United States Department of Labor
Employees' Compensation Appeals Board

R.P., Appellant	)	
and	)	**Docket No. 14-988**
	)	**Issued: September 5, 2014**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Fairton, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 25, 2014 appellant, through his attorney, filed a timely appeal from the December 4, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 met his burden of proof to establish more than 12 percent permanent impairment of his left leg, for which he received schedule awards.

FACTUAL HISTORY

OWCP accepted that, on July 8, 2002, appellant, then a 35-year-old correctional officer, sustained a closed trimalleolar fracture of the left ankle and dislocation of the left ankle when he was securing an inmate.

[1] 5 U.S.C. §§ 8101-8193.

In a November 15, 2004 report, Dr. Mark Levitsky, an attending Board-certified orthopedic surgeon, discussed appellant's left ankle condition and indicated that he had "approximately 20 to 25 percent functional impairment of the left ankle."

On December 7, 2004 appellant filed a claim for a schedule award due to his accepted work conditions.

In a November 13, 2007 report, Dr. Levitsky stated that appellant had reached maximum medical improvement that day and that he sustained 25 percent permanent impairment of his left leg.

By decision dated February 1, 2008, OWCP denied appellant's scheduled claim on the grounds that the record did not contain a rationalized medical opinion regarding appellant's permanent impairment.

By decision dated April 11, 2008, an OWCP hearing representative remanded the case to OWCP in order to refer the case to an OWCP medical adviser for review of the case record and an opinion on appellant's left leg impairment.

On July 6, 2011 Dr. Henry Magliato, a Board-certified orthopedic surgeon, serving as an OWCP medical adviser, determined that there was a need for a new examination and impairment rating under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009).

In an October 18, 2011 report, Dr. Kenneth Heist, a Board-certified orthopedic surgeon serving as an OWCP referral physician, determined that appellant had eight percent permanent impairment of his left leg under the sixth edition of A.M.A., *Guides*. He found that, under Table 16-2 on page 503, appellant sustained a class 1 impairment based upon the diagnosis of a nondisplaced trimalleolar fracture with mild motion deficits. This resulted in a 10 percent default value for impairment of appellant's left leg. However, Dr. Heist placed the grade modifiers (including a functional history grade modifier of 1) at 0 and applied the net adjustment formula to find that appellant moved one space to the left of the default value to the value of eight percent. On November 17, 2011 Dr. Magliato, serving as an OWCP medical adviser, determined that appellant was at class 1 and had sustained a 10 percent permanent impairment of his left leg. He disagreed with the reduction for grade modifiers.

By decision dated January 23, 2012, OWCP granted appellant a schedule award for 10 percent permanent impairment of his left leg. The award ran for 28.8 weeks.

Appellant submitted a June 21, 2011 report of Dr. David Weiss, an attending osteopath. In this report, Dr. Weiss determined that appellant had 19 percent permanent impairment of his left leg. He found that appellant sustained a class 2 impairment of the left leg due to some nonunion of the trimalleolar fracture, which resulted in a default 22 percent impairment of the left leg. Dr. Weiss determined that appellant's functional history grade modifier was 1 and his physical examination grade modifier was 1. Using the net adjustment formula, he found that appellant sustained 19 percent permanent impairment of the left leg. Dr. Weiss also stated that appellant reached maximum medical improvement on June 21, 2011, the date of his examination.

By decision dated May 7, 2012, an OWCP hearing representative found that there was a conflict in the medical opinion evidence between Dr. Weiss, the attending physician and Dr. Heist and Dr. Magliato, the government physicians, regarding appellant's left leg impairment. The case was remanded to OWCP for referral of appellant to an impartial medical examination and opinion on his impairment.

In a July 24, 2012 report, Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon serving as an impartial medical specialist, discussed appellant's medical history and reported findings on examination.[2] He determined that appellant had 12 percent permanent impairment of his left leg under the sixth edition of the A.M.A., *Guides.* Under Table 16-2 on page 503, Dr. Glenn found that, for an ankle fracture, appellant sustained a class 1 impairment of his left leg, resulting in a default value of 10 percent, because appellant did not show moderate-to-severe motion deficits or moderate malalignment (the standard for a class 2 impairment).[3] He determined that appellant's condition warranted grade modifiers of 1 for functional history, 1 for physical examination and 2 for clinical studies. Using the net adjustment formula, Dr. Glenn calculated that appellant's condition moved him one space to the right of the default value on Table 16-2 resulting in a 12 percent impairment of the left leg. He stated that appellant reached maximum medical improvement on December 27, 2002. On August 23, 2012 Dr. Andrew Merola, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed Dr. Glenn's impairment rating and found it to be correct.

By decision dated October 1, 2012, OWCP determined that appellant was entitled to a schedule award based upon a 12 percent permanent impairment of his left leg, less the 10 percent impairment already awarded. It based its decision on the opinion of Dr. Glenn as reviewed by Dr. Merola.

Appellant requested a video hearing with an OWCP hearing representative. During the January 14, 2013 hearing, counsel argued that Dr. Glenn's opinion was insufficient to carry the weight of the medical opinion regarding appellant's schedule award. He argued that Dr. Glenn did not adequately explain why appellant's left ankle condition fell under class 1 on Table 16-2.

In a March 27, 2013 decision, the hearing representative affirmed OWCP's October 1, 2012 decision finding that appellant had 12 percent permanent impairment of his left leg. The hearing representative determined that the weight of the medical evidence regarding appellant's left leg impairment rested with the well-rationalized opinion of Dr. Glenn as affirmed by the opinion of Dr. Merola.

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[2] In particular, Dr. Glenn reviewed recent x-rays of the left ankle dated July 19, 2012.

[3] Dr. Glenn noted that appellant's July 19, 2012 x-rays showed a fibrous union, rather than bony union, at the medial malleolus and stated that "the fracture was in anatomical position with complete preservation of the so-called ankle mortise." He indicated that the components of the claimant's left ankle "were indeed in the appropriate positions and perfectly symmetrical with the opposite or normal side" and stated that the fibrous union actually represented healing of the fracture with a "gristle-like material" rather than bone. Dr. Glenn noted that appellant's injury resulted in preservation of a normal ankle mortise and no evidence of arthritis, a normal range of motion with normal strength and sensory pattern, but with subjective complaints of pain. He explained that appellant was able to work in full capacity without restrictions.

In reports dated July 22 and August 19, 2013, Dr. Weiss indicated that he had reviewed the x-rays of appellant's left ankle and had concluded that, due to nonunion of the fracture, his accepted left ankle fracture fell under class 2 of Table 16-2 of the A.M.A., *Guides*.

In a December 4, 2013 decision, OWCP affirmed its March 27, 2013 decision finding that the weight of the medical evidence regarding appellant's left leg impairment continued to rest with the opinions of Dr. Glenn and Dr. Merola.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[5] 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, FECA 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 regulation as the appropriate standard for evaluating schedule losses.[6] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[7]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the ankle, the relevant portion of the leg for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.[8] After the class of diagnosis (CDX) is determined from the Knee Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using the Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9]

Section 8123(a) of FECA provides in pertinent part: "If there is 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."[10] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical

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[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.

[7] FECA Bulletin No. 09-03 (issued March 15, 2009).

[8] *See* A.M.A., *Guides* (6th ed. 2009) 501-08.

[9] *Id.* at 515-22.

[10] 5 U.S.C. § 8123(a).

evidence.[11] In situations 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 background, must be given special weight.[12]

ANALYSIS

OWCP accepted that on July 8, 2002 appellant sustained a closed trimalleolar fracture of the left ankle and dislocation of the left ankle when he was securing an inmate. Appellant received schedule awards for a 12 percent permanent impairment of his left leg. Based primarily on the opinion of Dr. Glenn, a Board-certified orthopedic surgeon serving as an impartial medical specialist, OWCP determined that appellant was not entitled to any additional schedule award compensation.[13]

OWCP had determined that there was a conflict in the medical opinion between Dr. Weiss, an attending osteopath, Dr. Heist, an OWCP referral physician, and Dr. Magliato, an OWCP medical adviser,[14] with respect to the extent of appellant's left leg impairment. In order to resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Glenn for an impartial medical examination and an opinion on the matter.

The Board finds that the weight of the medical evidence with respect to appellant's left leg impairment rests with the well rationalized July 24, 2012 opinion of Dr. Glenn, which is based on a complete and accurate factual and medical history and properly applies the standards of the sixth edition of the A.M.A., *Guides* to find that appellant has a 12 percent permanent impairment of his left leg.

In his July 24, 2012 report, Dr. Glenn determined that appellant has 12 percent permanent impairment of his left leg under the sixth edition of the A.M.A., *Guides*. Under Table 16-2 on page 503, he found that, for his ankle fracture, appellant sustained a class 1 impairment of his left leg, resulting in default value of 10 percent, because appellant did not show moderate to severe motion deficits or moderate malalignment (the standard for a class 2 impairment). Dr. Glenn determined that appellant's condition warranted 1 for functional history grade modifier, 1 for physical examination grade modifier and 2 for clinical studies grade modifier. Using the net adjustment formula, he calculated that appellant's condition moved him one space to the right of the default value on Table 16-2 resulting in a 12 percent impairment of the left leg. On August 23, 2012 Dr. Merola reviewed Dr. Glenn's impairment rating and found that it properly applied the A.M.A., *Guides*.

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[11] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[12] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[13] Dr. Glenn's impairment rating was reviewed and approved of by Dr. Merola, a Board-certified orthopedic surgeon, serving as an OWCP referral physician.

[14] Both Dr. Heist and Dr. Magliato were Board-certified orthopedic surgeons.

Before OWCP and on appeal, counsel argued that Dr. Glenn's opinion was not well rationalized particularly with regard to his determination that appellant's left ankle fracture fell under class 1 on Table 16-2. Counsel noted that, in July 22 and August 19, 2013 reports, Dr. Weiss indicated that he had reviewed the x-rays of appellant's left ankle and had concluded that, due to nonunion of the fracture, his accepted left ankle fracture fell under class 2 of Table 16-2 of the A.M.A., *Guides.* The Board notes that Dr. Weiss did not provide any detailed explanation of why appellant's left ankle condition fell under class 2 and his opinion on this matter is of limited probative value. Furthermore, Dr. Weiss was on one side of the medical conflict that was resolved by Dr. Glenn. The Board has held that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[15] However, Dr. Glenn provided extensive discussion as to why appellant's condition did not rise to the level of class 2. He noted that appellant's July 19, 2012 x-rays showed a fibrous union, rather than bony union, at the medial malleolus and stated that "the fracture was in anatomical position with complete preservation of the so-called ankle mortise." Dr. Glenn indicated that the components of the claimant's left ankle "were indeed in the appropriate positions and perfectly symmetrical with the opposite or normal side" and stated that the fibrous union actually represented healing of the fracture with a "gristle-like material" rather than bone. He noted that appellant's injury resulted in preservation of a normal ankle mortise and no evidence of arthritis, a normal range of motion with normal strength and sensory pattern, but with subjective complaints of pain. Dr. Glenn explained that appellant was able to work in full capacity without restrictions.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than 12 percent permanent impairment of his left leg, for which he received schedule awards.

[15] *I.J.*, 59 ECAB 408 (2008).

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 5, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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