United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
	)	
and	)	**Docket No. 09-489**
	)	**Issued: December 8, 2009**
DEPARTMENT OF THE INTERIOR, VOLCANOES NATIONAL PARK, Volcano, HI, Employer	)	

Appearances:
Christopher R. Evans, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 10, 2008 appellant, through his attorney, filed a timely appeal from a December 21, 2007 decision of the Office of Workers' Compensation Programs and an October 22, 2008 merit decision granting him a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUE

The issue is whether appellant has more than a 29 percent permanent impairment of the right lower extremity and a 20 percent permanent impairment of the left lower extremity.

FACTUAL HISTORY

On January 18, 1994 appellant, then a 46-year-old maintenance worker, filed a claim alleging that he sustained an injury to his right ankle on January 17, 1994 while stepping on lava rock. The Office accepted the claim for a right ankle and right knee sprain and a consequential injury of left ankle Achilles tendinitis.

On July 19, 1994 appellant underwent a debridement of the Achilles tendinitis and tendon sheath and a splitting of the Achilles tendon. On July 11, 1995 he underwent an arthroscopy of the right ankle joint with a synovectomy and a right knee partial medial meniscectomy. On April 8, 1995 appellant underwent a right ankle arthroscopy and ligament reconstruction with excision of the lateral ankle varicosity.[1]

By letter dated October 25, 2006, the Office informed appellant that he could request a schedule award for impairment to his lower extremities and requested a report from his attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). On November 1, 2006 appellant notified the Office that he was unable to find a physician to perform an impairment evaluation.

On November 7, 2006 the Office referred appellant to Dr. Maureen E. Mackey, a Board-certified physiatrist, for an impairment evaluation. On December 5, 2006 Dr. Mackey reviewed his physical complaints and history of surgeries. On physical examination of ankles, she measured dorsiflexion of 0 degrees on the right and 10 degrees on the left, plantar flexion of 30 degrees on the right and 20 degrees on the left, inversion of 10 degrees on the right and 25 degrees on the left and eversion of 0 degrees on the right and 20 degrees on the left. Dr. Mackey measured weakness of the peroneus muscles of 4/5 bilaterally on dorsiflexion and bilateral unmeasurable atrophy. She found normal range of motion of the toes bilaterally. Dr. Mackey diagnosed chronic plantar fasciitis and noted that it represented an additional factor of disability. For the right knee, she noted that appellant had significant knee pain which interfered with the activities of daily living. Dr. Mackey measured range of motion of the right knee as 130 degrees flexion and 0 degrees extension. She found no anklylosis but atrophy of four centimeters and 4/5 quadriceps weakness. Dr. Mackey opined that appellant's partial meniscectomy represented an additional impairment and listed a valgus deformity of 11 degrees. She found that he had a 25 percent loss of lower extremity strength. Dr. Mackey indicated that appellant reached maximum medical improvement in 1998.

On January 30, 2007 the Office medical adviser noted that appellant experienced bilateral ankle pain interfering with activity. He graded the pain as 70 percent and multiplied the graded pain by 5 percent, the maximum impairment of the L5 and S1 nerve roots, to find a 7 percent impairment of each lower extremity.[2] The Office medical adviser further found that, for the right ankle, 0 degrees dorsiflexion and 30 degrees plantar flexion constituted a mild impairment, or 7 percent, and that inversion of 10 degree constitute a mild, or 2 percent impairment under the A.M.A., *Guides*, for a total impairment of the right ankle of 11 percent.[3] For the left ankle, he found that 10 degrees dorsiflexion constituted 7 percent impairment, 20 degrees plantar flexion constituted 7 percent impairment and that there was no impairment for 25 degrees inversion and

[1] By decision dated March 16, 2001, the Office reduced appellant's compensation benefits based on his earnings as a teacher. In a decision dated August 22, 2002, a hearing representative affirmed the March 16, 2001 decision. He found, however, that appellant's temporary teaching position had ended and instructed the Office to further develop whether appellant had the capacity to earn wages as a teacher. On December 22, 2002 the Office set aside the March 16, 2001 decision and reinstated compensation. By decision dated November 1, 2006, it reduced appellant's compensation benefits based on its finding that his actual earnings as a teacher effective August 29, 2006 fairly and reasonably represented his wage-earning capacity.

[2] A.M.A., *Guides* 424, Tables 15-18, 15-15.

[3] *Id*. at 537, Tables 17-11, 17-12.

20 degrees eversion, for a total left ankle impairment of 14 percent.[4] The Office medical adviser further determined that 4/5 weakness in dorsiflexion constituted a 12 percent impairment of the left lower extremity.[5] He noted that impairments for weakness or atrophy could not be combined with impairments for loss of motion. The Office medical adviser stated:

> "One would select the value that gives the highest to [appellant]. For the right lower extremity there would be 7 percent for pain combined with 11 percent for limitation of motion, or a 17 percent impairment of the right lower extremity for the ankle pathology -- symptoms and findings. For the left lower extremity there would be a 14 percent impairment for limitation of ankle range of motion combined with 7 percent for pain factors to arrive at a 20 percent impairment of the left lower extremity or leg."

For the right knee, the Office medical adviser graded pain as 70 percent as it interfered with the activities of daily living. He multiplied the 70 percent graded pain by the maximum impairment due to pain for the femoral nerve of 7 percent to find a 4.9, or rounded 5 percent impairment of the right knee.[6] The Office medical adviser opined that 4 percent atrophy for the right thigh constituted a 13 percent impairment[7] and that 4/5 quadriceps weakness constituted a 12 percent impairment.[8] He noted that weakness could not be combined with atrophy and selected the impairment due to atrophy as it was the greater impairment. The Office medical adviser found that 11 degrees of valgus was mild, or 10 percent impairment.[9] He asserted that an impairment due to atrophy or weakness could not be combined with a loss of range of motion. The Office medical adviser thus selected the impairment due to valgus of 10 percent and combined this impairment with the 5 percent loss of pain to find 15 percent right knee impairment. He did not provide an impairment for bilateral plantar fasciitis as it was not accepted as employment related. For the right lower extremity, the Office medical adviser combined the 15 percent knee impairment and the 17 percent ankle impairment to find 29 percent impairment. He further opined that appellant had a 20 percent impairment of the left lower extremity.

By decision dated April 17, 2007, the Office granted appellant a schedule award for a 29 percent permanent impairment of the right lower extremity and a 20 percent permanent

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[4] *Id*.

[5] *Id*. at 532, Table 17-8.

[6] *Id.* at 482, 552, Tables 16-10, 17-37.

[7] *Id*. at 530, Table 17-6.

[8] *Id*. at 532, Table 17-8.

[9] *Id*. at 537, Table 17-10.

impairment of the left lower extremity.[10] The period of the award ran for 141.12 weeks from April 15, 2007 to December 27, 2008.[11]

On May 14, 2007 appellant requested an oral hearing. On September 6, 2007 his attorney requested a telephone conference.

In a report dated August 31, 2007, Dr. Charles L. Quilty, Board-certified in family practice, found that appellant "recently had to withdraw from a teaching position when accommodations for his impairments were not made."

A telephonic hearing was held on September 27, 2007. Appellant's attorney contended that he was entitled to compensation for his current condition and disability. The hearing representative explained the difference between disability and impairment and informed appellant that he would need to request disability compensation and submit medical evidence showing that his present condition was work related.

By decision dated December 21, 2007, the Office hearing representative affirmed the April 17, 2007 decision.

On March 3, 2008 appellant, through his attorney, requested reconsideration. He argued that the hearing representative did not give sufficient weight to Dr. Quilty's opinion and appellant's assertion that working in his private employment worsened his condition. Counsel argued that the hearing representative should have found appellant totally disabled. He submitted a report dated November 25, 2007 from a physician's assistant, who found that appellant was not able to work.

By decision dated October 22, 2008, the Office denied modification of its December 21, 2007 decision.

On appeal appellant, through his attorney, contends that working in private employment exacerbated his condition and resulted in an increased impairment.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[12] and its implementing federal regulations,[13] 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all

[10] On April 17, 2007 the Office finalized its finding that appellant received an overpayment of $339.11 for which he was at fault. It deducted the amount from his first schedule award payment.

[11] The Office moved the date of maximum medical improvement from April 8, 1998 to April 15, 2007 as he was receiving compensation for total disability until April 14, 2007.

[12] 5 U.S.C. § 8107.

[13] 20 C.F.R. § 10.404.

claimants.[14] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[15]

ANALYSIS

The Office accepted that appellant sustained a sprain of the right ankle and right knee on January 17, 1994 and a consequential injury of left ankle Achilles tendinitis. In 2006 he requested a schedule award. In a report dated November 7, 2006, Dr. Mackey, an Office referral physician, provided detailed findings on examination. For the bilateral ankles, she provided impairment factors to be calculated distressing ankle pain, loss of range of motion, and 4/5 weakness in dorsiflexion of the foot. For the left foot and toes, Dr. Mackey found uncomfortable foot pain and plantar fasciitis. She measured range of motion for the right knee and noted that appellant experienced distressing knee pain which interfered with activity. Dr. Mackey further found four centimeters of left knee atrophy, 4/5 weakness of the right quadriceps, 11 degrees of valgus and a 50 percent loss of shock absorption. She provided detailed clinical findings but did not refer to the A.M.A., *Guides* or calculate the extent of appellant's bilateral lower extremity impairment. Consequently, the Office properly referred the record to an Office medical adviser.[16]

On January 30, 2007 an Office medical adviser reviewed Dr. Mackey's report and applied the A.M.A., *Guides* to her findings. For the bilateral ankle, he applied Table 15-15 and 15-18 on page 424 of the A.M.A., *Guides* and graded appellant's pain as 70 percent and multiplied the 70 percent graded pain by 5 percent, the maximum impairment of the L5 and S1 nerve roots, to find a 7 percent impairment of the right and left lower extremity. The Board notes, however, that these provisions of the A.M.A., *Guides* are relevant to determining the extent of a spinal nerve root impairment affecting the lower extremity. Appellant sustained an injury to his bilateral ankles and right knee. There is no evidence that he has a spinal nerve root impairment causing impairment of the lower extremity.

The Office medical adviser further determined that appellant was not entitled to an additional award for plantar fasciitis because it was not causally related to his work injury. He did not, however, consider whether appellant's plantar fasciitis preexisted his work injury.[17] It is well established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included.[18]

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[14] *Id*. at § 10.404(a).

[15] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). As of May 1, 2009, the sixth edition will be used. FECA Bulletin No. 09-03 (issued March 15, 2008).

[16] *Tommy R. Martin*, 56 ECAB 273 (2005) (after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and extent of impairment in accordance with the A.M.A., *Guides*).

[17] On February 5, 1998 a second opinion physician referred to a report in September 1995 describing appellant's problems with plantar fasciitis.

[18] *See Clary J. Cleary*, 57 ECAB 563 (2006); *Mike E. Reid*, 51 ECAB 543 (2000); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (June 2003).

For the right knee, the Office medical adviser determined that appellant had a 10 percent impairment due to mild valgus, a 5 percent impairment due to pain as well as a 4 percent impairment due to atrophy of the right thigh and a 12 percent impairment due to 4/5 quadriceps weakness. He properly noted that impairments due to atrophy and weakness could not be combined with each other or with an impairment due to loss of motion. The Office medical adviser did not, however, determine whether appellant had any additional impairment due to his partial medial meniscectomy.

The case will be remanded for the Office medical adviser to reevaluate the percentage of impairment to appellant's bilateral lower extremities in accordance with the applicable tables and sections of the A.M.A., *Guides*. After such further development as the Office deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 22, 2008 and December 21, 2007 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 8, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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