United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 08-365**
	)	**Issued: June 11, 2008**
DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Barstow, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 15, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated August 10, 2007, finding that he was not entitled to an additional schedule award as well as a March 21, 2007 overpayment decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than 10 percent impairment of his left lower extremity for which he has received schedule awards; (2) whether appellant received an overpayment in the amount of $14,166.93 for which he was not at fault; and (3) whether the overpayment is subject to waiver.

FACTUAL HISTORY

On October 7, 2000 appellant, then a 57-year-old boiler plant operator, filed an occupational disease claim alleging that he developed hallux valgus deformity and a bunion on

the toe of his left foot due to wearing steel-toed boots as required by his employing establishment. The Office accepted his claim for bunion on the first toe of his left foot on December 21, 2000. Dr. Nicholas C. Crismali, a podiatrist, performed an offset-V bunionectomy with Akin osteotomy and K-wire stabilization on appellant's left foot on May 2, 2001. He performed additional surgery on May 30, 2001 consisting of an excision of deep implant left foot and open reduction and internal fixation of the first metatarsal fracture in appellant's left foot.

Appellant requested a schedule award on June 28, 2001. Dr. Laurence Meltzer, a Board-certified orthopedic surgeon, examined him on July 28, 2001 and found that he had not yet reached maximum medical improvement. Appellant again requested a schedule award on October 9, 2002. The Office referred appellant for a second opinion evaluation with Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon who completed a report on December 3, 2002 and opined that he had not yet reached maximum medical improvement as he required additional surgery to remove the pin in his toe.

Appellant requested a schedule award on March 3, 2004. Dr. Crismali completed reports on April 20, 2004 and provided his findings on physical examination. The Office medical adviser reviewed these reports on June 11, 2004 and found that appellant had 9 percent impairment of his left lower extremity or 13 percent impairment of the left foot based on pain which interfered with activity of 4 percent and 5 percent impairment due to loss of range of motion. The Office medical adviser also noted that appellant had muscle weakness, of two percent which could not be combined with his evaluation for pain. He concluded that appellant had nine percent impairment of the left lower extremity. By decision dated July 19, 2004, the Office granted appellant a schedule award for nine percent of the left lower extremity. Appellant requested an oral hearing and in a December 22, 2004 decision, the hearing representative affirmed the Office's July 19, 2004 decision.

In a letter received by the Office on July 20, 2005, appellant requested reconsideration and alleged that he had developed dysesthesia due to his accepted employment injury which was not considered in his July 19, 2004 schedule award. By decision dated October 25, 2005, the Office reviewed appellant's claim on the merits and denied modification of the December 22, 2004 decision.

Appellant requested an additional schedule award on March 6, 2006 based on Dr. Crismali's reports. In a report dated November 17, 2005, Dr. Crismali noted appellant's complaints of pain and numbness in his left foot. He found that from the mid-foot distally appellant had dysesthesia associated with the superficial peroneal nerve, deep peroneal nerve, both branches of the posterior tibial nerve and the lateral dorsicutaneous nerve. Dr. Crismali found contracture of the second and third digits as well as adductovarus rotation of the fourth and fifth toes. He noted limited range of motion in the first toe of 20 degrees of dorsiflexion and 30 degrees of plantar flexion. Dr. Crismali noted motor function deficits. He diagnosed neuroma, second and third interspace of the left foot, hallux valgus left foot and degenerative joint disease of the first metatarsal phalangeal joint of the left foot as well as hammertoe of the second and third toes of the left foot. On December 22, 2005 Dr. Crismali diagnosed neuroma in the second and third interspace of the left foot, as well as drop foot due to diminished tibialis anterior tendon strength. He found that appellant had normal muscle strength except for the tibialis anterior tendon on the left side which was 4/5. Dr. Crismali also reported marked

reduction in dorsiflexion of the first metatarsophalangeal joint as well as chronic edema. He opined that appellant's current foot conditions were due to his accepted employment injury.

Appellant requested an additional schedule award on February 18, 2006. The Office medical director reviewed the medical evidence and accepted appellant's claim for the additional condition of post-traumatic degenerative joint disease of the left first metatarsal phalangeal joint. He found that appellant had 8 percent impairment of his left lower extremity as a result of developing moderate to severe post-traumatic degenerative joint disease in his first metatarsal phalangeal joint, 2 percent impairment for loss of range of motion of the great toe and therefore a combined 10 percent impairment of his left lower extremity. The Office medical adviser stated, "It should be noted that the claimant's impairment has increased as compared to July 19, 2004 as he now has increasing problems as a result of post-traumatic arthritis in his left metatarsal phalangeal joint." By decision dated May 19, 2006, the Office granted appellant a schedule award for an additional 10 percent impairment of his left lower "extremity/foot." The Office awarded appellant 20.5 weeks of compensation.

In a letter dated August 25, 2006, appellant requested reconsideration and disagreed with the number of weeks of compensation he had received. He alleged that he was entitled to receive 28.8 weeks of compensation for 10 percent impairment of the lower extremity and 28.7 weeks of compensation for 14 percent impairment of the foot rather than the 20.5 weeks of compensation awarded by the Office.

The Office medical adviser again reviewed appellant's claim on September 18, 2006 and found the neuroma and the foot drop diagnosed by Dr. Crismali were not related to his accepted employment injury. He concluded that appellant had 10 percent total loss of use of the left lower extremity.

By decision dated October 16, 2006, the Office reviewed the merits of appellant's claim and found that he was entitled to a schedule award for an additional 1 percent impairment rather than the additional 10 percent impairment previously received. In a letter dated November 17, 2006, the Office noted that the October 16, 2006 decision had been returned to the Office by the post office on October 26, 2006. The Office stated that appellant was entitled to appeal rights beginning on the date of the November 17, 2006 letter.

The Office made a preliminary finding that appellant had received an overpayment of compensation in the amount of $14,166.93 because he was paid $15,724.42 in schedule award benefits when he was entitled to benefits for a schedule award in the amount of $1,557.49 on October 16, 2006. The Office found that appellant was without fault in the creation of the overpayment. Appellant requested a prerecoupment hearing on November 2, 2006 and disagreed with the fact and amount of the overpayment.

In a note dated January 23, 2007, Dr. Crismali examined appellant and found that he was developing progressive weakening of the musculature of the left lower extremity likely due to nerve entrapment of systemic disease.

In a letter dated January 31, 2007, the Branch of Hearings and Review scheduled a telephonic hearing for appellant on February 9, 2007. The Branch of Hearings and Review

issued a letter dated February 12, 2007 and stated that appellant's request to reschedule the February 9, 2007 telephone hearing could not be granted and that a review of the written record would be issued instead. Appellant responded on February 16, 2007 and apologized for missing the February 9, 2007 telephone hearing. He stated that he believed that he was entitled to a schedule award for 19 percent impairment of his left lower extremity and that he had been underpaid rather than receiving an overpayment.

By decision dated March 21, 2007, the hearing representative finalized the Office's October 16, 2006 preliminary finding of overpayment. He found that appellant was entitled to a schedule award for only one percent impairment of his lower extremity and that he had therefore received an overpayment in the amount of $14,166.93. The hearing representative further found that appellant was at fault in the creation of the overpayment and that recovery of the overpayment would neither defeat the purpose of the Federal Employees' Compensation Act nor be against equity and good conscience. He noted that as appellant failed to submit financial information waiver could not be granted. The hearing representative determined that appellant should repay the overpayment at the rate of $400.00 per month.

In a letter dated May 2, 2007, appellant requested reconsideration of the Office's November 17, 2006 merit decision. He disagreed with his impairment rating and alleged that he was entitled to receive schedule awards totaling 19 percent impairment of his left lower extremity. Appellant alleged that following his initial schedule award he had developed moderate to severe post-traumatic degenerative joint disease in his first metatarsal phalangeal joint which should have resulted in an additional schedule award for eight percent impairment as well as an additional two percent impairment due to loss of range of motion. He concluded that he was entitled to 28.8 weeks of compensation for his permanent impairment of the left lower extremity.

By decision dated August 10, 2007, the Office reviewed appellant's claim on the merits and found that he was not entitled to a schedule award for more than 10 percent impairment of his left lower extremity.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[1] and its implementing regulations[2] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[3] Effective February 1, 2001, the Office

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] *Id.*

adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[4]

ANALYSIS -- ISSUE 1

The Board finds this case not in posture for decision. Appellant requested an additional schedule award and submitted medical evidence from his attending podiatrist, Dr. Crismali, finding dysesthesia associated with the superficial peroneal nerve, deep peroneal nerve, both branches of the posterior tibial nerve and the lateral dorsicutaneous nerve. Dr. Crismali found contracture of the second and third digits as well as adductovarus rotation of the fourth and fifth toes. He noted limited range of motion in the first toe of 20 degrees of dorsiflexion and 30 degrees of plantar flexion. Dr. Crismali noted motor function deficits. He did not provide any details regarding these conditions and did not correlate his findings with the A.M.A., *Guides*. Dr. Crismali diagnosed neuroma, second and third interspace of the left foot, hallux valgus left foot and degenerative joint disease of the first metatarsal phalangeal joint of the left foot as well as hammertoe of the second and third toes of the left foot.

The Office medical adviser reviewed Dr. Crismali's reports and accepted the additional diagnosis of post-traumatic degenerative joint disease of the first metatarsal phalangeal joint. He opined that the remaining conditions diagnosed by Dr. Crismali were not employment related, but did not explain how he reached this conclusion.[5] The Office medical adviser found that appellant had eight percent impairment of the left lower extremity due to degenerative joint disease. However, he did not offer any explanation for how he reached this impairment rating and did not correlate any specific findings offered by Dr. Crismali to the A.M.A., *Guides*.[6] The Office medical adviser also found that appellant had two percent impairment of the left lower extremity due to loss of range of motion, but again he failed to make reference to any specific provision of the A.M.A., *Guides*.[7] As it is unclear how the Office medical adviser reached the 10 percent impairment rating, the case must be remanded for the Office medical adviser to explain his impairment rating for appellant's left lower extremity.[8] Following this and such further necessary development, the Office shall issue a *de novo* decision regarding the percentage of impairment of appellant's left lower extremity.

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[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

[5] The Board notes that the Office has not issued a final decision addressing appellant's claim that the additional conditions of neuroma in the second and third interspace of the left foot, as well as drop foot were due to his accepted employment injury as opined by Dr. Crismali.

[6] The A.M.A., *Guides* further provide that arthritis impairments are based on roentgenographically determined cartilage intervals. A.M.A., *Guides*, 544, 17.2h. The record does not contain medical evidence addressing appellant's cartilage intervals.

[7] Mild impairment of the great toe extension is two percent impairment of the lower extremity and three percent impairment of the foot. A.M.A., *Guides* 537, Table 17-14.

[8] *P.C.*, 58 ECAB ___ (Docket No. 07-85, issued April 5, 2007).

CONCLUSION

The Board finds that the case is not in posture for decision. Further, development of the medical evidence is warranted.[9]

ORDER

IT IS HEREBY ORDERED THAT the August 10 and March 21, 2007 decisions of the Office of Workers' Compensation Programs are set aside and remanded for further development consistent with this opinion of the Board.

Issued: June 11, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[9] Due to the disposition of this issue, it is not currently appropriate for the Board to address whether appellant received an overpayment of compensation for an additional schedule award of 10 percent impairment of the left lower extremity.