

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

N.D., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
U.S. CUSTOMS AND BORDER PROTECTION,)
U.S. BORDER PATROL, San Ysidro, CA,)
Employer)
_____)

**Docket No. 24-0873
Issued: October 30, 2024**

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, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 27, 2024 appellant filed a timely appeal from an August 27, 2024 merit decision 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 greater than 15 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances of the case as set forth in the Board's prior order are incorporated herein by reference.² The relevant facts are as follows.

On May 3, 2021 appellant, then a 38-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left ankle when he lost his balance and fell from a boulder while in the performance of duty.³ He stopped work on the date of injury. On May 6, 2021 appellant underwent surgery to the left ankle, performed by Dr. Mark T. Selecky, a Board-certified orthopedic surgeon, for the primary repair of complex complete rupture of the left Achilles tendon with augmentation of local plantaris tendon autograft. On May 7, 2021 OWCP accepted the claim for spontaneous rupture of other tendons of the left ankle and foot. It paid appellant wage-loss compensation on the supplemental rolls, effective June 18, 2021, and on the periodic rolls from June 20, 2021 through June 23, 2022.

On April 27, 2022 appellant filed a claim for compensation (Form CA-7) for an additional schedule award.

In support of his claim, appellant submitted a March 15, 2022 impairment rating evaluation by Dr. Selecky, who noted the history of the May 3, 2021 injury and appellant's subsequent medical treatment, including the surgical repair that he performed. Dr. Selecky opined that appellant reached maximum medical improvement (MMI) on March 15, 2022. He documented physical examination findings, including a slightly antalgic gait favoring the left lower extremity, hypertrophy and thickening over the area of the Achilles tendon repair, reduced range of motion (ROM) of the left ankle compared to the right in all planes, and 2.2 centimeters of atrophy of the left calf compared to the right. Dr. Selecky diagnosed spontaneous rupture of other tendons, left ankle and foot. He referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ and, utilizing the ROM rating method and Table 16-22, page 549, he noted that appellant's ROM findings of 8 degrees of dorsiflexion resulted in seven percent lower extremity permanent impairment; that 50 degrees of plantarflexion did not account for any ratable impairment; and that 10 degrees of hindfoot eversion and 19 degrees of hindfoot inversion each resulted in two percent impairment lower left extremity permanent impairment. Dr. Selecky combined these impairment ratings to find a total of 11 percent left lower extremity impairment. Under the diagnosis-based impairment (DBI) rating method, he found under Table 16-2 (Foot and Ankle Regional Grid), page 501, the class of diagnosis (CDX) for complete rupture of the Achilles' tendon with mild motion deficits was Class 1 impairment with a default value of five percent permanent impairment of the left lower extremity. Dr. Selecky assigned a grade modifier for functional history (GMFH) of 1 for limp and pain with more

² *Order Remanding Case*, Docket No. 23-0491 (issued November 15, 2023).

³ OWCP assigned the present claim OWCP File No. xxxxxx533. Appellant has a previously accepted April 21, 2019 traumatic injury claim for sprains of the deltoid and calcaneofibular ligaments of the left ankle under OWCP File No. xxxxxx177. On January 6, 2020 OWCP granted him a schedule award for 10 percent left lower extremity permanent impairment under the latter claim.

⁴ A.M.A., *Guides* (6th ed 2009).

aggressive running, jumping, and twisting activities, and a grade modifier for physical examination (GMPE) of 2 due to calf atrophy. He noted that the grade modifier for clinical studies (GMCS) was excluded as it was used for diagnostic placement. Dr. Selecky utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1-1) + (2-1) = +1$, which raised the default to a severity grade of D and resulted in a final impairment rating of six percent of the left lower extremity. He opined that appellant had 11 percent left lower extremity permanent impairment based upon the ROM rating methodology, as that method produced the higher rating.

On July 21, 2022 OWCP referred appellant's case and a statement of accepted facts (SOAF) to Dr. Michael Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to provide an impairment rating in conformance with the A.M.A., *Guides*.

In a July 29, 2022 report, Dr. Katz reviewed the medical record and evaluated appellant's permanent impairment under the A.M.A., *Guides*.⁵ Utilizing Table 16-2, page 501, he identified a CDX for sprain, tendinitis or ruptured tendon, Achilles as a Class 1 impairment with a default value of five percent. Dr. Katz applied the net adjustment formula with a GMFH of 1, a GMPE of 2, and no GMCS resulting in a Class 1, grade D impairment of six percent of the left lower extremity. He noted that the ROM impairment method was not applicable in accordance with section 16.7, page 543 of the A.M.A., *Guides*, and opined that appellant had reached MMI on March 15, 2022, the date of Dr. Selecky's evaluation. Dr. Katz referenced the prior schedule award for 10 percent permanent impairment of appellant's left lower extremity under OWCP File No. xxxxxx177 and administratively combined the prior award for instability with the present impairment of six percent per Appendix A, page 604, which totaled 15 percent of the left lower extremity. He opined that the additional award was therefore five percent of the left lower extremity.

On October 27, 2022 OWCP requested clarification from Dr. Katz regarding the additional award. In a November 4, 2022 addendum report, Dr. Katz reiterated his finding of an additional award of five percent permanent impairment of the left lower extremity.

By decision dated February 1, 2023, OWCP granted appellant a schedule award for an additional five percent permanent impairment of his left lower extremity for a total of 15 percent. The period of the award ran for 14.4 weeks from March 15 through June 23, 2022, and was based on the July 29, 2022 and November 4, 2022 reports of Dr. Katz.

On February 22, 2023 appellant appealed OWCP's February 1, 2023 decision to the Board.

By order dated November 15, 2023,⁶ the Board remanded the case for OWCP to administratively combine the current claim with OWCP File No. xxxxxx177, to be followed by a *de novo* decision.

⁵ A.M.A., *Guides* (6th ed 2009).

⁶ *Supra* note 2.

On November 16, 2023 OWCP administratively combined OWCP File Nos. xxxxxx533 and xxxxxx177, with the latter serving as the master file.

On April 22, 2024 OWCP submitted an updated SOAF to Dr. Katz and requested clarification regarding the additional award.

In an April 30, 2024 addendum report, Dr. Katz again applied the DBI rating method of the A.M.A., *Guides* and reiterated his finding of an additional award of five percent of the left lower extremity for a total of 15 percent. He explained that the DBI rating method is the preferred method for determining permanent impairment for appellant's condition and that ROM was used principally as a factor in the adjustment grid for physical examination, not as a stand-alone rating, in accordance with section 16.7, page 543 of the A.M.A., *Guides*.

By decision dated August 27, 2024, OWCP denied appellant's claim for an additional schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA⁷ and its implementing regulations⁸ 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.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 (ICF): A Contemporary Model of Disablement*.¹¹ Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the CDX, which is then adjusted by a GMFH, a GMPE, and/or a GMCS.¹² The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹³ The standards for evaluation of permanent impairment of an extremity

⁷ *Supra* note 1.

⁸ 20 C.F.R. § 10.404.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a. (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ A.M.A., *Guides*, page 3, section 1.3.

¹² *Id.* at 493-556.

¹³ *Id.* at 521.

under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.¹⁴

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and extent of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.¹⁵

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.¹⁶

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 15 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

In support of his April 27, 2022 claim for an additional schedule award, appellant submitted a March 15, 2022 permanent impairment evaluation including both ROM and DBI methodologies by Dr. Selecky. Dr. Selecky reported appellant's physical examination findings and opined that he had 11 percent left lower extremity permanent impairment based upon ROM rating methodology as that method produced the higher rating.

OWCP thereafter referred the evidence of record, including Dr. Selecky's report, to Dr. Katz, serving as DMA. Dr. Katz utilized Table 16-2, page 501, and identified the CDX of ruptured Achilles tendon with mild motion deficits as a Class 1 impairment, which yielded a default value of five percent. He applied the net adjustment formula using a GMFH of 1 and a GMPE of 2, which resulted in an impairment rating of six percent of the left lower extremity. Dr. Katz referenced the prior schedule award of 10 percent permanent impairment of the left lower extremity under OWCP File No. xxxxxx177 and combined it with the present impairment of six percent per Appendix A, page 604, of the A.M.A., *Guides*. He opined that this resulted in a total of 15 percent permanent impairment of the left lower extremity and, thus, an additional award of

¹⁴ *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁵ See *supra* note 7 at Chapter 2.808.6f (March 2017).

¹⁶ 20 C.F.R. § 10.404(d); see *S.T.*, Docket No. 22-1342 (issued November 9, 2023); *B.C.*, Docket No. 21-0702 (issued March 25, 2022); *D.P.*, Docket No. 19-1514 (issued October 21, 2020).

five percent permanent impairment of the left lower extremity. Dr. Katz also properly advised that ROM was not an alternative method for rating appellant's condition.¹⁷

The Board, therefore, finds that OWCP properly relied on the opinion of Dr. Katz, the DMA, to find that appellant had no greater than 15 percent permanent impairment of his left lower extremity. Dr. Katz reached conclusions regarding appellant's additional permanent impairment that are in accordance with the standards of the sixth edition of the A.M.A., *Guides*.¹⁸ Moreover, when the prior impairment is due to a previous work-related injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.¹⁹ Thus, Dr. Katz properly found that appellant was entitled to an award for an additional five percent permanent impairment of the left lower extremity.²⁰

Appellant did not submit any other medical evidence in conformance with the sixth edition of the A.M.A., *Guides* establishing that he has greater than 15 percent permanent impairment of his left lower extremity. Accordingly, the Board finds that he has not established that he is entitled to increased schedule award compensation.²¹

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 greater than 15 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

¹⁷ The A.M.A., *Guides*, explain that some of the diagnosis-based grids refer to the ROM 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 sections of the chapter are applicable for impairment rating of a condition. A.M.A., *Guides*, page 543; *see also M.D.*, Docket No. 16-0207 (issued June 3, 2016); *D.F.*, Docket No. 15-0664 (issued January 8, 2016).

¹⁸ *See T.S.*, Docket No. 22-0924 (issued April 27, 2023).

¹⁹ *Supra* note 17; *see also S.T.*, *supra* note 16.

²⁰ *See A.R.*, Docket No. 21-0346 (issued August 17, 2022).

²¹ *See A.R.*, *id.*; *P.S.*, Docket No. 22-1051 (issued May 4, 2023); *M.H.*, Docket No. 20-1109 (issued September 27, 2021); *R.H.*, Docket No. 20-1472 (issued March 15, 2021); *L.D.*, Docket No. 19-0495 (issued February 5, 2020).

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 30, 2024
Washington, DC

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

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

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