United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 08-1945**
	)	**Issued: April 8, 2009**
U.S. POSTAL SERVICE, POST OFFICE, White Plains, NY, Employer	)	

Appearances:
Appellant, pro se
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 July 7, 2008 appellant filed a timely appeal from a February 1, 2008 decision of the Office of Workers' Compensation Programs concerning his schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award claim.

ISSUE

The issue is whether appellant has greater than seven percent left lower extremity impairment, for which he received a schedule award. On appeal, he notes that he was previously awarded three percent impairment for pain which should have been added to the schedule award determination as different impairment evaluation methods were used.

FACTUAL HISTORY

On June 8, 2002 appellant, then a 36-year-old letter carrier, filed an occupational disease claim alleging that he sustained an injury to his left heel and arch while in the performance of duty. The Office accepted the claim for left plantar fasciitis and calcaneus spur. On

February 17, 2004 appellant began employment as a paralegal with a law firm. By decision dated May 6, 2004, the Office determined that his paralegal position fairly and reasonably represented his wage-earning capacity.

Appellant requested a schedule award. In a September 26, 2005 report, Dr. Steven R. Small, an orthopedic surgeon, described appellant's physical condition and advised that he had reached maximum medical improvement "a couple of years ago." He found that he had a 15 percent impairment of the left lower extremity. On November 8, 2005 an Office medical adviser opined that appellant had three percent impairment of the left lower extremity under Chapter 18 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

By decision dated November 16, 2005, the Office granted appellant a schedule award for a three percent impairment of the left lower extremity. The period of the award ran from September 26 to November 25, 2005 for a total of 9.36 weeks of compensation.

By decision dated January 20, 2006, an Office hearing representative set aside the November 16, 2005 decision and remanded the case for further development. He found that the Office medical adviser did not provide rationale for rating three percent impairment for pain under Chapter 18. Following clarification from its Office medical adviser, on February 23, 2006 appellant was found to have no more than three percent impairment of the left leg. On August 30, 2006 an Office hearing representative affirmed the February 23, 2006 schedule award. By decision dated January 26, 2007, the Office denied appellant's request for reconsideration.

On May 1, 2007 the Office received appellant's request for reconsideration. Appellant submitted an October 12, 2006 report from Dr. Samuel A. Hoisington, a Board-certified orthopedic surgeon, who noted that appellant had significant left heel pain. Dr. Hoisington provided an impression of left plantar fasciitis, left ankle dorsiflexion tightness, and mild left leg calf atrophy and provided impairment testing, which included range of motion measurements. He noted that there was a loss of dorsiflexion of the left ankle, which measured three degrees. Dr. Hoisington also found a left calf atrophy of one centimeter on the right side. He opined that appellant had 10 percent impairment to his left lower extremity under the federal guidelines for permanent impairment.

On July 20, 2007 the Office asked that an Office medical adviser assess the percentage of permanent impairment to appellant's left leg. In a July 28, 2007 report, Dr. Morley Slutsky, the medical adviser, advised that appellant reached maximum medical improvement on October 12, 2006. Based on Dr. Hoisington's examination, Dr. Slutsky found that appellant had a seven percent left lower extremity impairment. Under Table 17-11, page 537 of the A.M.A., *Guides*, three degrees of extension/dorsiflexion equaled seven percent lower extremity impairment. Dr. Slutsky also noted that, under Table 17-6, page 530 of the A.M.A., *Guides*, one centimeter calf atrophy equaled three percent lower extremity impairment. However, under the cross-usage chart at Table 17-2, page 526, the left calf atrophy and ankle range of motion impairments could not be combined. Dr. Slutsky advised that, in the case where impairment methods could not be combined, the impairment rating was based on the single largest

impairment method. He found the largest impairment was the seven percent left lower extremity impairment based on loss of ankle range of motion.

By decisions dated July 30, 2007, the Office found appellant was entitled to an additional schedule award of four percent for the left lower extremity. As appellant had already received a three percent award, the Office granted an additional award of four percent left lower extremity impairment. The period of the award ran from October 12 to December 31, 2006 for a total of 11.52 weeks of compensation.

On October 9, 2007 appellant requested reconsideration. He advised that he was married and had a dependent and was entitled to compensation at the augmented compensation rate of 75 percent, as was previously awarded. Appellant noted that the prior award was for pain and contended that, under Chapter 18, he should be rated for pain in addition to the seven percent impairment rating for loss of use. He also questioned the use of Table 17-2 of the A.M.A., *Guides*. Appellant also contended that his foot was limited in loss of plantar flexion which was the same motion of extension (dorsiflexion) but in the opposite direction. He opined that, under Table 17-11, of the A.M.A., *Guides*, he was entitled to an award of an additional seven percent loss for this loss in range of motion.

By decision dated October 10, 2007, the Office found that appellant's schedule award should have been paid at the augmented compensation rate of 75 percent. It noted that appellant received $6,531.84 but should have been paid $7,344.00 for the period October 12 to December 31, 2006. The Office paid the difference of $812.16 owed appellant.

On January 15, 2008 the Office requested that the medical adviser clarify whether the medical evidence established greater impairment. In a January 24, 2008 report, Dr. Slutsky advised that, based on the information presented, he was unable to rate appellant for pain associated dysfunction.[1] He further noted that pain impairments were added and were separate from Table 17-2, which discusses the appropriate combination for the lower extremity impairment methods. Dr. Slutsky advised that appellant was in error in contending that loss of range of motion in the ankle in one direction would mean limited range of motion in another direction. He advised that the muscles and nerve innervations which produce active range of motion in one direction may be totally different than the muscles and nerves which innervate range of motion in other directions. Additionally, all motion using those structures is not affected equally. Dr. Slutsky advised that appellant see a treating physician for ankle range of motion measurements. He further noted that Dr. Hoisington assigned 10 percent left lower extremity impairment without documenting his calculations or providing any explanation as to how he arrived at that rating. Dr. Slutsky reiterated that the medical evidence documented three percent impairment for left calf atrophy and seven percent impairment for loss of ankle dorsiflexion based on Dr. Hoisington's physical examination. However, since Table 17-2 of the A.M.A., *Guides* did not allow these two impairment methods to be combined, the largest impairment (seven percent left lower extremity impairment for loss of ankle dorsiflexion) was the final left lower extremity rating.

[1] Dr. Slutsky stated that appellant could obtain a formal pain assessment from his treating physician.

By decision dated February 1, 2008, the Office found that appellant had not established that he had more than seven percent impairment of the left lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] provides for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[3] As of February 1, 2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*.[4]

The standards for evaluating the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.[5] Chapter 17 of the A.M.A., *Guides* sets forth the grading schemes and procedures for evaluating impairments of the lower extremities.[6]

Section 18.3b provides that pain-related impairment should not be used if the condition can be adequately rated under another section of the A.M.A., *Guides*. Office procedures provide that, if the conventional impairment adequately encompasses the burden produced by pain, the formal impairment rating is determined by the appropriate section of the A.M.A., *Guides.*[7] Office procedures further provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.[8]

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[4] *A.S.*, 58 ECAB ___ (Docket No. 06-1613, issued November 29, 2006). *See* FECA Bulletin No. 01-05 (issued January 29, 2001).

[5] *See Paul A. Toms*, 38 ECAB 403 (1987).

[6] A.M.A. *Guides* 523-61, (5th ed. 2001) Chapter 17, The Lower Extremities.

[7] *Id.* at 573, 588; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); *see Richard B. Myles*, 54 ECAB 379 (2003).

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

ANALYSIS

In the present case, the Office originally granted appellant a schedule award for three percent impairment to the left lower extremity for pain. Appellant subsequently submitted medical evidence from Dr. Hoisington, who found 10 percent left lower extremity impairment. However, Dr. Hoisington did not provide adequate findings on physical examination to support the impairment rating or as to how he arrived at that estimate. It is well established that, when an impairment rating by the examining physician does not conform to the protocols of the A.M.A., *Guides,* the Office may rely on the rating provided by the Office medical adviser.[9]

Dr. Slutsky found appellant had seven percent left lower extremity impairment based on loss of range of motion of the left ankle. Under Table 17-11, page 537, three degrees of extension/dorsiflexion is seven percent lower extremity impairment. Under Table 17-6, page 530, one centimeter calf atrophy equaled three percent lower extremity impairment. Dr. Slutsky properly utilized Table 17-2, page 526 of the A.M.A., *Guides,* to rate impairment on the larger loss. Under Table 17-2, page 562, he properly noted that left calf atrophy and ankle extension range of motion deficits could not be combined. As more than one impairment method can be used, the method that provides the higher rating should be adopted.[10] In this case, appellant's ankle loss of motion allows seven percent impairment. While appellant contends he should also be awarded for loss in plantar flexion, Dr. Slutsky properly determined that there were no examination findings to support such an award. He advised that loss of range of motion in one direction does not necessitate an equal loss in the opposite direction. Thus, Dr. Slutsky's opinion supports seven percent left lower extremity impairment based on loss of ankle extension range of motion.

Dr. Slutsky also noted that he was unable to rate appellant for pain associated dysfunction. While Dr. Hoisington noted that appellant had significant left heel pain, he did not address whether a pain-related impairment was warranted or necessary. Thus, his report does not provide a sufficient basis to rate pain under Chapter 17. Additionally, a review of the medical evidence of record establishes that no physician provided any explanation to support a Chapter 18 pain rating. Thus, the Office medical adviser properly found no basis on which to attribute additional impairment to pain.

The medical evidence establishes that appellant has no more than seven percent permanent impairment to the left lower extremity for which he has received a schedule award. In issuing the July 30, 2007 schedule award the Office properly subtracted the prior schedule award of three percent impairment. There is no medical evidence in conformance with the A.M.A., *Guides* to support any greater permanent impairment.

[9] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (October 1990). *See also Tommy R. Martin*, 56 ECAB 273 (2005).

[10] *See* A.M.A., *Guides* 527.

CONCLUSION

The Board finds that appellant did not establish that he has more than seven percent permanent impairment to the left lower extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2008 and July 30, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 8, 2009
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