United States Department of Labor
Employees' Compensation Appeals Board

MARK A. HOLLOWAY, Appellant	)	
and	)	**Docket No. 03-2144**
	)	**Issued: February 13, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Richmond, VA, Employer	)	

Appearances:
Mark A. Holloway, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 3, 2003 appellant, filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated May 19 and August 21, 2003 which granted schedule awards for impairment to both lower extremities. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule awards.

ISSUE

The issue is whether appellant has more than a five percent impairment to his right and left lower extremities.

FACTUAL HISTORY

The Office accepted appellant's claim for bilateral plantar fasciitis.[1] On January 29, 2003 he filed a claim for a schedule award.

[1] The case record does not contain appellant's original claim form; however, the record reflects that appellant was placed on modified duty due to bilateral plantar fasciitis in July 2000.

In a report dated February 13, 2002, Dr. Layshia T. Fowler, a podiatrist at the Department of Veterans Affairs, stated that appellant had moderate to severe palpation tenderness in the arches of his feet.[2] She noted that she was unfamiliar with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and could not provide an impairment rating.

On June 6, 2002 appellant underwent nerve conduction studies of the lower extremities which were reported as normal. Needle examination of the distal right lower extremity muscles and left abductor hallucis brevis muscle were also normal. A normal electromyogram study ruled out a tarsal tunnel syndrome.

In a report dated June 20, 2002, Dr. Andrew K. Worthington, a Board-certified neurologist and second opinion specialist, reported findings based on his physical examination of appellant. He noted a history of appellant's complaint of foot pain while working as a postal worker and noted that examination revealed absent reflexes at the ankles and decreased vibratory and pin sensation in the lower extremities. Dr. Worthington stated that he suspected a neuropathic component to appellant's foot pain and stated, "I believe he has reached maximum medical improvement as of this time, although I cannot approximate the date." The physician opined that appellant was 50 percent disabled and was only capable of sedentary employment. In a July 26, 2002 follow-up report, Dr. Worthington noted that medication he had prescribed did not alleviate appellant's pain. He stated that appellant had reached maximum medical improvement and that there would be no further change in appellant's condition. Dr. Worthington noted that appellant had no restrictions of movement or active motion but was restricted based on pain and discomfort.

In a November 26, 2002 report, Dr. Jatinder K. Sidhu, a Board-certified physiatrist at the Department of Veterans Affairs, stated that appellant was seen in the clinic on April 22, 2002 for a functional capacity evaluation. He noted that the reports of Dr. Worthington had revealed some neuropathic component to appellant's pain which did not respond to medical management. Dr. Sidhu saw appellant on September 27, 2002 in followup and reviewed the negative results of the diagnostic studies which ruled out tarsal tunnel syndrome, entrapment or peripheral neuropathy. In response to questions posed by the Office, Dr. Sidhu stated his opinion that appellant had not yet reached maximum medical improvement and recommended referral of appellant to the VA pain clinic. The physician examined appellant's range of motion of the feet and ankles and concluded that he had 3/5 for all planes of motion with an abnormal gait, shortened stride length and varus foot flat stage. Dr. Sidhu found that appellant had tenderness over the bilateral feet on the plantar side, calcaneal area, on all metaphalangeal joints, and on the transverse arch. He also found sensory loss over the dorsolateral and plantar side of the feet and a positive Tinel's bilaterally over the median and lateral plantar nerves. Dr. Sidhu stated that the subjective complaints causing impairment were moderate to severe pain with light touch and movement involving the ankle, foot and toes primarily along the plantar surface of the foot. He concluded that appellant had a lower extremity impairment of five percent and a foot impairment of seven percent, pursuant to Tables 17-11 and 17-14, page 537 and pain-related impairment, Figure 18-1, page 574.

[2] The record indicates that appellant received treatment at the Department of Veterans Affairs based on a service-connected injury to his neck and shoulders.

In an April 8, 2003 note, an Office medical adviser found that appellant had reached maximum medical improvement as of November 26, 2002, the date of Dr. Sidhu's report. The medical adviser rated appellant's impairment as five percent to both the right and left lower extremities based on pain pursuant to the A.M.A., *Guides* (5th ed. 2001), citing to pages 575-81.[3]

By decision dated May 19, 2003, the Office granted a schedule award for 28.80 weeks of compensation for the period November 26, 2002 to June 15, 2003. The schedule award did not identify the specific extremity or percentage of impairment.

On May 21, 2003 appellant requested reconsideration of the schedule award. He contended that Dr. Sidhu had properly evaluated his condition and stated that he had at least a 50 percent impairment of his feet. Appellant submitted a May 20, 2003 work restriction form signed by Dr. Fowler, who noted that there were permanent restrictions and that the expected recovery date was undetermined. A May 22, 2003 note from the VA podiatry clinic was submitted, in which Dr. Lelia F. Banks, a podiatrist, noted giving injections to relieve appellant's foot pain. She noted that there were differences in opinions from the rehabilitation medicine and neurology examiners. In a June 4, 2003 report, Dr. Fowler noted that appellant had been a patient at the VA podiatry clinic since October 2000 for treatment of plantar fasciitis of both feet. She stated that, from a podiatric standpoint, appellant had reached maximum medical improvement as of April 8, 2002. Appellant also submitted medical reports previously of record.

In an August 21, 2003 decision, the Office modified the May 19, 2003 schedule award decision to reflect a finding of five percent impairment to each lower extremity. The Office indicated that the weight of the medical evidence was represented by the Office medical adviser, who had clarified the findings of Dr. Sidhu.[4]

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulation[6] 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, the Act 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 regulation as the appropriate standard for evaluating schedule losses.[7]

[3] The medical adviser cited generally to the text at Chapter 18 for rating pain disorders.

[4] The claims examiner indicated that, as a podiatrist, Dr. Fowler was not a certified physician. The Board notes that the term physician, as defined under 5 U.S.C. § 8101(2), includes podiatrists within the scope of their practice as defined by state law. The reconsideration decision also erroneously incorporated the clear evidence of error standard into the evidentiary review.

[5] 5 U.S.C. § 8107(a)-(c).

[6] 20 C.F.R. § 10.404.

[7] *See id*. *See also James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

It is well established that the period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[8] The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record, and is usually considered to the date of the evaluation by the attending physician which is accepted as definitive by the Office.[9]

Under FECA Bulletin No. 01-05, issued January 29, 2001, the Office provided for the effective use of the fifth edition of the A.M.A. *Guides to the Evaluation of Permanent Impairment* as of February 1, 2001. Regarding impairment ratings of the lower extremities, the bulletin notes that the evaluation is to conform to the methods used in combination with Chapter 17, Table 17-2. Before finalizing any impairment calculation for the lower extremities, the Office medical adviser is to verify the appropriateness of the rating under that chapter. The bulletin notes that with regard to Chapter 18 and impairment ratings based on pain, section 18.3(b) states that "examiners should not use this chapter to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the [A.M.A.,] *Guides*." The bulletin provides that Chapter 18 is not to be used in combination with other methods to measure impairment due to sensory pain, identifying those as Chapters 13, 16 and 17.

ANALYSIS

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

The schedule awards granted by the Office for impairment to appellant's lower extremities were based upon the April 8, 2003 note of the Office medical adviser. The Board finds, however, that the Office medical adviser's impairment rating failed to conform to the methodologies as outlined in FECA Bulletin No. 01-05. In finding five percent impairment to both the right and left lower extremities, the medical adviser cited generally to Chapter 18 of the A.M.A., *Guides*, pages 575-81. As noted above, FECA Bulletin No. 01-05 and section 18.3(b) provide that Chapter 18 should not be used to rate pain-related impairment when conditions are adequately rated in the other chapters of the A.M.A., *Guides*.[10] In assessing the impairment due to pain or sensory loss to appellant's lower extremities, the Office medical adviser did not explain why the protocols of Chapter 17 would not adequately rate appellant's lower extremity sensory loss. Moreover, the medical adviser opined that appellant had reached maximum medical improvement as of November 26, 2002, the date of Dr. Sidhu's medical report. However, in that report, Dr. Sidhu stated his opinion that appellant had not yet reached maximum medical improvement. For these reasons, the Board finds that the schedule awards granted in this case should be set aside and the case remanded for further development.

[8] *See James E. Earle*, 51 ECAB 567 (2000).

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a) (June 2003). *See Richard Larry Enders*, 48 ECAB 184 (1996).

[10] A.M.A., *Guides* (5th ed. 2000), § 18.3b, p. 571.

Although the medical reports of Dr. Fowler, Dr. Worthington and Dr. Banks indicated that appellant had reached maximum medical improvement, none of the physicians provided a medical opinion rating appellant's lower extremity impairment according to the A.M.A., *Guides*. Dr. Fowler stated that she was not familiar with the A.M.A., *Guides* and could not provide an impairment rating. Dr. Worthington noted appellant's complaints of foot pain, but was equivocal as to whether maximum medical improvement had been reached, noting that he could not approximate a date. He opined that appellant was 50 percent disabled but, again, he did not provide an impairment rating conforming to the protocols adopted by the Office. Dr. Banks noted that she provided injections to relieve appellant's foot pain but did not provide any impairment rating. For these reasons, the Board notes that the medical evidence of record is of diminished probative value as it pertains to the extent and nature of impairment to appellant's lower extremities.

CONCLUSION

The Board finds that the case is not in posture for decision and that the schedule awards issued in this case must be set aside. The case will be remanded to the Office for further development of the medical evidence, as is appropriate, to determine whether appellant has reached maximum medical improvement and, if so, for an opinion on the extent of permanent impairment which conforms with the A.M.A., *Guides* and FECA Bulletin No. 01-05.

ORDER

IT IS HEREBY ORDERED THAT the August 21 and May 19, 2003 decisions of the Office of Workers' Compensation Programs be set aside. The case is remanded to the Office for further action in conformance with this decision.

Issued: February 13, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member