



## 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

This case has previously been before the Board on another issue.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision and prior order are incorporated herein by reference. The relevant facts are set forth below.

On August 28, 2017 appellant, then a 46-year-old air conditioning mechanic, filed a traumatic injury claim (Form CA-1) alleging that as he was leaving the jobsite he rolled his right ankle on an uneven edge of the driveway and fell forward on hard compacted dirt, reinjuring his neck and right shoulder while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx721 and accepted it for right ankle sprain.<sup>4</sup>

OWCP referred appellant for a second opinion evaluation with Dr. Charles Xeller, a Board-certified orthopedic surgeon, for an assessment of appellant's work-related condition.

In a report dated September 29, 2020, Dr. Xeller noted appellant's history of injury and medical treatment. On examination of appellant's right ankle, he reported full range of motion (ROM), no swelling, instability, or numbness, normal dorsalis pedis and posterior tibial, and normal gait. Appellant reported no right ankle complaints.

On April 2, 2021 Dr. Yu-Po Lee, a Board-certified orthopedic surgeon, advised that appellant had reached maximum medical improvement (MMI) that day.

In a permanent impairment rating report dated September 16, 2021, Dr. George T. Ricks, a physician specializing in family medicine, reported appellant's physical examination findings, noting that appellant had an abnormal, slight limping gait, as the result of his right ankle sprain. He also noted mild right ankle and right Achilles tendon area tenderness on palpation and full right ankle ROM. Dr. Ricks used the diagnosis-based impairment method (DBI) of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>5</sup> in determining appellant's permanent impairment. Using Table 16-2, the muscle/tendon section of the Foot and Ankle Regional Grid, page 501 he assigned a Class 1 impairment with a default grade of C, one percent impairment for the class of diagnosis (CDX) of right ankle sprain.

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<sup>3</sup> Docket No. 20-0548 (issued November 25, 2020); *Order Remanding Case*, Docket No. 19-0340 (issued October 22, 2019).

<sup>4</sup> On June 2, 2017 appellant filed a traumatic injury claim (Form CA-1) alleging that on May 25, 2017 he injured his right shoulder, arm, and neck when working on an unstable ladder while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx230 and accepted it for right shoulder sprain and cervical disc displacement. It has administratively combined appellant's claims with OWCP File No. xxxxxx721 serving as the master file.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

Dr. Ricks determined that the grade modifier for functional history (GMFH) using Table 16-6, page 516 was 2 due to a moderate-to-severe problem, that the grade modifier for physical examination (GMPE) using Table 16-7, page 517 was 1 due to palpatory findings, and that the grade modifier for clinical studies (GMCS) was not applicable as there were no imaging studies. Applying the net adjustment formula, page 521, he found a net adjustment of +1, resulting in two percent right lower extremity permanent impairment. Dr. Ricks also found that the ROM method was not applicable.

In a January 10, 2022 report, Dr. Jack L. Miller, a district medical adviser (DMA), reviewed the medical evidence of record and determined the date of MMI to be April 2, 2021, the date of Dr. Lee's medical note. The DMA disagreed with the two percent right lower extremity permanent impairment rating found by Dr. Ricks. Based on his review of the medical record, he concluded that appellant had zero percent right lower extremity permanent impairment using the DBI method. In support of this conclusion, the DMA noted that Dr. Xeller reported a normal gait in September 2020 while Dr. Ricks reported a slight limping gait in his September 16, 2021 report. In addition, all the examination findings reported normal ROM and normal appearance. The DMA disagreed with Dr. Ricks' diagnosis selection of muscle/tendon injury under Table 16-2, page 501 for the diagnosis of ankle sprain, noting that a sprain is not considered a muscle tendon injury. Using Table 16-2, page 504 he found Class 0 impairment based on the CDX of ligament joint instability laxity with no significant objective findings resulting in zero percent permanent impairment.

By decision dated February 9, 2022, OWCP denied appellant's claim for a schedule award, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On February 18, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on April 27, 2022.

By decision dated July 11, 2022, OWCP's hearing representative affirmed the February 9, 2022 decision.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>6</sup> and its implementing regulations<sup>7</sup> 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 of a member 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 concurred in such

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<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

adoption.<sup>8</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.<sup>9</sup>

The sixth edition of the A.M.A., *Guides* provides the DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning, Disability and Health: A Contemporary Model of Disablement*.<sup>10</sup> Under the sixth edition, the evaluator identifies the impairment for the diagnosed condition CDX, which is then adjusted by grade modifiers of GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>11</sup> Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grids and calculations of modifier scores.<sup>12</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.<sup>13</sup>

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>14</sup> For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.<sup>15</sup> Where OWCP has referred the case to an impartial medical examiner (IME) to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.<sup>16</sup>

### ANALYSIS

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

In support of his claim for a schedule award appellant submitted a September 16, 2021 impairment rating from Dr. Ricks. A physical examination of his right ankle revealed an abnormal, slight limping gait, mild right ankle and right Achilles tendon area tenderness on

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<sup>8</sup> *Id.* at § 10.404(a); *see also R.C.*, Docket No. 22-0239 (issued June 11, 2022); *M.B.*, Docket No. 20-0552 (issued May 14, 2021); *T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>10</sup> A.M.A., *Guides*, page 3, section 1.3.

<sup>11</sup> *Id.* at 494-531.

<sup>12</sup> *See R.C.*, *supra* note 8; *M.B.*, *supra* note 8; *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>13</sup> *Supra* note 9 at Chapter 2.808.6(f) (March 2017); *R.C.*, *id.*; *B.B.*, Docket No. 18-0782 (issued January 11, 2019).

<sup>14</sup> 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321; *see also M.B.*, note 8; *C.B.*, Docket No. 19-0464 (issued May 22, 2020); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

<sup>15</sup> *M.B.*, *id.*; *R.N.*, Docket No. 19-1685 (issued February 26, 2020); *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>16</sup> *Y.I.*, Docket No. 20-0263 (issued November 30, 2020); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

palpation, and full right ankle ROM. Using the DBI of the sixth edition of the A.M.A., *Guides*, Dr. Ricks indicated that appellant used the ankle sprain diagnosis under the muscle/tendon selection and assigned a CDX of 1, a GMFH of 2, a GMPE of 1, and a GMCS of 0, finding two percent permanent impairment of appellant's right ankle.

In a January 10, 2022 report, Dr. Miller, OWCP's DMA, reviewed the medical evidence of record and determined the date of MMI to be April 2, 2021, the date of Dr. Lee's medical note. The DMA disagreed with the two percent right lower extremity permanent impairment rating found by Dr. Ricks. He noted that Dr. Xeller reported a normal gait in September 2020 while Dr. Ricks reported a slight limping gait in his September 16, 2021 report. In addition, all the examination findings reported normal ROM and normal appearance. Using the DBI method of the A.M.A., *Guides*, Dr. Miller utilized the ligament section of the Foot and Ankle Regional Grid and assigned a CDX of 0 as he found a sprain was not a muscle or tendon injury.

The Board, therefore, finds that there is a conflict in the medical opinion between Dr. Ricks and the DMA, Dr. Miller, as to the extent of appellant's right lower extremity permanent impairment. As there is a conflict in the medical evidence as to the extent of permanent impairment, the case must be remanded to OWCP for referral to an IME for resolution of the conflict in accordance with 5 U.S.C. § 8123(a).<sup>17</sup>

On remand, OWCP shall refer appellant, along with the case file and a statement of accepted facts, to a physician in the appropriate field of medicine for an impartial medical evaluation and a report including a rationalized opinion as to whether he sustained permanent impairment of a scheduled member or function of the body, warranting a schedule award. Following this and other 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.

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<sup>17</sup> *Supra* note 14 and 15; *see also* R.K., Docket No. 19-0247 (issued August 1, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 11, 2022 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: January 19, 2023  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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