United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 09-690**
	)	**Issued: December 29, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Grand Rapids, MI, Employer	)	

Appearances:
Appellant, pro se
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 January 14, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' December 17, 2008 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has more than 13 percent permanent impairment of his right foot, for which he received a schedule award; and (2) whether the Office used the correct pay rate for compensation purposes.

FACTUAL HISTORY

On December 19, 2001 appellant, then a 50-year-old letter carrier, filed an occupational disease claim alleging that he sustained an injury to the great toe, and the second, third and fourth toes of his right foot while delivering mail. He did not stop work but began modified duty within restrictions. The Office accepted appellant's claim for aggravation of a preexisting great toe deformity, right foot metatarsalgia, second, third and fourth toes, hammer toe, right great toe

and right foot hammer toe. It also accepted nonunion of a previous arthrodesis of the metatarsophalangeal joint, right foot.[1] Appellant received appropriate compensation benefits.[2]

On April 27, 2004 appellant filed a Form CA-7 claim for a schedule award. In a report dated July 22, 2004, Dr. Scott Free, a Board-certified orthopedic surgeon, advised that appellant reached maximum medical improvement. In a November 15, 2004 report, he diagnosed nonunion of the right first metatarsophalangeal joint. Dr. Free recommended a revision arthrodesis.

In a letter dated December 3, 2004, appellant contended that he should receive a 50 percent benefit for his right great toe and a 33 percent benefit for his foot. This was based on his physical work performance evaluation, which reflected that he was able to function at a medium work level. On January 9, 2006 appellant indicated that he had not undergone the recommended surgery.

On January 12, 2007 the Office referred appellant with a statement of accepted facts, a set of questions and the medical record to Dr. Joseph Burkhardt, a Board-certified orthopedic surgeon and osteopath. In a February 28, 2007 report, Dr. Burkhardt reviewed appellant's history and utilized the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He noted that appellant had restricted movement in the first metatarsophalangeal joint after fusion comprised of zero degrees of motion of the metatarsophalangeal (MP) joint. Dr. Burkhardt found that appellant had normal motion in the second, third and fourth MP joints with metatarsal head discomfort with palpation. Appellant also had complete ankylosis of the first metatarsophalangeal joint. He had subjective pain complaints in the second, third and fourth metatarsal heads. Appellant referred to Table 17-30[3] for ankylosis of toes and 10 percent impairment to the lower extremity impairment. Dr. Burkhardt indicated that appellant was at maximum medical improvement.

In an April 12, 2007 report, Dr. Free opined that appellant had reached maximum medical improvement. Appellant had metatarsalgia-related symptoms as the mechanics of his great toe had been altered by the necessity of surgery.

In a letter dated June 11, 2007, Kathryn V. Hundley, a health and human resource management specialist at the employing establishment, noted that appellant's current pay rate was $49,219.00 per year. She indicated that the pay rate for the same grade and step from December 6, 2001 was equal to $46,401.00 per year.

[1] The record reflects that appellant had a previous surgery to the great right toe, which was not employment related. Appellant had surgery on September 5, 2003 to remove a failed implant of the right great toe and to correct a right second hammer toe. He also had surgery on May 17, 2006 to refuse the right great toe.

[2] The record reflects that the Office issued wage-earning capacity decisions dated December 19, 2005 and August 14, 2007 reducing his compensation to zero upon determining that his actual earnings as a modified city carrier fairly and reasonably represented his wage-earning capacity.

[3] A.M.A., *Guides* 543.

In an August 25, 2007 report, an Office medical adviser referred to Table 17-30 to find that appellant had nine percent impairment of the right leg.[4] The Office medical adviser explained that his report differed from that of Dr. Burkhardt because the physician did not note that the joint was fused in full extension. He explained that surgical fusion did not typically result in full extension; instead, it resulted in more of a position of function as indicated in Table 17-30.[5] The Office medical adviser recommended 9 percent impairment instead of 10 percent. He advised that appellant reached maximum medical improvement on February 28, 2007, the date of Dr. Burkhardt's examination.

On September 28, 2007 the Office granted appellant a schedule award for nine percent permanent impairment of the right lower extremity. The award covered a period of 25.92 weeks from February 28 to August 28, 2007. The pay rate for compensation purposes was $924.58 per week based on appellant's pay rate on February 28, 2007.

On August 20, 2008 appellant filed a claim for an increased schedule award. He asked to be compensated for the partial loss of use of his right foot. Appellant submitted a November 5, 2007 report from Dr. Richard Ilka, Board-certified in preventative medicine, who found that appellant had an eight centimeter long dorsal surgical scar along the length of his right great toe which was ankylosed at the MP joint. Dr. Ilka noted that the second toe was straight but the third and fourth had hammertoes. He indicated that he had hammertoes on toes two through five. Dr. Ilka advised that appellant had a 13 percent impairment to the right foot due to ankylosis of the right great toe in the position of function according to Table 17-30.[6] He explained that the A.M.A., *Guides* do not provide a great toe rating, only whole person, lower extremity and of the foot. Dr. Ilka explained that all of the lesser toes could be extended more than 10 degrees at the metatarsal-phalangeal joints and they would not be entitled to impairment as they moved beyond the range of motion impairments pursuant to Table 17-14.[7] He noted that 13 percent impairment of the right foot was equal to 9 percent of the right leg.

In an October 15, 2008 report, the Office medical adviser reviewed the evidence and referred to Table 17-30[8] and explained that ankylosis of the MP joint of the right big toe in positioning function was equal to 13 percent of the right big toe or foot. He also indicated that this was equal to nine percent of the lower extremity.

On November 13, 2008 the Office requested clarification with regard to whether there was 13 percent impairment of the right big toe or 13 percent impairment of the right foot. In a December 12, 2008 report, the Office medical adviser clarified his opinion. He explained that appellant's right big toe was the only toe that was ankylosed in the position of function. The

[4] *Id.*

[5] *Id.*

[6] *Id.* at 543.

[7] *Id.* at 537. While he indicated 17-4, this appears to be a typographical error.

[8] *Id*. at 543.

Office medical adviser clarified that according to Table 17-30[9] appellant would be entitled to 4 percent of the whole person, or 9 percent of the lower extremity or 13 percent of the foot. He concluded that appellant's impairment of the right big toe resulted in 13 percent of the right foot.

In a December 16, 2008 memorandum to the file, the Office noted that appellant was previously awarded a nine percent permanent impairment of the right lower extremity on September 28, 2007. It determined that the new medical evidence supported an award of the right foot only. The Office determined that the 9 percent to the right lower extremity should be subtracted from the 13 percent to the right foot. It subtracted the number of days (181.44) previously paid for the 9 percent of the lower extremity from the number of days payable for 13 percent to the right foot (186.55) and determined that appellant was owed an additional 5.11 days of compensation. The Office utilized the established pay rate of $924.58 (weekly) and divided this amount by seven days per week. It multiplied this by 5.11 days and arrived at the amount of $674.94.

On December 17, 2008 the Office granted appellant an amended schedule award for 13 percent permanent impairment of the right foot. The award covered the period August 29 to September 4, 2007. The Office indicated that appellant was previously paid 181.44 days of compensation for nine percent to the right lower extremity. It indicated that appellant would be entitled to 186.55 days for 13 percent to the foot and subtracted the previous amount paid for the lower extremity (181.44) days and determined that appellant was entitled to receive an additional 5.11 days. The effective date of the pay rate for compensation purposes was based on appellant's pay rate on February 28, 2007, the date of maximum medical improvement.[10]

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[11] and its implementing regulations[12] 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 regulations as the appropriate standard for evaluating schedule losses.[13]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be

[9] *Id*. at 543.

[10] The employing establishment confirmed his pay rate remained at $924.58 per week.

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

[13] A.M.A., *Guides* (5th ed. 2001).

itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[14] However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.[15]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not shown that he sustained more than 13 percent permanent impairment of his right foot, for which he received a schedule award.

In the present case, the Board finds that the Office medical adviser and appellant's treating physician, Dr. Ilka, properly applied the fifth edition of the A.M.A., *Guides.* They both referred to Table 17-30[16] and explained that ankylosis of the MP joint of the right big toe in positioning function was equal to 13 percent of the right foot. They also indicated that this was equal to nine percent of the lower extremity.

Appellant is not entitled to receive two awards for injury to the same body part. The Board has held that, when impairment residuals of an injury to a member of the body specified in the schedule extend into an adjoining area of a member also enumerated in the schedule, such as an injury of a finger into the hand, of a hand into the arm, or of a foot into the leg, the schedule award should be made on the basis of the percentage loss of use of the larger member, not both members.[17] However, where impairment of the foot would yield more compensation than the impairment to the larger member, the leg, appellant should be given the benefit of the more favorable allowance.[18]

Section 8107(c) of the Act provides 288 weeks of compensation for total loss of a leg and 205 weeks for total loss of a foot. For the leg, 288 weeks times 9 percent impairment equals 25.92 weeks of compensation. For the foot, 205 weeks times 13 percent impairment equals 26.65 weeks compensation. The award to the foot is the more favorable and is what appellant received. Appellant has not submitted any other reports to establish a greater impairment.

On appeal, appellant alleges that he is entitled to receive a schedule award to his leg and to his foot concurrently. However, as noted, appellant is not entitled to two awards for injury to the same body part, only to the more favorable allowance. In this case, it was for impairment to the right foot.

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[14] *See William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

[15] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000); *see also Paul A. Toms*, 28 ECAB 403 (1987).

[16] A.M.A., *Guides* 543.

[17] *See Sam Jones*, 25 ECAB 163 (1974).

[18] *Cf.* FECA Program Memorandum No. 134 (issued February 3, 1971) (where the cumulative allowances for the digits is greater than the value of the percentage loss of the hand or foot, the employee should have the benefit of the more favorable award and be compensated in accordance with the scheduled allowances for the sum of the digits).

LEGAL PRECEDENT -- ISSUE 2

Section 8101(4) of the Federal Employees' Compensation Act defines monthly pay as "the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater."[19] When the injury is caused by exposure to an occupational hazard, the date of injury is the date the employee was last exposed to the hazardous condition.[20]

If it is determined after payment of a schedule award that the claimant is entitled to a greater percentage of loss, an amended award should be issued. The pay rate will remain the same, and the revised award will begin on the day following the end of the award issued previously.[21] Where exposure to work factors continues, the date of injury is the date of relevant medical evaluation, *i.e.*, the date of the medical examination upon which the extent of permanent impairment has been determined.[22]

ANALYSIS -- ISSUE 2

Regarding appellant's pay rate, the record reflects that appellant received an amended award for the difference between the previous award of 9 percent to the right lower extremity and 13 percent to the right foot. The Office utilized the same pay rate in effect as that of the previous award, in the amended award. In a December 16, 2008 memorandum to the file, the Office noted that the 9 percent schedule award previously issued for the right lower extremity should be subtracted from the 13 percent award to the right foot. As noted above, this properly represents the more favorable allowance.[23] The Office subtracted the number of days (181.44) previously paid for the 9 percent of the lower extremity from the number of days payable for 13 percent to the right foot (186.55) and determined that appellant was owed an additional 5.11 days. It utilized the established pay rate of $924.58 (weekly) and divided this amount by seven days per week. The Office multiplied this by 5.11 days and arrived at the amount of $674.94. The revised award began on August 29, 2007, the day following the end of the award issued previously.[24]

On appeal, appellant argues that his schedule award should be based on a weekly pay rate of $959.75 that is retroactive to November 25, 2006. Based on the evidence of record, there is no indication that the pay rate used by the Office is inappropriate. The Office calculated appellant's pay rate as of February 28, 2007, the date appellant reached maximum medical

[19] 5 U.S.C. § 8101(4).

[20] *Manuel Carbajal*, 37 ECAB 216 (1985).

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7.b(1) (November 1998).

[22] *R.S.*, 58 ECAB ___ (Docket No. 06-1346, issued February 16, 2007).

[23] *See supra* note 18.

[24] *See supra* note 21.

improvement. The Board notes that Dr. Burkhardt, the second opinion physician, and the Office medical adviser agreed that appellant reached maximum medical improvement on February 28, 2007. The amended award also utilized the pay rate in effect at the time of the original award.[25] The amended award was based on the determinations from the subsequent physicians that appellant should receive the more favorable award to the foot as opposed to the leg. The employing establishment provided the requested information regarding appellant's pay rate on August 14, 2007. The Board finds no probative evidence of error regarding the pay rate for compensation purposes.

The Board notes that, subsequent to the Office's December 17, 2008 decision, appellant submitted additional evidence. This evidence includes information pertaining to the pay scale for letter carriers. The Board has no jurisdiction to review this evidence for the first time on appeal.[26] However, to the extent that appellant is arguing that there is new information pertinent to his pay rate, he may wish to seek reconsideration before the Office.[27]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained more than a 13 percent permanent impairment of his right foot, for which he received a schedule award. The Board also finds that the Office used the correct pay rate for compensation purposes.

[25] *Id.*

[26] 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

[27] Appellant also has another appeal pending before the Board, Docket No. 09-1296, that shall proceed to adjudication separately from the present matter.

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 29, 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