United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 17-0714**
U.S. POSTAL SERVICE, POST OFFICE, Little Falls, NY, Employer	)	**Issued: August 10, 2018**

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 9, 2017 appellant filed a timely appeal from a January 3, 2017 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 her burden of proof to establish permanent impairment of her right lower extremity, warranting a schedule award.

FACTUAL HISTORY

On May 13, 2002 appellant, then 46-year-old rural letter carrier, filed a traumatic injury claim alleging that on that date she sustained a sprained right ankle and pulled tendons while sorting mail. She explained that she turned to the left and her left leg hit a mail tray, and caused her right foot to go off balance. Appellant indicated that she lost her balance and fell to the floor, while working. She did not initially stop work.

On June 12, 2003 OWCP accepted appellant's claim for right ankle sprain and plantar fascial fibromatosis. As she missed no time from work, it authorized appropriate medical compensation benefits.

On February 2, 2015 appellant filed a claim for a schedule award (Form CA-7).

By development letter dated March 27, 2015, OWCP advised appellant of the evidence needed to establish her claim. It explained that additional medical evidence was required from her physician, including an opinion as to whether maximum medical improvement (MMI) had been reached and an impairment rating utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] No evidence was received.

On April 28, 2015 OWCP denied appellant's claim for a schedule award, finding that she failed to submit any medical evidence providing an impairment rating under the A.M.A., *Guides.*

In a letter dated May 11, 2015, appellant, through counsel, requested a telephonic hearing, which was held before an OWCP hearing representative on December 10, 2015. During the hearing, appellant was again advised that, in order to establish her claim for a schedule award, she needed to obtain an impairment rating from her physician utilizing the A.M.A., *Guides.*

By decision dated February 9, 2016, OWCP's hearing representative affirmed the April 28, 2015 decision. The hearing representative found that appellant had not submitted any medical evidence establishing permanent impairment of a scheduled member or function of the body causally related to the accepted employment injuries of May 13, 2002. As such, there was no basis for consideration of a schedule award in the instant claim.

In a March 3, 2016 report, Dr. Stewart A. Kaufman, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment. He examined appellant and provided his findings. They included that appellant had a normal gait, balance, and coordination. Her right knee went from 0 to 140 degrees of flexion, and the flexion on the left was 0 to 135 degrees. Dr. Kaufman found that regarding the ankles: dorsiflexion on the right and left was equal to 20 degrees; plantar flexion on the right was equal to 40 degrees and on the left was equal to 35 degrees;

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

eversion on the right was equal to 20 degrees and on the left was equal to 15 degrees; and inversion on the right equated to 25 degrees and 30 degrees on the left. He found that appellant was able to toe and heel walk and her plantar feet were nontender. Dr. Kaufman noted that there was no thickening or lumps to suggest plantar fibromatosis. Regarding diagnostic testing, he found that the hospital records from May 13, 2002 revealed small exostosis off the medial malleolus of the right ankle and no pathology. Dr. Kaufman opined that appellant's sprain of the right ankle had resolved and that she reached MMI on March 3, 2016. He referenced Table 16-8 for clinical studies adjustment[4] and Table 16-2 for the foot and ankle regional grid,[5] and determined that appellant fell into a class 1 category. Dr. Kaufman explained that, according to Table 16-8, imaging was normal giving her a 0 grade modifier, and a functional history modifier of 1. He referenced Table 16-7[6] for physical examination modifier and found that appellant qualified for a grade 1, modifier. Dr. Kaufman explained that the total was 2, and the average was 1 grade modifier. He noted that appellant defaulted to one percent and moving one to the left brought her again to one percent right lower extremity impairment. Dr. Kaufman opined that appellant had one percent right lower extremity permanent impairment.

In a letter dated September 27, 2016, appellant, through counsel, requested reconsideration. He noted that the report from Dr. Kaufman was new medical evidence.

By letter dated July 25, 2016, counsel provided additional medical evidence and requested that OWCP provide the findings of its district medical adviser (DMA).

On December 8, 2016 OWCP provided the DMA with a copy of the record along with a statement of accepted facts (SOAF) and requested that he provide an impairment rating.

In a December 29, 2016 report, the DMA opined that appellant did not have any permanent impairment of her right lower extremity. He explained that she had accepted conditions of ankle sprain and plantar fasciitis. The DMA noted that "the examination [of Dr. Kaufman]" did not reveal any evidence of plantar fasciitis and there was no rating for this condition. Regarding appellant's right ankle, he indicated that she had a class 1 impairment. The DMA referred to Table 16-2,[7] and noted that this equated to one percent lower extremity impairment. He made adjustments for functional history and referenced Table 16-6,[8] and determined that appellant had a grade 0 modifier. The DMA made adjustments for physical examination using Table 16-7[9] and determined that she had a grade 1 modifier. He made adjustments for clinical studies and utilized Table 16-8[10] and found a grade 0 modifier. The DMA determined that appellant would have a net

[4] *Id.* at 519.

[5] *Id.* at 502.

[6] *Id.* at 517.

[7] *Id.* at 503.

[8] *Id.* at 516.

[9] *Supra* note 6.

[10] *Supra* note 4.

modifier of -2, which was equal to a class 1 A impairment. He advised that, based upon Table 16-2,[11] this would equal zero percent lower extremity impairment for the right ankle. Regarding Dr. Kaufman's rating, the DMA explained that he did not appropriately perform the impairment rating according to the standards of the A.M.A., *Guides.* He explained that Dr. Kaufman averaged the modifiers. The DMA opined that appellant reached MMI on March 3, 2016.

By decision dated January 3, 2017, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[12] and its implementing regulations[13] 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[14] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[15]

The sixth edition requires identifying the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[16] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[17]

Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that diagnosis-based impairment is the primary method of calculation for the lower limb and that most impairments are based on the diagnosis-based impairment where impairment class is determined by the diagnosis and specific criteria as adjusted by the grade modifiers for functional history, physical examination, and clinical studies. It further provides that alternative approaches are also provided for calculating impairment for peripheral nerve deficits, complex

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[11] *Supra* note 7.

[12] 5 U.S.C. § 8107.

[13] 20 C.F.R. § 10.404.

[14] *Id. See also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims,* Chapter 2.808.5a (February 2013).

[15] Federal (FECA) Procedure Manual, *id.* at Chapter 2.808.5a (February 2013); and *id.* at Chapter 3.700, Exhibit 1 (January 2010).

[16] A.M.A., *Guides* 494-531.

[17] *Id.* at 521.

regional pain syndrome, amputation, and range of motion. Range of motion is primarily used as a physical examination adjustment factor.[18] The A.M.A., *Guides,* however, also explain that some of the diagnosis-based impairment grids refer to the range of motion section when that is the most appropriate mechanism for grading the impairment. This section is to be used as a stand-alone rating when other grids refer to this section or no other diagnosis-based impairment sections of the chapter are applicable for rating a condition.[19]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage impairment in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.[20]

ANALYSIS

The Board finds that the evidence of record is insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award in accordance with the sixth edition of the A.M.A., *Guides*.

OWCP accepted appellant's claim for right ankle sprain and plantar fascial fibromatosis.

In a March 3, 2016 report, Dr. Kaufman noted appellant's history of injury and treatment. He examined her and provided his findings, which included that she had a normal gait, balance, and coordination. Appellant's right knee went from 0 to 140 degrees of flexion, and the flexion on the left was 0 to 135 degrees. Dr. Kaufman also found that diagnostic testing from May 13, 2002 revealed a small exotosis of the medial malleolus of the right ankle and no pathology. He provided range of motion findings for the right ankle. Dr. Kaufman opined that appellant's sprain of the right ankle had resolved and that she reached MMI on March 3, 2016. He referred to Table 16-2 for the foot and ankle regional grid,[21] and determined that she fell into a class 1 category. Regarding functional history, Dr. Kaufman referenced Table 16-6[22] and provided appellant with a grade modifier of 1. The Board notes that this would include a mild problem and antalgic limp with asymmetric shortened stance, corrects with footwear modifications and or orthotics. However, Dr. Kaufman found that appellant had an essentially normal gait, and it is unclear why he selected this grade modifier. Additionally, he referenced Table 16-7[23] for physical examination adjustment and found that she qualified for a grade 1, modifier based on mild problem of minimal palpatory findings consistently documented without observed abnormalities. Dr. Kaufman

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[18] *Id.* at 497, section 16.2.

[19] *Id.* at 543; *see also D.F.,* Docket No. 15-0664 (issued January 8, 2016).

[20] Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.808.6(f) (February 2013).

[21] *Supra* note 5.

[22] *Supra* note 8.

[23] *Supra* note 6.

referenced Table 16-8 for clinical studies adjustment[24] and explained that, according to Table 16-8, imaging was normal giving appellant a 0 grade modifier. He explained that the total was 2, and the average was 1 grade modifier. However, the Board notes that the net adjustment formula does not include averaging the impairment classes.[25] Therefore, Dr. Kaufman's opinion that appellant had one percent right lower extremity impairment is not properly explained. As he did not adequately explain how he used the A.M.A., *Guides* to rate her right ankle impairment, his opinion is of diminished probative value.[26]

In a December 29, 2016 report, the DMA determined that appellant did not have any permanent impairment of the right lower extremity. He explained that appellant had accepted conditions of ankle sprain and plantar fasciitis. The DMA noted that appellant's examination did not reveal any evidence of plantar fasciitis and there was no rating for this condition. Regarding her right ankle, the DMA indicated that she had a class 1 impairment. He referred to Table 16-2,[27] and noted that this equated to one percent lower extremity impairment. The DMA made adjustments for functional history and referenced Table 16-6,[28] and determined that appellant had a grade 0 modifier as there was no gait derangement. He made adjustments for physical examination and using Table 16-7[29] and determined that she had a grade 1 modifier. The Board notes that this corresponds with Dr. Kaufman, who found that appellant had minimal palpatory findings consistently documented without observed abnormalities. The DMA concurred with Dr. Kaufman with regard to clinical studies and utilized Table 16-8[30] and found a grade 0 modifier as there were no available clinical studies or relevant findings. He utilized the net adjustment formula[31] in determining that appellant would have a net modifier of -2, which was equal to a class 1 A impairment. The DMA advised that, based upon Table 16-2,[32] this would equal zero percent lower extremity impairment for the right ankle. Regarding Dr. Kaufman's rating, as noted above, he explained that he did not appropriately perform the impairment rating according to the standards of the A.M.A., *Guides.* The DMA's explanation included that Dr. Kaufman averaged the modifiers, which as noted was not a proper application of the net adjustment formula. He opined that appellant reached MMI on March 3, 2016.

The Board finds that the DMA properly applied the A.M.A., *Guides* to rate appellant's right ankle permanent impairment based on the findings in Dr. Kaufman's report. Appellant has

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[24] *Supra* note 4.

[25] *See supra* note 15.

[26] *See J.G.,* Docket No. 09-1128 (issued December 7, 2009) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

[27] *Supra* note 7.

[28] *Supra* note 8.

[29] *Supra* note 6.

[30] *Supra* note 4.

[31] *See supra* note 15.

[32] *Id.*

not submitted any current medical evidence in conformance with the A.M.A., *Guides* to support permanent impairment. As such evidence has not been submitted, she has not met her 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 impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her right lower extremity, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 10, 2018
Washington, DC

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

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

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