United States Department of Labor
Employees' Compensation Appeals Board

W.G., Appellant	)	
and	)	**Docket No. 23-0843**
	)	**Issued: January 12, 2024**
DEPARTMENT OF DEFENSE, POLICE DEPARTMENT, Fort Dix, NJ, Employer	)	

Appearances:
Michael D. Overman, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On June 2, 2023 appellant, through counsel, filed a timely appeal from a January 12, 2023 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 over 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 six percent permanent impairment of the left lower extremity (left leg), for which he previously received a schedule award.

FACTUAL HISTORY

On October 21, 2001 appellant, then a 33-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on that day he sustained a left leg fracture after being struck by a moving vehicle while in the performance of duty. He stopped work on the date of the alleged injury. OWCP accepted the claim for left medial malleolar fracture, and subsequently expanded acceptance of the claim to include left ankle and foot primary osteoarthritis. On November 8, 2001 appellant underwent open reduction internal fixation of medial malleolus, derotational fibular osteotomy, and placement of syndesmotic screw. On February 14, 2002 he underwent left ankle syndesmotic screw removal. OWCP paid appellant wage-loss compensation on the supplemental rolls from January 7 through March 3, 2002. Appellant returned to full-duty work on March 4, 2002.

In a January 30, 2019 report, Dr. Arthur Becan, an attending orthopedic surgeon, related a history of appellant's October 20, 2001 employment injury and his medical course. He noted that appellant ambulated with a noticeable limp on the left, secondary to left ankle pain. On examination of the left ankle, Dr. Becan found a well-healed scar along the lateral aspect measuring 10 centimeters in length, lateral malleolar tenderness, tibiofibular syndesmosis tenderness, no medial malleolar tenderness, no subtalar joint tenderness, and no deltoid ligament tenderness, anteromedial and anterolateral tibial plafond tenderness, and common peroneal tenderness. He reported ankle range of motion (ROM), which was performed three times, as 0/15 degrees dorsiflexion, 40/55 degrees plantar flexion, 30/35 degrees inversion, and 20/45 degrees eversion. Dr. Becan reported extremes of motion were painful for appellant. Manual muscle strength testing revealed dorsiflexion, plantar flexion, inversion and eversion at 4/5 on the left. Ankle joint circumference measured 22 centimeters on the right and 24 centimeters on the left. Dr. Becan diagnosed left tibia ankle trimalleolar fracture/dislocation, left ankle tibiofibular syndesmosis disruption, status post removal of left ankle syndesmosis screw performed on February 14, 2002, left ankle post-traumatic arthropathy, and post-traumatic left ankle peroneal tendinitis.[3] He utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.MA., *Guides*),[4] to rate appellant's permanent impairment as a diagnosis-based impairment (DBI) of left ankle medial malleolar fracture. Dr. Becan indicated that appellant's class of diagnosis (CDX) for left ankle medial malleolar fracture with mild motion deficit resulted in a Class 1 impairment, with a default value of 10 percent under Table 16-2, page 503. He found a grade modifier for functional history (GMFH) of 2, under the Table 16-6 on page 516; a grade modifier for physical examination (GMPE) of 2, under Table 16-7 on page 517; and that a grade modifier for clinical studies (GMCS) was not applicable.

[3] The report contains a typographical error when noting right instead of tibial distal comminuted fracture and ankle disruption of tibiofibular syndesmosis.

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

Dr. Becan applied the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) resulting in a net adjustment of 2 to a 13 percent permanent impairment of the left lower extremity in accordance with Table 16-2, page 503 of the A.M.A., *Guides.* He concluded that appellant reached maximum medical improvement (MMI) on January 30, 2019.

On April 18, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On May 6, 2019 OWCP referred the record and a statement of accepted facts (SOAF) to Dr. Jovito Estaris, a Board-certified occupational medicine specialist serving as a district medical adviser (DMA), for review and rating of appellant's permanent impairment of the left lower extremity in accordance with the sixth edition of the A.M.A., *Guides*.

In a report dated May 15, 2019, Dr. Estaris noted that he had reviewed appellant's medical records, history of injury, and the SOAF. He noted that no permanent impairment rating had been provided using the ROM method of the A.M.A., *Guides*. Dr. Estaris applied the DBI method of the A.M.A., *Guides*, for the diagnosis of left ankle medial malleolar fracture with mild motion deficit, CDX of 1, with a default value of 10 percent under Table 16-2, page 503. He found a GMFH of 1 and found that a GMPE was not used because of mild limitation of ROM was used for placement in DBI grid and found a GMCS was not used because it was used in the diagnosis and in the placement in the grid. Dr. Estaris applied the net adjustment formula, and found a net adjustment of +1, yielding a grade D or 12 percent left lower extremity permanent impairment. He indicated that the ROM method was not used as it resulted in lower impairment, and he concluded that appellant had a 12 percent left lower extremity permanent impairment. Dr. Estaris explained that the difference between his impairment rating and that of Dr. Becan was that he assigned a GMPE of 2. The DMA explained that since GMPE was used to define the CDX, it is not used in adjusting the rating, and that the only GMFH was on the only grade modifier that could be used. Lastly, he determined the date of MMI to be January 30, 2019.

By decision dated October 11, 2019, OWCP denied appellant's claim for a schedule award, finding no permanent impairment of a scheduled member or function of the body due to the accepted work injury.

On October 18, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated December 9, 2019, an OWCP hearing representative found the case not in posture for a hearing. The hearing representative vacated the October 18, 2019 decision and remanded the case to resolve the conflict in the medical opinion evidence between Dr. Becan and Dr. Estaris on the degree of permanent impairment.

On February 17, 2021 OWCP referred appellant, together with a SOAF, medical records, and a series of questions, for an impartial medical examination with Dr. Ian B. Fries, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence on the degree of permanent impairment.

In a report dated September 10, 2021, Dr. Fries, the impartial medical examiner (IME), reviewed the medical evidence of record, the SOAF, and series of questions. He diagnosed left

ankle fracture, post open reduction and internal fixation, and post removal of syndesmosis screws. On physical examination, Dr. Fries reported some left talonavicular joint tenderness, and some decreased tenderness along the lateral ankle incision. He found no permanent impairment using the ROM method as the left ankle ROM was within normal limits and did not reach mild impairment. Dr. Fries noted appellant's prior history of tibial and fibular shaft fractures, and indicated that if two significant diagnoses are appropriate for impairment in the same region, the highest impairment rating in the region was to be used, and as the tibial fracture was included in the foot and ankle grid, page 503, he considered it the same region as the ankle fracture. Using Table 16-2, page 503, he assigned a CDX of 1 for tibia (intra-articular – pilon/plafond) with mild problem, nondisplaced with minimal findings and an impairment range of three to seven percent. Dr. Fries explained that appellant did not qualify for mild motion deficit and/or mild malalignment due to zero percent ROM calculations. He referred to Table 16-16, page 516 and assigned a GMFH of 1 for minimal palpatory findings. Dr. Fries assigned a GMPE of 1for mild deficit based upon minimal palpatory findings under Table 16-7, page 517. He assigned a GMCS of 2 for moderate pathology based on imaging studies under Table 16-8, page 519. Using the net adjustment formula on page 521, (GMFH – CDX) + (GMPE – CDX) = (1 – 1) + (1 – 1) + (2 – 1) = +1, resulted in a grade D, six percent permanent impairment of the left lower extremity. Lastly, Dr. Fries found that appellant reached MMI on August 27, 2021, the date of his examination.

By decision dated October 1, 2021, OWCP granted appellant a schedule award for six percent permanent impairment of the left leg. The award was for 17.28 weeks and ran from August 27 to December 25, 2021.

On October 7, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In an addendum dated February 8, 2022, Dr. Becan reviewed Dr. Fries' September 10, 2021 report. He related that the 10 degrees left ankle dorsiflexion found by Dr. Fries represented mild ROM impairment according to Table 16-2, page 549. Thus, Dr. Becan disagreed with Dr. Fries that all left ankle ROM findings were within normal limits. Using the DBI method, he reported a tibia fracture with mild motion deficits would be classified as CDX of 1 with impairment ratings between 7 and 13 percent. Dr. Becan noted that Dr. Fries assigned a GMFH of 1 while reporting functional history adjustment as moderate. He also noted that he found a "LEAS of 45," which equaled a GMFH of 2, and Dr. Fries reported that appellant transferred to a sedentary position as he was unable to perform his prior job. In addition, appellant's difficulty with ambulation was consistent with a moderate problem and supported a GMFH of 2. Thus, Dr. Becan again found appellant had 13 percent permanent impairment of the left lower extremity.

A telephonic hearing was held on February 18, 2022.

By decision dated May 4, 2022, OWCP's hearing representative vacated the October 1, 2021 decision. She found that Dr. Becan's February 8, 2022 report was sufficient to warrant additional development of the medical evidence. On remand OWCP's hearing representative instructed OWCP to refer the claim back to Dr. Fries for review of Dr. Becan's report.

In a supplemental report dated May 16, 2022, Dr. Fries reviewed Dr. Becan's report, and concluded that it did not change his determination that appellant had six percent left lower extremity permanent impairment. With respect to Dr. Becan's opinion that appellant's dorsiflexion ROM finding demonstrated mild impairment, he indicated the deficiency between 10 degrees ROM for the left ankle and 15 degrees ROM for the right ankle was insufficient to support even a mild permanent impairment. Next, Dr. Fries stated that even if a GMFH of 2 was considered, it would only increase the permanent impairment to seven percent. Dr. Fries advised that his opinion remained unchanged regarding the GMFH and left lower extremity permanent impairment.

By decision dated May 27, 2022, OWCP denied appellant's request for an additional schedule award.

On June 6, 2022 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearing's and Review. A telephonic hearing was held on October 5, 2022.

By decision dated January 12, 2023, OWCP's hearing representative affirmed the May 27, 2022 decision finding that appellant had no greater than six percent permanent impairment of the left lower extremity.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations 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.[5] 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. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[6] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[7]

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 -- Lower Extremity Impairments) beginning on page 501.[8] After the CDX is determined from the Foot and Ankle Regional Grid (including

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404; *B.C.*, Docket No. 21-0702 (issued March 25, 2022); *E.S.*, Docket No. 20-0559 (issued October 29, 2020); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *see also* Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a. (March 2017).

[8] *Supra* note 4 at 501-08.

identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[9]

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[10] In situations where there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS

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

OWCP properly found a conflict in the medical opinion evidence between appellant's treating physician, Dr. Becan, who found 13 percent permanent impairment of his left lower extremity, and its DMA, Dr. Estaris, who found 12 percent permanent impairment of appellant's left lower extremity impairment. It properly referred her case to Dr. Fries, pursuant to 5 U.S.C. § 8123(a), for an impartial medical examination in order to resolve the conflict in the medical opinion.[12]

Dr. Fries chose to rate appellant's left ankle permanent impairment for the diagnosis of tibia (intra-articular-pilon/plafond), which originated from a prior injury, rather than the diagnosis of ankle (malleolar, bimalleolar, trimalleolar), which was the diagnosis utilized by Dr. Becan and Dr. Estaris. Dr. Fries explained that his diagnosis would yield a greater permanent impairment value.

In an addendum dated February 8, 2022, Dr. Becan reviewed Dr. Fries' September 10, 2021 report. He related that 10 degrees left ankle dorsiflexion found by Dr. Fries represented mild ROM deficit according to Table 16-2, page 549. Dr. Becan again concluded that appellant had 13 percent permanent impairment of the left lower extremity.

In a supplemental report dated May 16, 2022, Dr. Fries reviewed Dr. Becan's report, noting that the deficiency between 10 degrees ROM for the left ankle and 15 degrees ROM for the right ankle was insufficient to support even a mild motion deficit. He concluded that his opinion remained unchanged regarding the GMFH and left lower extremity permanent impairment.

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

[10] 5 U.S.C. § 8123(a).

[11] *A.P.*, Docket No. 22-1246 (issued April 25, 2023); *D.C.*, Docket No. 20-0897 (issued August 11, 2021); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

[12] *L.W.*, Docket No. 22-1207 (issued April 10, 2023); *H.M.*, Docket No. 21-0046 (issued June 1, 2021); *W.C.*, Docket No. 19-1740 (issued June 4, 2020).

The Board finds that Dr. Fries provided insufficient medical rationale to explain why the difference in ROM for the left and right ankles was insufficient to support a mild motion deficit. Under Table 16-2, page 503 of the A.M.A., *Guides*, a mild motion deficit would grant a default rating of 10 percent, rather than a default rating of 3 percent if no mild motion deficit is found. The A.M.A., *Guides* provide that, if the contralateral joint is uninjured, it may serve as defining normal for the individual.[13] Table 16-22 of the A.M.A., *Guides* defines a mild impairment due to dorsiflexion of the ankle between 0 and 10 degrees. However, Dr. Fries did not explain how defining appellant's dorsiflexion compared to the contralateral ankle would result in a finding that appellant had more than 10 degrees of dorsiflexion. The Board finds that clarification is required from Dr. Fries as to why the contralateral ROM discrepancy between the ankles did not matter.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.[14] Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[15]

The Board has held that, when OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the IME to correct the defect in his original report.[16]

For the above-described reason, the opinion of the IME, Dr. Fries, requires clarification. Therefore, in order to address the unresolved conflict in the medical opinion evidence, the case will be remanded to OWCP for referral to Dr. Fries for a supplemental explanation as to why appellant's 10 degrees of dorsiflexion of the left ankle did not constitute a mild motion deficit. If Dr. Fries is unable to clarify his opinion, or if his requested supplemental report is lacking rationale, OWCP shall refer appellant to a new IME for the purpose of obtaining a rationalized medical opinion regarding any employment-related impairment.[17] 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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[13] *Supra* note 4 at page 544.

[14] *See T.H.,* Docket No. 20-0905 (issued December 9, 2022); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

[15] *Id.*; *see also C.F.,* Docket No. 21-0003 (issued January 21, 2022); *S.A.*, Docket No. 18-1024 (issued March 12, 2020).

[16] *See L.R.*, Docket No. 21-1312 (issued March 6, 2023); *F.H.*, Docket No. 17-1924 (issued January 25, 2019); *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979); *see also supra* note 7 at Chapter 2.810.11e (September 2010).

[17] *L.R., id.*; *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Harold Travis, id.*

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2023 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 12, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board