United States Department of Labor
Employees' Compensation Appeals Board

R.T., Appellant	)	
and	)	**Docket No. 06-1960**
	)	**Issued: May 22, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Alexandria, VA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 22, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decision dated May 24, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she is entitled to a schedule award.

FACTUAL HISTORY

On September 15, 2001 appellant, then 35-year-old city carrier/carrier technician, filed a traumatic injury claim alleging that, on that date, she stepped down off a step and turned her ankle in the performance of duty. She did not initially stop work.[1] On February 21, 2002 the Office accepted appellant's claim for left foot talonavicular bar with a sprain of the foot and

[1] The records reflect that she was subsequently placed off work for approximately three weeks.

ankle.[2] The Office expanded the claim to include removal of the coalition and fusion of the talonavicular joint.[3] The Office also accepted anomalies of the left foot. Appellant received appropriate compensation benefits.[4]

An October 2, 2003 x-ray of the foot read by Dr. Michael Friedman, a Board-certified radiologist, revealed talar navicular fusion in good alignment.

On July 30, 2004 appellant filed a claim for a schedule award.

By letter dated August 16, 2004, the Office requested that appellant obtain an opinion from her treating physician regarding her work-related condition. The Office advised appellant that her physician needed to utilize the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) and provide an opinion regarding whether she had any permanent impairment, and if so, the percentage of impairment with an explanation of how the calculation was derived.

In a September 14, 2004 report, Dr. Levin noted appellant's history of injury and treatment, noting that she had reached maximum medical improvement. He conducted a physical examination and advised that appellant was wearing orthotics to help her with her gait. Dr. Levin advised that appellant still limped and "has referred to pain elsewhere." He opined that appellant had a "good fusion in her left talonavicular joint." Dr. Levin noted that she had fusion of the joint in a neutral position of her foot without varus or valgus and that she had 4 percent whole person impairment with 10 percent leg impairment and 14 percent foot impairment. He advised that he had utilized the fourth edition of the A.M.A., *Guides*.

In a November 23, 2004 report, an Office medical adviser noted that appellant underwent surgery to the left foot in the form of a fusion of the left talonavicular joint on August 26, 2003. He utilized the fifth edition of the A.M.A., *Guides* and noted that Chapter 17 related to impairments to the lower extremities. The Office medical adviser explained that "there is no basis whatsoever in the [fifth edition of the A.M.A., *Guides*] for an impairment rating as it relates to a fusion of the talonavicular joint." Additionally, the Office medical adviser explained that there was no mention of any factor which would result in impairment. For example, he noted that there was no discussion regarding loss of motion, muscle wasting or atrophy. The Office medical adviser indicated that there was no evidence of any neurological impairment and no structural abnormality and opined that appellant had a zero percent impairment of the left lower extremity.

In a February 2, 2005 decision, the Office denied appellant's claim for a schedule award.

[2] The record reflects that appellant had a tarsal coalition, which was a congenital condition.

[3] On August 26, 2003 appellant underwent a fusion of the left talar navicular joint, which was performed by Dr. Arnold S. Levin, a podiatrist.

[4] On September 9, 2003 the Office determined that appellant's actual earnings exceeded the current wages of the job she held when injured. The Office determined that appellant was no longer entitled to compensation payments as she had no loss in earning capacity.

On January 3, 2006 appellant requested reconsideration. In a June 16, 2005 report, Dr. Abraham A. Cherrick, Board-certified in physical medicine and rehabilitation, noted appellant's history of injury and treatment. He noted restrictions on all planes of motion of the foot and ankle, both in dorsiflexion, plantar flexion, and inversion and eversion, and that the foot was essentially fixed in neutral. Dr. Cherrick added that there were no other pertinent findings, although he noted that her gait was antalgic and she had shortened limb functionality. He advised that appellant did not use a cane. Dr. Cherrick referred to the fifth edition of the A.M.A., *Guides,* section 17.2c[5] and advised that an impairment rating secondary to gait derangement should be supported by pathologic findings such as x-rays. He also indicated that he had referenced the x-ray of April 4, 2003[6] which showed a calcaneal spur and the October 2, 2003 x-ray, which showed a fusion in good alignment. Dr. Cherrick noted that an impairment rating secondary to gait derangement should be supported by x-rays, which "is certainly the case here." He determined that appellant had a mild gait limb impairment due to gait derangement, which was categorized by an antalgic limp with shortened stance and documented moderate to advanced arthritic changes of the ankle. Dr. Cherrick opined that appellant had 7 percent whole person impairment, 17 percent leg impairment and 24 percent impairment of the foot. He also added a rating for ankylosis of the ankle in neutral position pursuant to page 541 of the A.M.A., *Guides,* and referenced the heading under "ankle."

On March 9, 2006 an Office medical adviser referred to Dr. Cherrick's June 16, 2005 report. He noted that gait derangement was limited to whole person impairments according to Chapter 17 at page 529 of the A.M.A., *Guides.* The Office medical adviser noted that whole person impairments were not acceptable under Office protocols. He also advised that the A.M.A., *Guides* required that "whenever possible the evaluator should use a more specific method. When the gait method is used a written rationale should be included in the report." The Office medical adviser noted that the lower limb impairment percentages which were shown in Table 17-5 stood alone and were not to be combined with any other impairment method. He also noted that the section on gait derangement did "not apply to abnormalities based only on subjective factors such as pain or sudden giving way as with, for example, an individual with low back comfort who chooses to use a cane to assist in walking." The Office medical adviser opined that there was no basis in the A.M.A., *Guides* for an impairment rating for talonavicular joint fusion. He further noted that "from a functional point of view talonavicular joint fusion does not result in any physical impairment whatsoever." The Office medical adviser also indicated that, while Dr. Cherrick provided a rating for ankylosis of the ankle in the neutral position, he noted that appellant did not have a fusion of the ankle. The Office medical adviser indicated that the fusion was in the mid foot at the talonavicular joint and was not related to or affected her ankle motion or function.

By decision dated May 24, 2006, the Office affirmed the Office's February 2, 2005 decision.

[5] A.M.A., *Guides* 529.

[6] The record does not contain this x-ray.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[7] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[8] The Act, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[9] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[10]

The Board notes that section 17.2c of the A.M.A., *Guides* provides as follows:

> "Gait derangement is present with many different types of lower extremity impairments and is always secondary to another condition. An impairment rating due to a gait derangement should be supported by pathologic findings, such as x-rays. Except as otherwise noted, the percentages given in Table 17-5 are for full time gait derangements of persons who are dependent on assistive devices. Whenever possible, the evaluator should use a more specific method. When the gait method is used, a written rationale should be included in the report. The lower limb impairment percents shown in Table 17-5 stand alone and are not combined with any other impairment evaluation method."[11]

ANALYSIS

The evidence of record is insufficient to establish that appellant is entitled to a schedule award in accordance with the fifth edition of the A.M.A., *Guides*.

In a September 14, 2004 report, Dr. Levin opined that appellant had fusion of the joint in a neutral position of her foot without varus or valgus and that she had a 4 percent whole person disability impairment with a 10 percent lower extremity impairment and a 14 percent foot impairment. The Board notes that Dr. Levin used the fourth edition of the A.M.A., *Guides* in making his assessment. The fifth edition of the A.M.A., *Guides* is required on all medical opinions dated after February 1, 2001.[12] The Board has held that a medical opinion not based on the appropriate edition of the A.M.A., *Guides* has diminished probative value in determining the extent of a claimant's permanent impairment.[13] Dr. Levin did not otherwise provide findings

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[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8107.

[9] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[10] 20 C.F.R. § 10.404.

[11] A.M.A., *Guides* 529. *See also Rose V. Ford*, 55 ECAB 449 (2004).

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[13] *Carolyn E. Sellers*, 50 ECAB 393, 394 (1999).

that correlated with the fifth edition of the A.M.A., *Guides* that demonstrated a ratable permanent impairment.

In a June 16, 2005 report, Dr. Cherrick referred to the fifth edition of the A.M.A., *Guides,* section 17.2c[14] and found impairment for mild gait limb impairment due to derangement. He noted that appellant fell into the category for mild gait limb impairment, and opined that appellant had 7 percent whole person impairment,[15] or a 17 percent lower extremity impairment and a 24 percent impairment of the foot. Dr. Cherrick did not sufficiently explain how he arrived at this conclusion. As noted above, gait derangement is present with many different types of lower extremity impairments and is usually secondary to another condition. Although Dr. Cherrick noted referencing x-rays, he specifically noted that appellant did not use a cane. As noted impairment for gait derangement under Table 17-5 applies to persons "who are dependent on assistive devices."[16] Furthermore, while Dr. Cherrick advised that appellant would be entitled to a rating for ankylosis of the ankle, he did not explain how fusion of the talonavicular joint would constitute ankylosis of the ankle, nor did he provide any range of motion findings for the ankle that would be ratable under the A.M.A., *Guides*.

In a March 9, 2006 report, the Office medical adviser reviewed Dr. Cherrick's June 16, 2005 report and noted use of gait derangement to rate impairment was limited under the A.M.A., *Guides*. The medical adviser reiterated the cautionary language of the A.M.A., *Guides* regarding use of gait derangement, noting that "whenever possible the evaluator should use a more specific method" and that when "the gait method is used a written rationale should be included in the report." The Board notes that Dr. Cherrick provided little rationale to support why he chose to utilize gait derangement. The Office medical adviser also explained that the section of the A.M.A., *Guides* on gait derangement did "not apply to abnormalities based only on subjective factors such as pain or sudden giving way." He opined that there was no basis in the A.M.A., *Guides* for an impairment rating for talonavicular joint fusion and that, functionally, talonavicular joint fusion did not result in physical impairment. The Office medical adviser also indicated that appellant did not have a fusion of the ankle and she would not be entitled for a rating due to ankylosis.

Consequently, the medical evidence does not establish that appellant's accepted conditions of her left foot caused a permanent impairment to a scheduled member of the body.

On appeal, appellant contends that the Office medical adviser should have converted the whole person rating for gait derangement to the lower extremities and referenced a formula set forth in the Office's procedures for converting whole person impairments into impairment ratings of individual reproductive organs. However, any conversion of whole person impairment to impairment to a schedule member of a body is premature until it is established that appellant has a permanent impairment of a schedule member of the body. As noted above, the Office

[14] A.M.A., *Guides* 529.

[15] *See Tania R. Keka*, 55 ECAB 354 (2004); *James E. Mills*, 43 ECAB 215 (1991) (neither the Act, nor its implementing regulations provide for a schedule award for impairment to the body as a whole).

[16] *See supra* note 15.

evaluates schedule award claims pursuant to the standards set forth in the A.M.A., *Guides*. Appellant has the burden of proof to submit medical evidence supporting that she has permanent impairment of a schedule member of the body.[17] As such evidence has not been submitted, appellant has not established entitlement to a schedule award.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 24, 2006 is affirmed.

Issued: May 22, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[17] *See Annette M. Dent*, 44 ECAB 403 (1993).