United States Department of Labor
Employees' Compensation Appeals Board

C.S. (deceased), Appellant	)	
and	)	
DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Cleveland, OH, Employer	)	**Docket No. 08-1783** **Issued: February 2, 2009**

Appearances:
Alan J. Shapiro, 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 June 10, 2008 the employee timely appealed the April 21, 2008 merit decision of the Office of Workers' Compensation Programs, which denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the employee had sustained a permanent impairment as a result of his November 19, 1993 employment-related right ankle injury.

FACTUAL HISTORY

The employee, now deceased, injured his right lower extremity on November 19, 1993 when a female custodial worker struck him with a cleaning cart as he entered an elevator.[1] After a three-week absence, the employee returned to his regular duties. The Office initially accepted the claim for right ankle sprain.

On October 21, 1994 the employee filed a claim for a schedule award (Form CA-7). His physician, Dr. William R. Bohl, a Board-certified orthopedic surgeon, saw him on January 25, 1995 and diagnosed right anterior tibial spur.[2] He recommended Achilles tendon stretching exercise and if unsuccessful, then arthroscopic surgery to remove the spur. Dr. Bohl indicated there was a probability of improved ankle motion and, therefore, it was inappropriate at that time to make a statement of maximum medical improvement. Given his opinion regarding possible improvement of the employee's right ankle condition, the Office medical adviser indicated that a schedule award was premature. By letter dated May 4, 1995, the Office advised the employee to postpone his pursuit of a schedule award until all medical treatment had been exhausted. On May 22, 1995 Dr. Bohl advised the Office that the employee's right ankle pain had increased over the past few months and that he was currently awaiting authorization for surgery.

On September 25, 1995 the Office informed the employee that his claim was expanded to include anterior tibial spur as an accepted condition. It also authorized the right ankle arthroscopic surgery Dr. Bohl had recommended. That same day, the Office issued a formal decision denying the employee's claim for a schedule award. The September 25, 1995 decision explained that the schedule award was denied because the employee had not yet reached maximum medical improvement. This decision was affirmed on appeal.[3]

In December 2000, after more than two and a half years of inactivity, the employee contacted the Office regarding his claim. He indicated he was seeking compensation for his injuries, including lost time and medical expenses. The employee asked that his case file be retrieved from the Federal Records Center. He made a similar request on April 6, 2001. In early 2002, the Office retrieved the employee's file as requested. But it was subsequently returned to the Federal Records Center due to inactivity.

On July 1, 2003 the employee filed a claim for a schedule award.[4] In support of his claim, the employee submitted a June 14, 2002 attending physician's report (Form CA-20) from

---

[1] Appellant was employed as a lead fiscal accountant. He died on February 29, 2004 due to metastatic gastric carcinoma. Appellant was 47 years old at the time of death. He was survived by his spouse, Sandra J. Smith and three daughters, ages 25, 21 and 19.

[2] Dr. Bohl first treated appellant on November 24, 1993; just a few days after his employment-related right ankle injury.

[3] Docket No. 96-1846 (July 2, 1998). The Board also affirmed an April 30, 1996 decision by the Branch of Hearings and Review that found appellant had abandoned his request for an oral hearing. The Board's July 2, 1998 decision is incorporated herein by reference.

[4] Appellant listed his wife, Sandra, and daughters Amanda (age 20) and Samantha age 18 as dependents.

Dr. Bohl, who had examined him on June 5, 2002.[5] Dr. Bohl diagnosed a small anterior tibial spur on the right ankle. The report identified November 19, 1993 as the date of injury. Regarding the history of injury, Dr. Bohl indicated that the employee injured his right ankle and foot when a "cleaning cart hit him." While he noted there was no history or evidence of concurrent or preexisting injury or disease, he did not respond to the forms report question: "Do you believe the condition found was caused or aggravated by an employment activity?" Dr. Bohl also left those blank sections of the report regarding disability.[6] There was no indication from Dr. Bohl's latest report that the employee had undergone the previously recommended surgery. In fact, the only treatment the employee reportedly received was "stretching exercises."

On April 12, 2004 the employee's counsel advised the Office that his client had died on February 29, 2004 due to causes unrelated to his accepted employment injury. Counsel further noted that there was a pending schedule award claim that he intended to pursue on behalf of the employee's surviving dependent spouse.[7]

By decision dated March 20, 2007, the Office found that the medical evidence did not support entitlement to a schedule award. It noted that Dr. Bohl's latest report, dated June 14, 2002, did not assess any permanent partial impairment nor did he indicate the employee had reached maximum medical improvement. An Office hearing representative affirmed the denial by decision dated October 16, 2007.[8]

Counsel filed a request for reconsideration on November 24, 2007. The request was accompanied by a November 16, 2007 report from Dr. Bohl. Dr. Bohl noted that he had been requested to provide an assessment of permanent partial disability as of June 5, 2002; the date he last examined the employee "regarding injuries he sustained to his right ankle and foot at work … on [November 19, 1993.]" Dr. Bohl indicated that he first examined the employee approximately five days after his employment injury, at which time he diagnosed posterior deltoid sprain and abrasion of the Achilles tendon. The employee reported that a cart had run over the back of his heel at work. Dr. Bohl noted that he referred the employee to physical therapy, but the employee continued to experience pain over the area of the Achilles tendon. He then prescribed a heel-lift. Dr. Bohl continued to follow the employee intermittently until May 9, 1995, at which time he recommended arthroscopic surgery. He indicated that the employee scheduled the surgery, but later cancelled. Dr. Bohl next saw the employee on June 5, 2002 and he was still complaining of pain in the right ankle both anteriorly and posteriorly, which was worse with squats or lots of walking. That was the last time Dr. Bohl examined the employee. On physical examination, there was 30 degrees of ankle flexion, 0 degrees extension, 15 degrees inversion and 0 degrees eversion. Dr. Bohl stated that presumably the employee had

[5] This report was initially submitted to the Office in November 2002.

[6] In the "Remarks" section of the report, Dr. Bohl noted that appellant was not told to take off from work.

[7] Appellant also submitted written authorization from appellant's surviving spouse.

[8] Citing Board precedent, the hearing representative found that a posthumous schedule award would otherwise be permissible given that the claim was pending when appellant died due to circumstances unrelated to his accepted employment injury.

reached maximum medical improvement from his injuries by that time. He did not document any muscle atrophy or weakness. However, Dr. Bohl noted there was a degree of permanent partial impairment based on "loss of motion in [the] right ankle as a result of [the employee's] industrial injuries." While there was no impairment due to plantar flexion, the limitations with respect to extension, inversion and eversion represented a whole body impairment of five percent.

On March 4, 2008 the Office medical adviser reviewed the record and found 11 percent impairment of the right lower extremity. He relied on Dr. Bohl's right ankle range of motion measurements and essentially converted the noted whole body impairment into lower extremity impairment. The Office medical adviser calculated 0 percent impairment for 30 degrees plantar flexion, 7 percent impairment for 0 degrees dorsiflexion, 2 percent impairment for 15 degrees inversion and 2 percent impairment for 0 degrees eversion, for a total of 11 percent impairment of the right lower extremity. He indicated that the employee had reached maximum medical impairment as of June 5, 2002; the date Dr. Bohl last examined the employee.

By decision dated April 21, 2008, the Office denied modification of the hearing representative's October 16, 2007 decision. It questioned Dr. Bohl's and its own medical adviser's opinion because there was no indication that the "impairment [was] a result of the work injury sustained on [November 19, 1993.]" The senior claims examiner noted there was a seven-year gap between the last two dates Dr. Bohl examined the employee. She further noted that the file was "devoid of any information either for or against any intervening injuries that may have occurred during this interval." The senior claims examiner also stated that "bridging factual and medical evidence would be a crucial element of this case." Furthermore, she found noteworthy the fact that the death certificate indicated the employee had been working as a car hauler in the transportation industry prior to his death. Lastly, the Office questioned whether Dr. Bohl actually took the range of motion measurements he referenced in his November 16, 2007 narrative report.

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.[9] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[10] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[11]

[9] For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2000).

[10] 20 C.F.R. § 10.404 (2008).

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

ANALYSIS

The evidence of record indicates that prior to his death the employee had an 11 percent permanent impairment of the right lower extremity. Both Dr. Bohl and the Office medical adviser found impairment due to loss of motion in the right ankle. Whereas Dr. Bohl calculated whole body impairment, the Office medical adviser properly converted Dr. Bohl's right ankle range of motion measurements into a lower extremity impairment rating. The Board does not share the Office's skepticism about the authenticity of Dr. Bohl's range of motion measurements.[12] Dr. Bohl treated the employee from the outset and consistently diagnosed employment-related right ankle anterior tibial spur. Moreover, there is no factual information or medical evidence suggesting an intervening injury. The mere passage of time and the possibility that something else may have occurred between May 1995 and June 2002 is not a reasonable basis for disregarding otherwise credible medical evidence. The Board further notes that the Office incorrectly stated there was "no indication that [the employee's] impairment [was] a result of the work injury." Dr. Bohl clearly indicated in his November 16, 2007 report that the employee's right ankle impairment was employment related. This is evident from the first sentence of the doctor's report.

Based on Dr. Bohl's reported physical findings, the Office medical adviser correctly found that 30 degrees of plantar flexion represented zero impairment of the right lower extremity under Table 17-11, A.M.A., *Guides* 537. Applying the same table, the Office medical adviser also correctly noted that zero degrees extension (dorsiflexion) represented seven percent impairment of the lower extremity. And under Table 17-12, A.M.A., *Guides* 537, 15 degrees inversion and 0 degrees eversion each represented two percent impairment of the lower extremity. When properly added, the employee's right lower extremity impairment due to loss of ankle motion totaled 11 percent. The Office medical adviser found the employee had reached maximum medical improvement as of June 5, 2002.

As the Office medical adviser's March 4, 2008 impairment rating is consistent with the A.M.A., *Guides* (5th ed. 2001), the Board finds that this represents the weight of the medical evidence regarding the extent of the employee's right lower extremity impairment attributable to his November 19, 1993 employment injury. Accordingly, the Board finds that the employee is entitled to a schedule award.

CONCLUSION

The evidence establishes that the employee had an 11 percent employment-related impairment of the right lower extremity.

[12] The Office compared the information included in Dr. Bohl's June 14, 2002 and November 16, 2007 reports. Because the earlier report did not include range of motion measurements, it stated "the actual treatment records would be necessary to show the physician actually took the measurements as shown on his [November 16, 2007] narrative report." While it is true Dr. Bohl's June 14, 2002 report did not include right ankle range of motion measurements, this is a preprinted attending physician's report (Form CA-20) that provides little room for detailed findings or analysis.

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2008 decision of the Office of Workers' Compensation Programs is reversed to find 11 percent impairment to the left leg. The case is remanded to the Office for further action consistent with this decision of the Board.

Issued: February 2, 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