related conditions.

In a May 11, 2020 development letter, OWCP requested that appellant submit an impairment rating report, which applied the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² It afforded him 30 days to submit the requested evidence.

OWCP subsequently received a May 18, 2020 letter in which appellant requested that OWCP send him for a second opinion examination and evaluation to assess his permanent impairment.

On December 14, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF), for a second opinion examination and evaluation with Dr. Steven Nadler, a Board-certified orthopedic surgeon. It requested that Dr. Nadler provide an opinion on the permanent impairment of appellant's left lower extremity under the standards of the sixth edition of the A.M.A., *Guides*.

In a January 28, 2021 report, Dr. Nadler discussed appellant's factual and medical history and reported the findings of his physical examination. He noted that appellant had a well-healed scar on his left ankle and indicated that the septic arthritis would affect the left ankle joint and leave patients with residual symptoms. Dr. Nadler opined that appellant reached maximum medical improvement (MMI) on April 29, 2020 and indicated that he had ordered weight-bearing x-rays of the ankles to determine if there was any loss of cartilage space. In a February 4, 2021 addendum report, he concluded that, based on his examination and review of x-ray testing, appellant had no impairment of the left lower extremity due to his accepted left ankle conditions under the sixth edition of the A.M.A., *Guides*. Dr. Nadler indicated that February 1, 2021 x-ray testing of the right ankle revealed that the joint space was preserved and noted, "[b]ased on this finding that the joint space is preserved and equal to that of the left, the patient is not entitled to an impairment rating at this time as a result of his injury at work."

On February 8, 2021 OWCP referred appellant's case to Dr. David Krohn, a Board-certified internist serving as an OWCP district medical adviser (DMA). It requested that Dr. Krohn

² A.M.A., *Guides* (6th ed. 2009).

review the evidence of record, including Dr. Nadler's reports, and provide an opinion on left lower extremity permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In a March 11, 2021 report, Dr. Krohn indicated his agreement with Dr. Nadler that appellant did not have permanent impairment under the sixth edition of the A.M.A., *Guides*. He explained that, under Table 16-2 on page 506, permanent impairment for arthritis could only be assigned when there was x-ray evidence of mild osteophytes with impingement, full-thickness cartilage defect, cystic changes on one side of the joint, focal areas of avascular necrosis, or ununited osteochondral fracture. Dr. Krohn added that, alternately, subtalar joint impairment could be assigned for a cartilage interval of less than two millimeters or, with respect to the tibiotalar joint, for a cartilage interval of less than three millimeters. He noted that weight-bearing x-rays of the ankles ordered by Dr. Nadler on February 1, 2021 demonstrated that the articular surfaces were smooth with normal cartilage intervals of the tibiotalar and subtalar joints. Dr. Krohn opined that, therefore, appellant had preserved joint spaces without radiographic evidence of arthritis. There was no narrowing of the cartilage interval on the left compared with the right. Dr. Krohn indicated that, given that the radiologist's interpretation of the left ankle x-rays demonstrated normal appearing ankle joints symmetrically, "impairment for arthritis of the subtalar and tibiotalar joints each is Class 0, correlating with zero percent impairment of the left lower extremity" under Table 16-2 of the sixth edition of the A.M.A., *Guides*.

By decision dated March 16, 2021, OWCP denied appellant's schedule award claim, finding that the weight of the medical opinion evidence regarding left lower extremity permanent impairment rested with the opinions of Dr. Nadler, OWCP's referral physician, and Dr. Krohn, the DMA.

On March 23, 2021 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings Review. During the hearing held on July 7, 2021, he testified that he still experienced pain in his left ankle.

By decision dated August 30, 2021, OWCP's hearing representative affirmed the March 16, 2021 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA³ and its implementing federal regulations⁴ 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 and the Board has

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

concurrent in such adoption.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

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 501.⁷ After the class of diagnosis (CDX) is determined from Table 16-1 (including identification of a default grade value), the net adjustment formula is applied utilizing modifiers for functional history, physical examination, and clinical studies.⁸

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

In a January 28, 2021 report, OWCP's referral physician, Dr. Nadler, discussed appellant's factual and medical history and reported the findings of his physical examination. He noted that appellant had a well-healed scar on his left ankle and opined that he reached MMI on April 29, 2020. Dr. Nadler ordered weight-bearing x-rays of the ankles to determine if there was any loss of cartilage space. In a February 4, 2021 addendum report, he concluded that, based on his examination and review of x-ray testing, appellant had no permanent impairment of the left lower extremity due to his accepted left ankle conditions under the sixth edition of the A.M.A., *Guides*. Dr. Nadler indicated that February 1, 2021 x-ray testing of the right ankle revealed that the joint space was preserved and noted, "[b]ased on this finding that the joint space is preserved and equal to that of the left, the patient is not entitled to an impairment rating at this time as a result of his injury at work."

In his March 11, 2021 report, DMA Dr. Krohn indicated his agreement with Dr. Nadler that appellant did not have permanent impairment under the sixth edition of the A.M.A., *Guides*. He explained that, under Table 16-2 on page 506, permanent impairment for arthritis could only be assigned when there was x-ray evidence of mild osteophytes with impingement, full-thickness cartilage defect, cystic changes on one side of the joint, focal areas of avascular necrosis, or ununited osteochondral fracture. Dr. Krohn added that, alternately, subtalar joint impairment could be assigned for a cartilage interval of less than two millimeters or, with respect to the tibiotalar joint, for a cartilage interval of less than three millimeters. He indicated that, given that the radiologist's interpretation of the left ankle x-rays demonstrated normal appearing ankle joints

⁵ *Id.*; see *V.J.*, Docket No. 1789 (issued April 8, 2020); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ See A.M.A., *Guides* 501-08 (6th ed. 2009).

⁸ *Id.* at 515-22.

symmetrically, “impairment for arthritis of the subtalar and tibiotalar joints each is Class 0, correlating with 0 [percent] impairment of the left lower extremity” under Table 16-2.

Dr. Nadler, OWCP’s referral physician, and Dr. Krohn, the DMA properly applied the A.M.A., *Guides* in finding that appellant had no permanent impairment of a scheduled member or function of the body.⁹ As their reports were detailed, well rationalized, and based on a proper factual background and application of the sixth edition of the A.M.A., *Guides*, their opinions represent the weight of the medical evidence.¹⁰

As there is no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides* establishing permanent impairment of a scheduled member or function of the body, the Board finds that appellant has met not his burden of proof.

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 permanent impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

⁹ See *B.B.*, Docket No. 20-1187 (issued November 18, 2021); *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *M.S.*, Docket No. 19-1011 (issued October 29, 2019); *W.H.*, Docket No. 19-0102 (issued June 21, 2019); *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

¹⁰ See *B.B., id., D.S.*, Docket No. 18-1816 (issued June 20, 2019).

ORDER

IT IS HEREBY ORDERED THAT the March 16 and August 30, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 11, 2022
Washington, DC

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

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

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