

**United States Department of Labor
Employees' Compensation Appeals Board**

C.V., Appellant)

and)

**U.S. POSTAL SERVICE, SOUTH JERSEY)
PROCESSING & DISTRIBUTION CENTER,)
Bellmawr, NJ, Employer)**

**Docket No. 09-1076
Issued: April 13, 2010**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 16, 2009 appellant, through her representative, filed a timely appeal from April 1, 2008 and January 9, 2009 merit decisions of the Office of Workers' Compensation Programs regarding a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant established that she sustained greater than three percent permanent impairment to her left lower extremity, for which she received a schedule award. On appeal, appellant's representative contends that the Office did not properly select Dr. Robert Dennis, a Board-certified orthopedic surgeon, as an impartial medical examiner in accordance with its procedure manual. He also argues that Dr. Dennis' medical report was not in conformance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

FACTUAL HISTORY

On March 15, 2000 appellant, then a 44-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on February 16, 2000, while loading a small parcel and bundle sorter on a trailer with a manual pallet jack, she experienced a sharp pain in her left foot. The Office accepted the claim for a fracture of the left metatarsal.¹

On May 31, 2005 appellant filed a claim for a schedule award (Form CA-7).

In a June 2, 2003 medical report, Dr. David Weiss, an osteopath, stated that on February 16, 2000 appellant experienced left foot pain while unloading a mail container. An x-ray of her left foot revealed a fracture of the fifth metatarsal. Appellant was placed in a walking cast for approximately nine weeks. Dr. Weiss reported her complaints of left foot pain, stiffness and swelling on an intermittent basis. Appellant stated that the pain in her left foot was 3 on a scale of 10 in severity. Examination of the left foot revealed palpable tenderness over the distal third of the fifth metatarsal. Range of motion of the fifth metatarsal phalangeal joint was at 90 percent of normal with pain. Range of motion tests of the ankle revealed dorsiflexion of 15 out of 15 degrees and plantar flexion of 55 out of 55 degrees. No tenderness was elicited over the base of the latter malleolus or over the anterior talofibular ligament. Motor strength testing involving the dorsiflexion, plantar flexion, inversion and eversion of the left foot was five out of five. Manual muscle testing of the gastrocnemius musculature was graded at five out of five but quadriceps testing was graded at four out of five. Gastrocnemius circumference measured 46 centimeters (cm) on the right versus 45 cm on the left. Quadriceps circumference at 10 cm above the patella measured 63 cm on the right versus and 63 cm on the left. Dr. Weiss diagnosed status post stress fracture to the left foot involving the fifth metatarsal. Citing the A.M.A., *Guides*, he opined that appellant sustained 11 percent total left lower extremity impairment. Dr. Weiss calculated the impairment by adding eight percent impairment for atrophy of the left gastrocnemius, using Table 17-6 on page 532, to three percent impairment for pain, using Figure 18-1 on page 574.²

On August 6, 2007 the Office forwarded Dr. Weiss' medical report to an Office medical adviser for a determination of permanent impairment in accordance with the fifth edition of the A.M.A., *Guides*.³

In a medical report dated August 6, 2007, Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as an Office medical adviser, indicated that appellant sustained six percent permanent impairment to his left lower extremity. He stated that she sustained three percent impairment for one cm of calf atrophy, in accordance with Table 17-6 on page 530 and three percent permanent impairment for pain, according to Table 18-1 on page 574. Dr. Magliato explained that he disagreed with Dr. Weiss' interpretation of Table 17-6, which

¹ This decision is not contained in the record.

² Dr. Weiss also provided a permanent impairment rating for appellant's right lower extremity for a work-related injury under a separate claim which is not the subject of the current appeal. *See* 20 C.F.R. § 501.3.

³ A.M.A., *Guides* (5th ed. 2001).

provides a three to eight percent impairment range for 1 to 1.9 cm of atrophy. He opined that, because appellant's one cm atrophy was on the low end of the range, his permanent impairment for atrophy should be three percent and not eight percent, as found by Dr. Weiss. Dr. Magliato also assigned a maximum medical improvement date of June 2, 2003.

The Office determined that a conflict of medical opinion existed between Drs. Magliato and Weiss and referred appellant, along with a statement of accepted facts, to an impartial medical examiner.

In an October 10, 2007 medical report, the impartial medical examiner, Dr. Dennis, a Board-certified orthopedic surgeon, reviewed appellant's occupational and medical background. He reported her complaints of discomfort in the latter aspect of her left foot which was more intense on some days than others. Examination revealed normal gait and balance and no swelling, deformity or gait abnormality of either ankle. Calf muscle strength was normal and symmetric. Strength of inversion and eversion were symmetric. No deformity, swelling or any abnormality about the arches or metatarsals was present. Both feet were symmetric and there was no weakness in the girth of the calves. Sensation in the lower extremities was normal. Range of motion in both ankles was 30 degrees dorsiflexion and at least 60 degrees plantar flexion. There was a total of 80 degrees of motion in the ankles with 30 degrees of inversion and eversion. Appellant demonstrated normal strength in dorsiflexion of all the toes and ankles. Circumference of the ankles just above midline measured 9 inches and the widest part of the calves measured 18 inches bilaterally. The circumference just below the knees measured 17 inches. Dr. Dennis noted that there was no evidence anywhere along the leg of any difference between the two calves. He opined that any findings made by Dr. Weiss in 2003 must have improved to normal in 2007. Dr. Dennis diagnosed post stress fracture to the left foot involving the fifth metatarsal, which was nondisplaced and well healed. Dr. Weiss stated that he was unable to find any objective identifiable impairment to the left lower extremity and noted that the injury that occurred seven years ago was a nondisplaced, almost invisible fracture of the fifth metatarsal. He, however, provided a three percent impairment rating to accommodate appellant's subjective complaints of pain. Dr. Weiss indicated that appellant reached maximum medical improvement on May 18, 2001.

On November 5, 2007 the Office referred Dr. Dennis' medical report to a second Office medical adviser for a determination of permanent impairment in accordance with the A.M.A., *Guides*, (5th ed. 2001).

In a January 22, 2008 medical report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon acting as an Office medical adviser, agreed with Dr. Dennis' finding of three percent permanent impairment of the lower extremity. He noted that Dr. Dennis did not find any evidence of weakness of either lower extremity, loss of sensation or evidence of calf atrophy. Dr. Berman opined that following cast immobilization atrophy could be present for a period of time. However, with normal usage and return to activity, the atrophy would resolve. Thus, over seven years after the injury, at the time of Dr. Dennis' examination, appellant's lack of atrophy would be anticipated in the normal sequence of events. Dr. Berman found that she sustained three percent permanent impairment for pain in accordance with Figure 18-1, page 574. He indicated a maximum medical improvement date of October 10, 2007, the date of Dr. Dennis' report.

By decision dated April 1, 2008, the Office awarded appellant a schedule award for three percent impairment of the left lower extremity. The award ran for 8.64 weeks during the period October 10 to December 9, 2007. It indicated that appellant reached maximum medical improvement on October 10, 2007.

On April 15, 2008 appellant, through her representative, filed a request for an oral hearing before an Office hearing representative. An oral hearing took place on September 24, 2008.

By decision dated January 9, 2009, the Office hearing representative affirmed the April 1, 2008 Office decision. The hearing representative found that the weight of the medical evidence rested with Dr. Dennis, the impartial medical examiner, who found that appellant only sustained three percent permanent impairment to the left lower extremity due to pain.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulations⁵ 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 losses.⁶

The Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁷ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁸

ANALYSIS

The Office accepted that appellant sustained a fracture of the left metatarsal on February 16, 2000 due to her employment injury. It issued a schedule award for three percent

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*

⁷ *Supra* note 4.

⁸ 20 C.F.R. § 10.321.

permanent impairment of the left lower extremity. The issue is whether appellant sustained greater than three percent permanent impairment for which she received a schedule award.

In support of her claim for a schedule award, appellant submitted a June 2, 2003 medical report from Dr. Weiss. Physical examination revealed a gastrocnemius circumference of 46 cm on the right versus 45 cm on the left. Manual muscle testing of the quadriceps was graded four out of five.⁹ Dr. Weiss calculated an impairment rating of 11 percent of the lower left extremity by adding 8 percent impairment for atrophy of the left gastrocnemius, citing to Table 17-6 on page 532 of the A.M.A., *Guides* and 3 percent impairment for pain, using Figure 18-1 on page 574.

The Office forwarded Dr. Weiss' medical report to Dr. Magliato for a determination of permanent impairment in accordance with the A.M.A., *Guides*. In an August 6, 2007 report, Dr. Magliato found that appellant sustained six percent impairment. He stated that he disagreed with Dr. Weiss' interpretation of Table 17-6, on page 530, which provides three to eight percent impairment range for muscle atrophy of 1 to 1.9 cm. Dr. Magliato found that, because appellant's one cm of atrophy was on the low end of the range, the impairment rating should be three and not eight cm. He also added three percent impairment for pain.

The Board finds that the Office properly found that a conflict of medical opinion existed between Drs. Weiss and Magliato regarding appellant's degree of permanent impairment. The Office subsequently referred appellant to Dr. Dennis for an impartial medical evaluation.¹⁰

In an October 10, 2007 medical report, Dr. Dennis diagnosed post stress fracture to the left foot involving the fifth metatarsal, which was nondisplaced and well healed. He was unable to find any objective identifiable impact to the left lower extremity. Dr. Dennis opined that any findings made by Dr. Weiss must have improved to normal in 2007 and noted that the injury was only a nondisplaced, almost invisible fracture of the fifth metatarsal. He provided an impairment rating of three percent to accommodate appellant's subjective complaints of pain.

The Office subsequently referred Dr. Dennis' medical report to Dr. Berman, an Office medical adviser, who agreed with Dr. Dennis' impairment rating of three percent for pain in accordance with Figure 18-1 on page 574 of the A.M.A., *Guides*.¹¹ Dr. Berman noted that cast immobilization could cause atrophy for a period of time, however, with normal muscle usage, atrophy would resolve. Thus, over seven years after the injury, appellant's lack of atrophy would be anticipated in the normal sequence of events.

Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual

⁹ In accordance with Table 17-2 on page 526 of the A.M.A., *Guides*, a rating for muscle atrophy cannot be combined with an impairment rating for muscle strength.

¹⁰ See *Elaine Sneed*, 56 ECAB 373 (2005).

¹¹ A.M.A., *Guides* at 574.

background, must be given special weight.¹² The Board finds that Dr. Dennis provided a well-rationalized medical opinion, based on a complete physical examination and an accurate factual and medical background. As such, his opinion is entitled to the special weight afforded an impartial medical examiner.¹³ The Board further finds that Dr. Berman properly applied Dr. Dennis' findings of pain to the A.M.A., *Guides* to determine that appellant sustained three percent permanent impairment according to Figure 18-1 on page 574.¹⁴ Appellant did not submit any additional evidence establishing entitlement to a greater schedule award. Therefore, the evidence supports that she sustained three percent permanent impairment.

On appeal, appellant contends that the Office did not properly select Dr. Dennis as an impartial medical examiner in accordance with its procedures. However, she did not submit any evidence establishing that Dr. Dennis was improperly selected or that he was biased.¹⁵

CONCLUSION

The Board finds that appellant did not establish that she sustained greater than three percent permanent impairment to her left lower extremity for which she received a schedule award.

¹² See *R.H.*, 59 ECAB ____ (Docket No. 07-2124, issued March 7, 2008); *David W. Pickett*, 54 ECAB 272 (2002).

¹³ See *Willie C. Howard*, 55 ECAB 564 (2004).

¹⁴ It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician. See *Linda Beale*, 57 ECAB 429 (2006).

¹⁵ See *William Fidurski*, 54 ECAB 146 (2002) (an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise; mere allegations are insufficient to establish bias).

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2009 and April 1, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 13, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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