

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

M.J., Appellant)	
)	
and)	Docket No. 17-1776
)	Issued: December 19, 2018
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
Cleveland, OH, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 August 17, 2017 appellant, through counsel, filed a timely appeal from a June 20, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 met her burden of proof to establish more than five percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On March 7, 2013 appellant, then a 34-year-old social worker, filed a traumatic injury claim (Form CA-1) alleging that she sustained a fractured left ankle and tibia when she fell on ice in the employee parking lot and could not get up. She stopped work on March 5, 2013. On March 21, 2013 OWCP accepted the claim for fractures of the left ankle bimalleolar and medial malleolus. Appellant had OWCP-approved ankle surgery on March 15, 2013. She returned to full-duty work on June 3, 2013. OWCP paid appellant wage-loss compensation and medical benefits.³

In a July 23, 2015 report, Dr. Alan W. Davis, an orthopedic surgeon, opined that appellant reached maximum medical improvement (MMI).

On September 11, 2015 appellant filed a claim for a schedule award (Form CA-7).

By development letter dated September 14, 2015, OWCP notified appellant that medical evidence was needed to establish her schedule award claim. It advised her to submit a detailed narrative medical report from her treating physician regarding the nature and extent of her permanent impairment, including an impairment rating calculated in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ OWCP afforded appellant 30 days to provide the necessary evidence. No response was received.

By decision dated October 14, 2015, OWCP denied appellant's schedule award claim.

An October 16, 2015 x-ray of the ankles, interpreted by Dr. Ian Fisher, a Board-certified diagnostic radiologist, revealed orthopedic nails traverse to the left medial malleolus. He advised that no acute fracture was identified and related that there appeared to be mild-to-moderate loss of joint space involving the left tibiotalar joint with subchondral sclerosis. Dr. Fisher found that the talocrural angle on the right was 13 degrees and on the left 16 degrees. He noted that there did not appear to be significant widening of the tibiofibular clear space. Dr. Fisher found moderate degenerative changes of the left tibiotalar joint space and findings consistent with prior open reduction internal fixation (ORIF) of a medial malleolus fracture.

On October 21, 2015 counsel requested a telephonic hearing before an OWCP hearing representative.

³ OWCP initially denied the claim in a July 6, 2005 decision. Appellant requested reconsideration and in a March 7, 2006 decision, it vacated the denial and accepted the claim for left posterior tibial tendinitis.

⁴ A.M.A., *Guides* (6th ed. 2009).

In a December 30, 2015 report, Dr. Catherine Watkins Campbell, Board-certified in occupational medicine, opined that appellant had 14 percent left lower extremity permanent impairment due to her left bimalleolar ankle fracture. She noted appellant's history of injury and treatment. Dr. Watkins Campbell's findings on examination included: a mild antalgic gait and inability to toe walk on the left; 3/5 strength deficit with dorsiflexion and 4/5 strength deficit with both inversion and eversion. She found restricted range of motion, and bony tenderness. Dr. Watkins Campbell referred to Table 16-2 (ankle grid), under joint stability/ankle syndesmosis.⁵ She determined that appellant fell into a class 2 for a talocrural angle greater than 15 degrees, (appellant had 16 degrees), grade C impairment with adjustments of one each for functional history (gait deficiency) and physical examination (motion restriction) for a net minus 2, grade A. Dr. Watkins Campbell opined that appellant had 14 percent lower extremity permanent impairment. She noted that appellant reached MMI on July 23, 2015, as recommended by Dr. Davis.

By decision dated April 15, 2016, OWCP's hearing representative advised that a preliminary review was conducted, and he determined that the case was not in posture for a hearing. He vacated OWCP's October 14, 2015 decision and remanded the case for a district medical adviser (DMA) to provide a rationalized opinion as to the percentage of left lower extremity impairment in accordance with the sixth edition of the A.M.A., *Guides*, as well as to determine the date of MMI. OWCP's hearing representative explained that upon receipt of the DMA's report, and any additional development deemed necessary, OWCP should issue a *de novo* decision as to schedule award benefits.

In a report, dated July 15, 2016, the DMA noted appellant's history of injury and treatment and utilized the sixth edition of the A.M.A., *Guides*. He explained that the diagnosis-based impairment (DBI) rating was the preferred rating method. The DMA noted that the lower extremity chapter, DBI, Section 16.2, at page 497 states, "[m]ost impairments are based upon the [DBI] [c]lass." It further states, "Range of motion is primarily used as a physical examination adjustment factor and is only used to determine actual impairment when it is not possible to otherwise define impairment." The DMA explained that the summary of how to rate the lower extremities, on page 552,⁶ of the A.M.A., *Guides* clearly states, "Only if no other approach is available to rating, calculate impairment based on range of motion, as explained in Section 15.7."

The DMA explained that the A.M.A., *Guides* supported the use of the DBI method for lower extremity impairment calculations and that valid range of motion measurements were to be used principally as an adjustment factor. He reiterated that the range of motion (ROM) methodology was to be used only as a stand-alone impairment approach as an alternative impairment method when no other approach was available to rate the lower extremity (such as the DBI method which was specific to the accepted injury and applicable in this case).

The DMA explained that the most impairing diagnosis in the left ankle region was mild instability, and advised that this was used in his final impairment calculations.

⁵ A.M.A., *Guides* 501.

⁶ The DMA indicated page 551. However, this appears to be a typographical error as the noted summary is actually found on page 552.

The DMA found that appellant had an impairment rating of five percent to the left lower extremity. Regarding the date of MMI, he determined that appellant reached MMI on January 16, 2015, the date of Dr. Watkins Campbell's impairment examination. The DMA explained that Dr. Watkins Campbell rated appellant for a talocrural angle of greater than five degrees. However, he explained that this was not correct as it was the difference in angle between the affected and nonaffected ankles that was rated, not the absolute value. The DMA explained that the right (unaffected) talocrural angle was 3 degrees and the left was 6 degrees according to October 16, 2015 x-rays. He advised that the difference was 3 degrees and this placed appellant into a class 1, row 2 for mild joint instability. The DMA noted that the x-ray findings were consistent with the mild ligament laxity (class1) found by Dr. Watkins Campbell on examination. He concluded that the class 2 used by Dr. Watkins Campbell was an error.

By decision dated August 3, 2016, OWCP granted appellant a schedule award for five percent permanent impairment of the left lower extremity. The award covered a period of 14.4 weeks from October 16, 2015 to January 24, 2016.

On August 16, 2016 appellant, through counsel, requested a telephonic hearing, held before an OWCP hearing representative on April 19, 2017. Counsel argued that the case should be remanded back to the DMA, as it was unclear which version of the A.M.A., *Guides* he utilized. Counsel argued that the DMA did not examine appellant, and he failed to supply sufficient medical rationale for the placement of appellant in a different class than that indicated by the examining physician, Dr. Watkins Campbell.

By decision dated June 20, 2017, OWCP's hearing representative affirmed the August 3, 2016 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁷ and its implementing federal regulations,⁸ 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 concurred in such adoption.⁹ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.¹⁰

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at § 10.404(a); *see also Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

¹⁰ *See D.T.*, Docket No. 12-503 (issued August 21, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

(ICF).¹¹ In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the class of diagnosis (CDX) condition, which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).¹² The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹³

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.¹⁴

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish more than five percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

In support of her claim for a schedule award, appellant submitted a December 30, 2015 report from Dr. Watkins Campbell, who opined that appellant had 14 percent left lower extremity permanent impairment due to her left bimalleolar ankle fracture. She reviewed medical records and the history of the employment injury. Dr. Watkins Campbell provided examination findings and noted that Dr. Davis indicated that appellant had reached MMI on July 23, 2015. She referenced Table 16-2 of the A.M.A., *Guides* (ankle grid), under joint stability/ ankle syndesmosis.¹⁵ Dr. Watkins Campbell determined that appellant fell into a class 2 for a talocrural angle greater than 15 degrees, (appellant had 16 degrees), grade C impairment with adjustments of one each for functional history (gait deficiency) and physical examination (motion restriction) for a net minus 2, grade A. She opined that appellant had 14 percent permanent impairment of the left lower extremity.

OWCP's DMA reviewed Dr. Watkins Campbell's impairment rating and disagreed with her assessment. He explained that she made an error when she rated appellant for a talocrural angle of greater than 15 degrees as it was the difference in angle between the affected and nonaffected ankles that was rated, not the absolute value, which caused her class of 2 to be an error. The DMA also explained that the ROM method was only to be utilized when no other approach was available.

The DMA reviewed the case record and determined that appellant had five percent permanent impairment of the left lower extremity. Regarding the date of MMI, he determined that appellant reached MMI on January 16, 2015, the date of Dr. Watkins Campbell's impairment

¹¹ A.M.A., *Guides* (6th ed., 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹² *Id.* at 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹³ *Id.* at 521.

¹⁴ *P.R.*, Docket No. 18-0022 (issued April 9, 2018); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6f (March 2017).

¹⁵ *Id.* at 501.

examination. The DMA noted that Dr. Watkins Campbell rated appellant for a talocrural angle of greater than five degrees. However, he explained that this was incorrect as it was the difference in angle between the affected and nonaffected ankles that was rated, not the absolute value. The DMA explained that the right (unaffected) talocrural angle was 3 degrees and the left was 6 degrees according to October 16, 2015 x-rays. He advised that the difference was three degrees and this placed appellant into a class 1, row 2 for mild joint instability. The DMA explained that the x-ray findings were consistent with the mild ligament laxity (class1) found by Dr. Watkins Campbell on examination. He concluded that the class 2 used by Dr. Watkins Campbell was an error.

The Board finds that the weight of the medical evidence rests with the opinion of OWCP's medical adviser as he provided the only impairment rating that properly applied the sixth edition of the A.M.A., *Guides*. The Board notes that the medical adviser properly reviewed the medical record and evaluated appellant's left lower extremity in accordance with the A.M.A., *Guides*. The medical adviser appropriately applied the sixth edition of the A.M.A., *Guides* in determining that appellant had five percent permanent impairment of the left lower extremity.¹⁶ The record does not contain any other medical evidence in conformance with the sixth edition of the A.M.A., *Guides* establishing greater than the five percent permanent impairment of the left lower extremity previously awarded. Watkins Campbell¹⁷

On appeal counsel for appellant argues that the June 20, 2017 hearing representative's decision ignores *T.H.*, Docket No. 14-0943 (issued November 25, 2016) and FECA Bulletin No. 17-06 (issued May 8, 2017). The Board has consistently held that the application of *T.H.* and FECA Bulletin No. 17-06 is limited to upper extremity impairment claims. Therefore, based on the findings and reasons stated above, the Board finds that counsel's arguments are not substantiated.

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 more than five percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

¹⁶ *M.C.*, Docket No. 15-1757 (issued March 17, 2016). The only medical evidence that demonstrated a proper application of the A.M.A., *Guides* was the report of the medical adviser).

¹⁷ A.M.A., *Guides* 516.

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 19, 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