United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 10-1058**
	)	**Issued: December 22, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 8, 2010 appellant filed a timely appeal from a December 15, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's claim.

ISSUE

The issue is whether appellant established that he sustained greater than a 17 percent permanent impairment of his right great toe, for which he received a schedule award.

On appeal, appellant disputes the district medical adviser's impairment rating and the Office's reliance upon that rating.

FACTUAL HISTORY

On November 20, 2007 appellant, a 60-year-old mail processing equipment mechanic, filed a traumatic injury claim (Form CA-1) for a crushed big toe that he attributed to a November 15, 2007 incident when a forklift rolled over his right foot. The Office accepted appellant's claim for crushed right big toe and a fractured great toe hallux.

An x-ray report dated November 15, 2007 was interpreted by Dr. Steven Kruis, a Board-certified radiologist, as demonstrating a fracture of the distal phalanx of the first digit, with slight displacement of the fracture component and no dislocation.

On May 20, 2009 Dr. Darren P. Di Iulio, a podiatrist, presented findings on examination and diagnosed right hallux crush injury with some sensory deficiency. He reported that, while vibratory sensation was intact bilaterally, a Semmes-Weinstein monofilament test of the plantar aspect of the right side of the hallux revealed some sensory loss which extended to the plantar aspect of the metatarsophalangeal joint. In a follow-up note dated June 3, 2009, Dr. Di Iulio estimated appellant sustained 40 percent protective sensation loss on the plantar aspect of the hallux. He also diagnosed functional deficits in plantar flexion of the right hallux.

On August 18, 2009 appellant filed a schedule award claim (Form CA-7).

By letter dated August 20, 2009, the Office contacted Dr. Di Iulio concerning the neurological aspects of his reports and notes. It advised him that impairment ratings must be made pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). The Office also advised Dr. Di Iulio concerning the information it required concerning any neurological impairment rating he might provide.

On September 3, 2009 Dr. Di Iulio telephoned the Office and advised that he would not provide an impairment rating. He reported that he would advise appellant to see Dr. Robert A. Raines, who is Board-certified in orthopedic surgery, concerning the impairment rating.

By note dated September 21, 2009, Dr. Raines opined that appellant reached maximum medical improvement on September 16, 2009. He opined that appellant qualified for three different ratings. Citing the A.M.A., *Guides*,[1] Dr. Raines noted that appellant had less than 15 percent range of motion in his hallux and gave appellant a 1 percent whole person impairment rating. He gave appellant's plantar nerve sensory loss and dysesthesias a two percent impairment rating and gave appellant's peroneal nerve sensory loss and dysesthesias a one percent impairment rating. Dr. Raines opined that appellant sustained a combined five percent permanent whole person impairment.

The Office referred Dr. Raines' report for review by the district medical adviser who, on October 5, 2009, rejected Dr. Raines' impairment rating because it was a whole person impairment rating and also because it was not based on the sixth edition of the A.M.A., *Guides*. Citing the A.M.A., *Guides*,[2] the district medical adviser gave appellant a two percent lower extremity impairment rating for loss of interphalageal flexion. The district medical adviser made no additional rating for loss of peroneal sensation because he opined, such a loss did not "seem" compatible with the type of injury at issue here and, further, was inconsistent with Dr. Raines' findings on examination; namely, "intact sensory function to light touch and pin prick." The

[1] Dr. Raines cited Table 17-4 and Table 17-37. The Board notes that these tables are in the fifth edition of the A.M.A. *Guides*, not the sixth edition.

[2] The district medical adviser cited Table 16-19.

district medical adviser also disputed Dr. Raines' impairment rating by asserting that the sixth edition of the A.M.A., *Guides* provided no means of calculating an impairment rating for the digit in question.

By letter dated October 8, 2009, the Office contacted Dr. Raines concerning his impairment rating. After reviewing his impairment ratings and that provided by the district medical adviser, it requested that Dr. Raines provide a report containing an impairment rating determined under the sixth edition of the A.M.A., *Guides*.

On October 13, 2009 Dr. Raines agreed with the district medical adviser's two percent lower extremity impairment rating for loss of range of motion of the toe. However, he disputed the remainder of the district medical adviser's report and asserted that the medical evidence of record demonstrated that appellant also sustained nerve damage in the hallux region. Citing the A.M.A., *Guides*,[3] Dr. Raines opined that appellant had a Class 1 problem with his superficial peroneal nerve with complete sensory loss for which he gave a one percent impairment rating. Further, Dr. Raines opined that the medial plantar nerve lesion was also a Class 1 problem and represented a moderate sensory deficit for which he gave a two percent impairment rating. These additional impairments totaled three percent and when combined with the two percent impairment determined by the district medical adviser, produced a five percent total impairment.

The Office referred Dr. Raines' report for review by the district medical adviser. On November 3, 2009, citing the A.M.A., *Guides*,[4] the district medical adviser opined that Dr. Raines' impairment rating was improper because the sixth edition of the A.M.A., *Guides* did not permit combining range of motion ratings with those for peroneal nerve loss. The district medical adviser opined that appellant sustained a one percent impairment of his lower left extremity.[5]

The Office sought a clarifying opinion from the district medical adviser. On November 9, 2009 the district medical adviser opined that the proper rating was two percent lower extremity impairment, as appellant was entitled to the greater award if two different methods of rating were used.

On December 9, 2009 the district medical adviser amended his October 5, 2009 report. Citing the A.M.A., *Guides*,[6] he reported that a 2 percent permanent impairment of the lower extremity converted to a 17 percent permanent impairment of the great toe. Thus, for schedule award purposes, the proper impairment rating was 17 percent, not 2 percent.

By decision dated December 15, 2009, the Office granted appellant a schedule award for 17 percent permanent impairment of his right great toe. It found the weight of the medical

[3] Dr. Raines cited Table 16-12 on pages 534 and 536.

[4] The district medical adviser cited page 387.

[5] The district medical adviser cited Table 16-2 on page 505, Table 16-6 on page 516, and Table 16-7 on page 517.

[6] The district medical adviser cited Table 16-10 on page 530.

evidence with the district medical adviser because appellant's attending physician improperly applied the A.M.A., *Guides* in calculating the impairment rating.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[7] and its implementing regulations[8] 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, the Act does not specify the manner in which the percentage of loss should be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standards applicable to all claimants.[9] Office procedures direct that for impairment ratings calculated on and after May 1, 2009, the sixth edition of the A.M.A., *Guides* should be used to calculate impairment.[10]

The sixth edition of the A.M.A., *Guides*,[11] provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[12] Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).[13] The net adjustment formula is (GMFH-CDX) + (GMPE - CDX) + (GMCS- CDX).[14]

ANALYSIS

The Board finds that this case is not in posture for decision.

In the present case, the Office granted appellant a schedule award for 17 percent permanent impairment of his right great toe. This impairment rating was based upon the loss of motion, specifically loss of flexion of the great toe of 15 degrees, which was reported by Dr. Raines and which was properly rated by the Office medical adviser as a 2 percent lower extremity impairment or a 17 percent great toe impairment pursuant to Table 16-19 at page 549. The Board notes that the Office medical adviser properly noted that the range of motion

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id.* at § 10.404(a).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

[11] A.M.A., *Guides* (6th ed. 2008).

[12] *Id.* at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[13] *Id.* at 494-531.

[14] *Id*. at 521.

calculation stands alone, and will not be combined with other methods of evaluation, including diagnosis-based impairment.[15] If the range of motion impairment resulted in the greater impairment rating, this award would be proper. However, the Board notes that the Office in this case has not evaluated appellant's toe fracture as a diagnosis-based impairment. This is particularly important because a diagnosis-based impairment of the lower extremity can be combined with peripheral nerve impairment, if the diagnosis-based impairment does not already include the nerve impairment.[16]

Table 16-2, the Foot and Ankle Regional Grid,[17] which rates diagnosis-based impairments, provides that a fracture of the phalanx, which is either displaced or fragmented, is rated between a three to seven percent impairment of the lower extremity. Pursuant to Table 16-19, a 3 percent lower extremity impairment would be rated as a 25 percent impairment of the great toe, while a 7 percent impairment of the lower extremity would be rated as a 59 percent impairment of the great toe. The Board further notes that appellant's treating physician, Dr. Raines, identified significant peroneal and medial plantar nerve injuries. The Office medical adviser noted that the impairment value of these nerve injuries could not be combined with the impairment value for loss of range of motion. However, as the Board has previously noted peripheral nerve impairment values can be combined with diagnosis-based impairments, if the diagnosis-based impairment does not otherwise already rate the nerve injury. As none of the physicians of record, including the Office medical advisers, attempted to rate appellant's impairment pursuant to Table 16-2, nor did they offer an opinion as to whether appellant in fact has a peripheral nerve injury which should be combined with the rating for the diagnosis-based fracture, the Board is unable to adjudicate this schedule award without further development of the record.

On remand the Office should further develop the case as necessary to determine appellant's impairment pursuant to Table 16-2 of the A.M.A., *Guides*. The Office shall thereafter further evaluate whether appellant is entitled to an additional award for peripheral nerve injury.

CONCLUSION

The Board finds this case not in posture for decision.

[15] *See id*. at page 500.

[16] *See id*. at page 531.

[17] *Id*. at page 505.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: December 22, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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