United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 14-333**
	)	**Issued: June 25, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Drexel Hill, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2013 appellant, through his representative, filed a timely appeal from the November 18, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied an additional schedule award. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than 18 percent impairment of his right lower extremity or more than 20 percent impairment of his left lower extremity, for which he has received schedule awards.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On the prior appeal,[2] the Board found that the case was not in posture for decision because it appeared that neither the second opinion physician nor an OWCP medical adviser had evaluated impairment due to vascular conditions under Chapter 4 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). The Board remanded the case for further development and a *de novo* decision.[3]

On November 4, 2013 Dr. Robert A. Smith, the Board-certified orthopedic surgeon and second opinion physician, advised that he had reviewed his May 24, 2012 evaluation[4] and noted that the analysis of appellant's impairment was taken from Table 4-12 on page 69 of the A.M.A., *Guides*. "Other than this addition, there are no other required corrections for this report."

An OWCP medical adviser reviewed Dr. Smith's reports and agreed with his determination that appellant had 17 percent impairment of his right lower extremity and 20 percent impairment of his left lower extremity. The medical adviser indicated that the diagnosis used for the diagnosis-based method of evaluation was bilateral lower extremity DVT with marked edema. He placed appellant's diagnosis in class 2. As appellant had bilateral marked edema, he found that functional history was also class 2 bilaterally. On physical examination, both legs demonstrated chronic venous insufficiency, but there was significantly more swelling on the left. He therefore graded the physical examination as class 2 on the right and class 3 on the left. Clinical studies were not applicable, as there were no objective studies at the time of maximum medical improvement.

Referencing Table 14-12, page 69 of the A.M.A., *Guides*, OWCP's medical adviser concluded that appellant had 17 percent impairment of his right lower extremity, which did not warrant adjustment from functional history or physical examination. He also concluded that appellant had 20 percent impairment of his left lower extremity, which was adjusted up from 17 percent due to severe physical examination findings.

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[2] Docket No. 12-1625 (issued September 12, 2013).

[3] On September 8, 1998 appellant, a 46-year-old letter carrier, sustained an injury in the performance of duty when he lifted his mail satchel. OWCP accepted his claim for lumbosacral strain, displacement of an intervertebral disc, aggravation of lumbar degenerative disc disease, phlebitis and thrombophlebitis. Appellant received a schedule award for 18 percent impairment of his right lower extremity and for 10 percent impairment of his left lower extremity. On July 17, 2012 OWCP issued a schedule award for an additional 10 percent impairment of the left lower extremity, for a total rating of 20 percent on that side. The facts of this case, as set forth in prior Board decisions, are hereby incorporated by reference.

[4] As the Board discussed on prior appeal, Dr. Smith's May 24, 2012 report appeared to be based on Table 9-12, page 208, of the A.M.A., *Guides*. He reported that appellant's deep vein thrombophlebitis (DVT) yielded 2 percent impairment with a default rating of 17 percent for the right lower extremity. Dr. Smith explained that appellant has functional history and physical examination modifiers of 0 percent resulting in 17 percent right lower extremity impairment. He also rated appellant's DVT of the left lower extremity as a class 2 impairment with a default rating of 17 percent impairment. Dr. Smith found physical examination modifier of three and a functional history modifier of two due to additional swelling on the left. This resulted in a +1 net modifier resulting in 20 percent impairment of the left lower extremity after moving to the right of the column.

In a decision dated November 18, 2013, OWCP denied an additional schedule award. Noting that appellant had already received schedule awards for 18 percent impairment of his right lower extremity and 20 percent impairment of his left, OWCP found that the reports of Dr. Smith and OWCP's medical adviser showed that no additional impairment was warranted.

Appellant's representative argues that OWCP did not fully comply with the Board's previous decision.

LEGAL PRECEDENT

The schedule award provision of FECA[5] and the implementing regulations[6] 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. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.[7]

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. OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9]

ANALYSIS

As the Board indicated on the prior appeal, Dr. Smith, the orthopedic surgeon and second opinion physician, did not identify which table in the sixth edition of the A.M.A., *Guides* he was using to evaluate appellant's lower extremity impairment due to chronic DVT. The medical adviser indicated that he was applying Table 9-12, page 208, relating to thrombotic disorders. The Board remanded the case for an evaluation of impairment due to vascular conditions under Chapter 4.

In his supplemental report, Dr. Smith clarified that his previous evaluation was indeed carried out using Table 4-12, page 69, relating to lower extremity peripheral vascular disease. He did not fully explain how he used the criteria in this table to determine appellant's impairment.

Table 4-12 uses objective test results as the key factor for determining the appropriate impairment class for the condition being rated. Although Dr. Smith placed appellant's

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

[8] 20 C.F.R. § 10.404; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010).

impairment in class 2 (mild problem), he did not explain how appellant met the criteria: "Abnormal ABI's [ankle-brachial indices] (0.71-0.90) or mildly abnormal arterial or venous duplex ultrasound or peripheral angiograms documenting mild PAD [peripheral arterial disease]."

Dr. Smith correctly noted that the default rating for a class 2 impairment was 17 percent of the lower extremity, but he did not explain how appellant's functional history met the criteria for mild. Nor did he explain how appellant's physical findings met the criteria for mild on right and moderate on the left. Dr. Smith noted additional swelling on the left, but the criteria for moderate physical findings is given as follows: "Vascular damage such as amputation at or above ankle or amputation of two or more digits with evidence of persistent vascular disease or persistent widespread or deep ulceration involving one extremity."

The medical adviser indicated that he was using the diagnosis-based method of evaluating impairment, and the diagnosis used for his rating was deep vein thrombosis with marked edema. He, too, placed appellant's impairment in class 2 without explaining how appellant's objective test results met the criteria. The medical adviser found that appellant's functional history was class 2 for marked edema, but marked edema may indicate class 2 or class 3 under Table 4-12. He judged appellant's physical examination to be class 2 on the right for evidence of chronic venous insufficiency (persisting vascular disease), but he did not explain how significantly more swelling on the right met the criterion for class 3. The medical adviser also indicated that clinical studies were not applicable, notwithstanding that objective test results are the key factor for determining the appropriate impairment class.

The Board finds that this case is not in posture for decision. Neither Dr. Smith nor OWCP's medical adviser sufficiently explained how appellant's impairment was determined under the criteria of Table 4-12, page 69 of the A.M.A., *Guides*. In this regard, appellant's representative correctly observes that OWCP did not fully comply with the Board's prior decision and order. Accordingly, the Board will set aside OWCP's November 18, 2013 decision and will remand the case for further development and a *de novo* decision on the extent of appellant's bilateral lower extremity impairment under Table 4-12.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development is warranted.

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: June 25, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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