United States Department of Labor
Employees' Compensation Appeals Board

G.G., Appellant	)	
and	)	**Docket No. 07-1257**
	)	**Issued: March 26, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Dallas, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN D. KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 10, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 11, 2007 merit decision granting him a schedule award for an additional 10 percent impairment of his left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUE

The issue is whether appellant has more than a 39 percent impairment of the left lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On August 12, 1991 appellant filed an occupational disease claim, alleging that he developed a right foot condition as a result of conditions of his federal employment. The Office accepted his claim for aggravation of his preexisting right foot conditions, including: degenerative joint disease; subtaler joint and ankle arthritis; pes planus; posterior tibial tendinitis.

On May 5, 1993 the Office granted appellant a schedule award for a 28 percent impairment of his right lower extremity.

On September 28, 1995 the Office accepted the conditions of left flat foot and tibia tendinitis, as a consequential injury. On May 22, 1996 the Office granted appellant a schedule award for a 29 percent impairment of his left lower extremity. On September 20, 1999 appellant filed a claim for recurrence, which was accepted for bilateral posterior tibial tendinitis and pes planus.

On April 1, 2005 the Office accepted the additional conditions of bilateral osteoarthritis and abnormality of gait. On April 5, 2005 the Office authorized a triple arthrodesis, which was performed the following day. On August 30, 2005 the Office authorized left fusion of foot bones and left revision of calf tendon.

Appellant submitted a report dated May 1, 2006 from Dr. Chris Bowers, a podiatrist, who provided a history of appellant's employment injury and medical treatment. Dr. Bowers' neurological examination revealed intact epicritic sensation in the bilateral lower extremities. A biomechanical evaluation showed that range of motion was approximately 10 percent in ankle joint dorsiflexion bilaterally; 5 percent in ankle joint plantar flexion bilaterally; and 0 percent in inversion and eversion in both lower extremities. Dr. Bowers diagnosed degenerative joint disease and equines deformity of both feet; posterior tibial dysfunction bilaterally; pes planus bilaterally; and status post triple arthrodesis bilaterally. Referring to page 542 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he opined that appellant had a 10 percent impairment of each lower extremity and an 8 percent whole person impairment.

The Office forwarded Dr. Bowers' May 1, 2006 report, together with a statement of accepted facts, to an Office medical adviser for review and an opinion as to the nature and degree of appellant's permanent impairment. In a report dated July 26, 2006, the medical adviser referred to page 542 of the A.M.A., *Guides*, which concerns "Foot (Hindfoot, Midfoot, Forefoot)," and determined that ankylosis of the foot in a neutral position constituted a 10 percent impairment of the lower extremity. Based upon Dr. Bowers' findings, he opined that appellant had sustained a 10 percent impairment of each lower extremity under this section of the A.M.A., *Guides*. The medical adviser noted that appellant's 1996 schedule award was given for impairment to his left lower extremity due to loss of motion in his ankle. He explained that the present award represented an additional impairment, as it related to the 2005 triple arthrodesis procedure. The medical adviser opined that the date of maximum medical improvement was May 1, 2006.

Appellant submitted a report dated July 21, 2006 from Dr. Byron E. Strain, a Board-certified physiatrist, who stated that appellant was previously determined to be at maximum medical improvement and that he was merely providing a second opinion regarding his impairment rating. Dr. Strain's examination revealed 5/5 strength; intact sensation to light touch; 2+ dorsalis pedal pulses; good capillary refill; 2+ deep tendon reflexes at the knees, 0 at the ankles secondary to fusion; and negative clonus and Babinski signs. At the right ankle, appellant was fused at approximately 17 degrees of plantar flexion. On the left, he was fused at approximately 16 degrees of plantar flexion. Inversion and eversion were neutral. Range of

motion in the right and left knees was 5 to 100 and 4 to 102 respectively. Referring to the fifth edition of the A.M.A., *Guides*, Dr. Strain opined that appellant had a 17 percent right lower extremity impairment for ankylosis in the plantar flexion and a 17 percent impairment in the left lower extremity for ankylosis in the plantar flexion. He opined that the date of maximum medical improvement was May 1, 2006.

The record contains a report of a new patient consultation dated August 22, 2006 from Dr. Dan E. Jones, a podiatrist. On examination, Dr. Jones found that range of motion in the left ankle was 4 to 102 degrees. At the right ankle, appellant was fused at approximately 17 degrees of plantar flexion. Dr. Jones agreed with Dr. Strain's July 21, 2006 report, in which he opined that appellant had a 17 percent impairment of each lower extremity.

By decision dated January 11, 2007, the Office granted appellant a schedule award for an additional 10 percent impairment of his left lower extremity. The period of the award was from May 1 through November 18, 2006. The Office found that the date of maximum medical improvement was May 1, 2006.[1]

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[4] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[5]

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from his physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or

[1] Following the Office's January 11, 2007 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). The Board notes that the record does not contain a final decision regarding appellant's request for an increased schedule award for his right lower extremity. Therefore, the Board does not have jurisdiction over the merits of this issue. *See* 20 C.F.R. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case).

[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.404.

[4] 5 U.S.C. § 8107(c)(19).

[5] *See supra* note 3.

disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[6]

Proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[7] Once the Office has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible.[8] The Office has an obligation to see that justice is done.[9] The Board has stated that, when the Office selects a physician for an opinion on causal relationship, it has an obligation to secure, if necessary, clarification of the physician's report and to have a proper evaluation made.[10] Where the Office referred appellant for a second opinion physician and the report did not adequately address the relevant issues, the Office should secure a report on the relevant issues.[11]

ANALYSIS

The Board finds that the case is not in posture for decision. Further development of the medical evidence is necessary to determine whether appellant has more than a 39 percent left lower extremity impairment.

Based upon Dr. Bowers' May 1, 2006 report, the medical adviser opined that appellant was entitled to a schedule award for an additional 10 percent impairment of his left lower extremity. He referred to page 542 of the A.M.A., *Guides*, which provides that the ankylosis in a neutral position constitutes a 10 percent impairment of the lower extremity. Noting that the 1996 schedule award was given for impairment to appellant's left lower extremity due to loss of motion in the ankle, the medical adviser explained that the present award represented an additional impairment, as it related to the 2005 triple arthrodesis procedure. The Board notes that Table 17-2 of the A.M.A., *Guides*, the Cross-Usage Chart, permits the combination of impairment ratings for range of motion and ankylosis.[12] However, the medical adviser did not explain the basis for his reliance on the provisions of the A.M.A., *Guides* contained on page 542, to the exclusion of all other provisions, to calculate appellant's impairment due to ankylosis.

Dr. Strain stated that appellant was fused on the left at approximately 16 degrees of plantar flexion. Referring to the fifth edition of the A.M.A., *Guides*, he opined that appellant had a 17 percent impairment in the left lower extremity for ankylosis in the plantar flexion. It

[6] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

[7] *John J. Carlone*, 41 ECAB 354, 359-60 (1989).

[8] *Edward Schoening*, 41 ECAB 277, 282 (1989).

[9] *Lourdes Davila*, 45 ECAB 139, 143 (1993).

[10] *Steven P. Anderson*, 51 ECAB 525, 534 (2000).

[11] *Robert Kirby*, 51 ECAB 474, 476 (2000).

[12] A.M.A., *Guides* 526, Table 17-2.

appears that Dr. Strain was referring to Table 17-24 at page 541 of the A.M.A., *Guides*, which addresses ankle impairment due to ankylosis in plantar flexion or dorsiflexion. Pursuant to Table 17-24, a measurement of plantar flexion between 10 and 19 degrees results in a 17 percent impairment rating.[13] However, Dr. Strain did not explain why he relied on Table 17-24 nor has he or the Office provided an explanation in the record why his opinion differed from that of the Office medical adviser.[14]

Due to the noted deficiencies in the medical evidence of record to clearly support the schedule award approved by the Office, the Board finds that the case requires further development by the Office to obtain clarification of the medical evidence.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should undertake further development of the record to determine the degree of left lower extremity impairment.

[13] *Id.* at 541, Table 17-24.

[14] The Board notes that Dr. Jones' August 22, 2006 report does not contain a finding as to the degree of fusion on appellant's left side or an explanation as to how he arrived at his impairment rating. Therefore, his report is of limited probative value.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: March 26, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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