United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket Nos. 09-981 & 09-1009**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Pekin, IL, Employer	)	**Issued: December 10, 2009**

Appearances:
James D. Muirhead, 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 6 and 10, 2009 appellant timely appealed the January 5, 2009 merit decisions of the Office of Workers' Compensation Programs, which denied an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has greater than one percent impairment of the left lower extremity.

FACTUAL HISTORY

Appellant, a 40-year-old correctional officer, sustained multiple injuries in the performance of duty dating back to July 26, 1996 when he fell to the floor from a height of approximately 16 feet. The Office accepted the 1996 injury (File No. xxxxxx657) for acute lumbar strain and right thumb abrasion. On January 18, 1997 appellant reinjured his back in a lifting incident. The Office accepted his 1997 injury (File No. xxxxxx339) for lumbar strain,

lumbar myositis and lumbar vertebral fracture. Appellant later sustained employment-related injuries to his left lower extremity. On March 30, 2000 he tore the gastrocnemius muscle in his left calf while descending stairs (File No. xxxxxx818). On September 12, 2000 appellant injured his left foot/ankle while exiting a motor vehicle. The Office accepted this latest claim (File No. xxxxxx374) for left acute retro-calcaneal bursitis and left heel spur excision, which he underwent on April 18, 2001.[1] Appellant underwent a second left foot surgical procedure on December 3, 2003.

In November 2007, appellant filed schedule awards for both his back and left lower extremity injuries.[2] In a report dated July 12, 2007, Dr. Nicholas Diamond, a pain management specialist, found 30 percent impairment of the left lower extremity due to muscle weakness and pain.[3] The overall rating included separate components for Grade 4 motor strength deficits involving the left gastrocnemius (17 percent) and left ankle (12 percent). Dr. Diamond also found an additional three percent impairment for pain. He attributed appellant's impairment to a combination of back and lower extremity injuries he sustained between July 1996 and September 2000.

With respect to appellant's back injury (File No. xxxxxx339), the district medical adviser (DMA), Dr. David H. Garelick, reviewed the record, including Dr. Diamond's July 12, 2007 report and found zero impairment of both the left and right lower extremities.[4] In his December 10, 2007 report, Dr. Garelick explained that there was no objective evidence implicating appellant's lumbar spine condition as the cause for his residual lower extremity weakness. He further explained that the residual weakness was probably secondary to pain associated with appellant's left foot and ankle condition rather than overt muscle weakness. Dr. Garelick was unaware that appellant's left foot condition had been accepted as employment related.

Another DMA, Dr. Robert W. Wysocki, reviewed the case file with respect to appellant's claim for a schedule award for his accepted left lower extremity injury (File No. xxxxxx818). He too authored a report dated December 10, 2007. Dr. Wysocki found one percent impairment of the left lower extremity due to sensory deficit involving the sural nerve. According to him, there was zero left lower extremity impairment for decreased range of motion in the ankle. Dr. Wysocki further explained that it was inappropriate to rate muscle weakness in the presence of pain.

In a decision dated December 18, 2007, the Office denied a schedule award with respect to appellant's January 18, 1997 back injury (File No. xxxxxx339). But in a separate decision dated January 2, 2008, it granted him a schedule award for one percent impairment of the left

[1] The four above-noted claims have been combined under master file number xxxxxx374.

[2] The two schedule award claims were separately adjudicated because the respective case records had yet to be combined.

[3] The original copy of the report did not include a signature page so the author was incorrectly identified as Dr. David Weiss; one of several physicians whose name appeared on the report's first-page letterhead.

[4] Dr. Garelick is a Board-certified orthopedic surgeon.

lower extremity as a result of his September 12, 2000 left foot injury (File No. xxxxxx374).[5] Appellant requested a review of the written record with respect to both schedule award decisions.

By decision dated May 23, 2008, the hearing representative set aside the Office's December 18, 2007 decision and remanded the case for further development. The hearing representative noted, among other things, that the DMA, Dr. Garelick, was unaware that appellant had an accepted left lower extremity condition. The case was remanded to the Office with instructions to combine appellant's various back and lower extremity claim files. The hearing representative also instructed the Office to prepare a comprehensive statement of accepted facts and refer appellant together with his combined case record to an appropriate medical specialist for a second opinion examination.[6] In a separate decision dated July 7, 2008, the Branch of Hearings & Review applied a similar rationale in setting aside the Office's January 2, 2008 schedule award.

On remand, the Office twice scheduled appellant for a second opinion examination. Appellant, however, missed both appointments.

On September 11, 2008 the Office issued two separate decisions (File Nos. xxxxxx339 and xxxxxx374) denying a schedule award in excess of the prior award of one percent impairment of the left lower extremity.

On September 29, 2008 appellant's counsel requested reconsideration of the September 11, 2008 decisions. He explained that appellant was unable to attend a second opinion examination because he had recently undergone a heart transplant. Counsel also submitted a supplemental report from Dr. Diamond dated August 8, 2008, who explained that, due to left lumbar radicular symptoms and left foot and ankle pain, appellant developed an altered gait, which lead to weakness in the muscles of the left lower extremity as previously identified in his July 12, 2007 report.

The Office referred Dr. Diamond's latest report to its medical adviser, Dr. Amon Ferry. In a report dated December 10, 2008, Dr. Ferry concurred with Dr. Wysocki's December 10, 2007 rating of one percent impairment of the left lower extremity. He explained that the decreased strength Dr. Diamond identified was related to painful ankle motion. Dr. Ferry further explained that, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximal force in the region being evaluated.

In two separate decisions, both dated January 5, 2009, the Office found that appellant was not entitled to an increased schedule award for either his back or left lower extremity employment injuries. It based its decisions on Dr. Ferry's December 10, 2008 report.

[5] The January 2, 2008 schedule award covered 2.88 weeks.

[6] The hearing representative was aware that appellant had received an award for one percent impairment of the left lower extremity under claim file number xxxxxx374.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[7] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[8] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[9]

ANALYSIS

Appellant's counsel argues that the Board should award 30 percent impairment of the left lower extremity based on Dr. Diamond's reports. The Office awarded one percent impairment based on a Grade 3 pain and sensory deficit in the distribution of the left sural nerve.[10] The Board finds that appellant failed to establish greater than one percent impairment of the left lower extremity.

Dr. Diamond's July 12, 2007 and August 8, 2008 reports are insufficient to establish 30 percent impairment of the left lower extremity. Dr. Ferry, like Dr. Wysocki before him, correctly explained that Dr. Diamond's impairment rating due to muscle weakness was inappropriate because of reported pain in appellant's left ankle. According to the A.M.A., *Guides*, "[d]ecreased strength *cannot* be rated in the presence of decreased motion, painful conditions, deformities or absence of parts ... that prevent effective application of maximal force in the region being evaluated."[11] Dr. Diamond's July 12, 2007 examination results revealed essentially normal range of motion in the left ankle, but he noted that "[a]ll ranges of motion [were] carried through with pain at the extremes." He also noted that appellant admitted to left heel and foot pain and stiffness on a daily basis that waxed and waned. Because of the presence of pain, Dr. Diamond's impairment rating for muscle weakness involving left ankle plantar flexion and dorsiflexion was clearly inappropriate.[12] Furthermore, he failed to justify his

[7] For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2006).

[8] 20 C.F.R. § 10.404.

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

[10] *See* Table 16-10, A.M.A., *Guides* 482 and Table 17-37, A.M.A., *Guides* 552. The one percent impairment was derived by multiplying the Grade 3 sensory deficit (43 percent) by the maximum lower extremity sensory deficit involving the sural nerve (2 percent).

[11] Section 16.8a, A.M.A., *Guides* 508.

[12] *Id.*

additional three percent rating for pain.[13] Accordingly, the Office properly declined to grant an increased schedule award based on Dr. Diamond's opinion.

CONCLUSION

Appellant has not established that he has greater than one percent impairment of the left lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 10, 2009
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

[13] The A.M.A., *Guides* limit the circumstances under which a pain-related impairment may be assessed under Chapter 18. If an impairment can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*, such as Chapters 13, 16 and 17, then pain-related impairments should not be assessed using Chapter 18. *See* section 18.3b, A.M.A., *Guides* 571. The A.M.A., *Guides* provide for an incremental adjustment of up to three percent for pain when the conventional rating system does not adequately encompass the burden of the individuals condition. Where the pain-related impairment appears to increase the burden of the individual's condition "slightly," the physician can increase the percentage found under the conventional rating system by up to three percent. *See id.* at 573; Figure 18-1, A.M.A., *Guides* 574.