United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 08-1882**
	)	**Issued: January 27, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Wilmington, DE, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 26, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated September 21, 2007 and March 20, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determinations in this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he has more than a 3 percent impairment of the right upper extremity and a 15 percent impairment of the right lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On October 26, 2001 appellant, then a 43-year-old postal clerk, sustained an employment-related right wrist sprain and right knee contusion and sprain when he tripped over a mail tub at work. He sustained a recurrence of disability on April 4, 2003 and underwent right knee arthroscopy on September 17, 2003.

On February 14, 2007 appellant filed a schedule award claim. In a November 16, 2006 report, Dr. Nicholas Diamond, an osteopath, provided examination findings and an impairment rating, who noted the history of injury, his review of medical records and appellant's complaints of daily right wrist and right knee and ankle pain. He stated that appellant reported difficulties with prolonged standing and prolonged walking. Physical examination of the right wrist demonstrated tenderness over the palmar aspect, normal range of motion and negative Tinel, Phalen, carpal compression, TFCC load, Watson and Finkelstein tests. Right hand grip strength was diminished. The right knee showed tenderness, diminished range of motion. Examination of the right ankle demonstrated normal range of motion. Motor strength in dorsiflexion and plantar flexion were rated 4+/5 and gastrocnemius and quadriceps musculature strength was 4 to 4+/5 on the right.

Dr. Diamond diagnosed post-traumatic right knee cystic lesion, status post diagnostic arthroscopy of the right knee, post-traumatic right wrist chronic strain and sprain and right and left foot plantar fasciitis. He advised that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[1] appellant had a 20 percent right upper extremity impairment due to loss of grip strength and a 3 percent pain-related impairment, for a total 23 percent right upper extremity impairment. Dr. Diamond found that appellant had a 12 percent right lower extremity impairment due to loss of quadriceps strength in knee extension, a 17 percent impairment due to loss of gastrocnemius strength, a 12 percent impairment due to loss of right ankle dorsiflexion and a 3 percent pain-related impairment. He combined the lower extremity impairments for a total 31 percent right lower extremity impairment.

On February 12, 2007 the Office referred the medical record to an Office medical adviser. The memorandum indicated that back and hip conditions were accepted as employment related. In a February 24, 2007 report, the Office medical adviser stated that maximum medical improvement was reached on November 16, 2006 and noted that a right upper extremity condition was not reported as accepted. He determined that, under the A.M.A., *Guides*, appellant had 12 percent impairment for quadriceps weakness and an additional 3 percent for pain for a total 15 percent impairment of the right lower extremity. On June 6, 2007 the Office again referred the record to the Office medical adviser, including the right wrist accepted condition. In a June 19, 2007 report, the Office medical adviser found that the weakness of the gastrocnemius, dorsiflexion and grip strength deficit could not be considered in the presence of a pain-related impairment. He agreed with Dr. Diamond's estimate that appellant had a three percent right upper extremity impairment due to pain.

By decision dated September 21, 2007, appellant was granted schedule awards for a 3 percent right upper extremity impairment and a 15 percent right lower extremity impairment, to run for 52.56 weeks from November 16, 2006 to November 18, 2007.

On October 3, 2007 appellant, through his attorney, requested a hearing. At the hearing, held on January 16, 2008, appellant testified that he was right-handed. He described the employment injury, the subsequent knee surgery and the current condition of his right upper and

[1] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

lower extremities, stating that he had discomfort and was limited in daily activities because he had difficulty opening jars and doing some chores that required hammering. Appellant also testified that he did not think the pay rate used for his schedule award was correct. In March 20, 2008 decision, an Office hearing representative affirmed the September 21, 2007 schedule award decision but remanded the case to the Office on the issue of the applicable pay rate.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[2] and section 10.404 of the implementing federal regulations,[3] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[4] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[5]

It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[6] Office procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred ("date of maximum medical improvement"), describes the impairment in sufficient detail to include, 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 disturbance of sensation or other pertinent description of the impairment and the percentage of impairment should be computed in accordance with the fifth edition of the A.M.A., *Guides*. The procedures further provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for opinion concerning the nature and percentage of impairment and the Office medical adviser should provide rationale for the percentage of impairment specified.[7]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] A.M.A., *Guides*, *supra* note 1.

[5] *See Joseph Lawrence, Jr., supra* note 1; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[6] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(b-d) (August 2002).

figures and tables found in the A.M.A., *Guides*. However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.[8] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments[9] and Chapter 17 provides the framework for assessing lower extremity impairments.[10]

Section 18.3b provides that pain-related impairment should not be used if the condition can be adequately rated under another section of the A.M.A., *Guides*. Office procedures provide that, if the conventional impairment adequately encompasses the burden produced by pain, the formal impairment rating is determined by the appropriate section of the A.M.A., *Guides*. Section 18.3d provides guidance on how a pain-related impairment should be rated, noting that an award of up to three percent whole person impairment may be granted if pain increases the burden of the employee's condition.[11]

ANALYSIS

The Board finds that appellant does not have more than three percent right upper extremity impairment. On November 16, 2006 Dr. Diamond advised that appellant had a 20 percent impairment due to loss of grip strength. The A.M.A., *Guides* do not encourage the use of grip strength as an impairment rating because strength measurements are functional tests influenced by subjective factors that are difficult to control and the A.M.A., *Guides*, for the most part, is based on anatomic impairment. Only in rare cases should grip strength be used and only when it represents an impairing factor that has not been otherwise considered adequately.[12] It is the responsibility of the evaluating physician to explain in writing why a particular method in determining an impairment rating was chosen.[13] In this case, Dr. Diamond did not offer any explanation as to why loss of grip strength was the best method for determining the extent of impairment of appellant's right arm. Appellant therefore is not entitled to an impairment rating for diminished grip strength of the right upper extremity.

Both Dr. Diamond and the Office medical adviser agreed that appellant had a three percent impairment right upper extremity under Figure 18-1 of the A.M.A., *Guides*. The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain by using Chapter 18, which provides a qualitative method for evaluating impairment due to chronic pain.[14] If an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly, the examiner may increase the

[8] *Robert V. Disalvatore*, 54 ECAB 351 (2003).

[9] A.M.A., *Guides*, *supra* note 1 at 433-521.

[10] *Id*. at 523-564.

[11] *Id*. at 573, 588; *see Richard B. Myles*, 54 ECAB 379 (2003).

[12] *Id*. at 507; *Cerita J. Slusher*, 56 ECAB 532 (2005).

[13] *Tara L. Hein*, 56 ECAB 431 (2005).

[14] A.M.A., *Guides*, *supra* note 1 at 573.

percentage up to three percent[15] and a formal assessment must be performed in accordance with Chapter 18.[16] However, neither Dr. Diamond nor the Office medical adviser addressed why appellant's pain-related impairment could not be adequately addressed under Chapter 16. Consequently, there is no probative evidence showing that he had more than the three percent impairment of the right upper extremity.

Regarding the right lower extremity, Dr. Diamond advised that, under Table 17-8 of the A.M.A., *Guides*, appellant had a 12 percent right lower extremity impairment due to loss of quadriceps strength in knee extension, a 17 percent impairment due to loss of gastrocnemius strength and a 12 percent impairment due to loss of right ankle dorsiflexion. Table 17-8 provides guidance for rating impairments due to lower extremity weakness. Dr. Diamond found that appellant had a Grade 4 quadriceps strength rating for knee extension and thus, in accordance with Table 17-8, a 12 percent impairment due to knee extension weakness. However, he did not explain his award of a 17 percent impairment due to gastrocnemius weakness under Table 17-8 because he did not identify the muscle group involved. While Dr. Diamond identified a Grade 4 right ankle dorsiflexion for an additional 12 percent impairment, appellant's claim was not accepted for any employment-related ankle injury. It is well established that, in determining entitlement to a schedule award, preexisting impairment to the schedule member is to be included.[17] The record in this case, however, does not indicate that appellant had any preexisting ankle condition. Appellant therefore has not established that he is entitled to a 12 percent right lower extremity impairment for ankle dorsiflexion.

Again, both Dr. Diamond and the Office medical adviser found that appellant had a three percent pain-related impairment right lower extremity under Figure 18-1 of the A.M.A., *Guides*. As noted neither physician provided a formal pain-related impairment in accordance with Chapter 18. The evidence therefore does not establish that appellant is entitled to an increased right lower extremity award due to pain. Consequently, there is no probative evidence showing that he had more than a 15 percent impairment of the right lower extremity.

On appeal, appellant's attorney argues that a conflict in medical opinion exists between Dr. Diamond and the Office medical adviser. As noted Dr. Diamond's impairment evaluation was not made in accordance with the A.M.A., *Guides*. Similarly, the report of the medical adviser was not fully explained.[18] This reduces the medical evidence of reduced probative value.

CONCLUSION

The Board finds that appellant did not establish that he has more than a 3 percent impairment of the right upper extremity and a 15 percent impairment of the right lower extremity for which he received a schedule award.

[15] *T.H.*, 58 ECAB ____ (Docket No. 06-1500, issued January 31, 2007).

[16] *Supra* note 14.

[17] *Michael C. Milner*, 53 ECAB 446 (2002).

[18] *See Carl J. Cleary*, 57 ECAB 563 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 20, 2008 and September 21, 2007 are affirmed.[19]

Issued: January 27, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[19] The Board notes that the Office has not issued a final decision with regard to the schedule award pay rate. The Board has jurisdiction to consider and decide appeals from final decisions of the Office. There shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case. 20 C.F.R. § 501.2(c); *Jennifer A. Guillary*, 57 ECAB 485 (2005).