United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 11-726**
	)	**Issued: October 14, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 25, 2011 appellant filed a timely appeal from a January 19, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established an employment-related permanent impairment to a scheduled member or function of the body under FECA.

FACTUAL HISTORY

On November 28, 2007 appellant, then a 28-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his left ankle walking down steps in the

[1] 5 U.S.C. § 8101 *et seq.*

performance of duty on November 28, 2007. OWCP accepted the claim for a left ankle sprain. Appellant received intermittent compensation for wage loss through April 21, 2008.

In a report dated January 13, 2010, Dr. Byrne Solberg, a physiatrist, diagnosed tarsal tunnel syndrome and lumbar radiculopathy. He stated that after reviewing a history and results on examination and review of a magnetic resonance imaging scan, he believed the diagnosed conditions were causally related to the employment injury. By report dated January 31, 2010, Dr. Daisy Rodriguez, an internist, provided a history and results on examination. She opined that appellant had a 14 percent left leg permanent impairment, based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*). Dr. Rodriguez found an 11 percent impairment for loss of ankle range of motion and 3 percent for tarsal tunnel syndrome.

Appellant was referred for a second opinion evaluation by Dr. Robert Smith, an orthopedic surgeon. In a report dated September 9, 2010, Dr. Smith provided a history and results on examination. He noted that a March 11, 2008 diagnostic study was negative for tarsal tunnel syndrome.[2] Dr. Smith diagnosed chronic left ankle strain. As to permanent impairment, he opined that under the A.M.A., *Guides* there was a two percent leg impairment for 10 degrees of ankle eversion. Dr. Smith noted that tarsal tunnel syndrome was not an accepted condition and since there was a normal EMG/NCV after the employment injury, he found there was no ratable impairment for this condition. In a report dated September 18, 2010, OWCP's medical adviser opined that appellant's left leg impairment was two percent.

OWCP found that a conflict in medical opinion arose regarding the nature and extent of an employment-related permanent impairment. Appellant was referred to Dr. E. Michal Okin, a Board-certified orthopedic surgeon selected as a referee physician. In a report dated November 23, 2010, Dr. Okin provided a history, results on examination (including left and right ankle range of motion) and review of medical records. With respect to tarsal tunnel syndrome, he stated, "I agree with Dr. Smith that he does not have a tarsal tunnel syndrome as a result of his ankle sprain. The EMG and [NCV] time performed concurrent with his injury was within normal limits." Dr. Okin noted that the electrophysiological study performed by Dr. Solberg on January 13, 2010, was more than two years after the initial injury, was interpreted as "delayed distal latency noted in the left medial plantar sural sensory nerve action potential." He stated that there was no such nerve as the medial plantar sural nerve, as the posterior tibial nerve divides into the medial and lateral plantar nerves in the region of Henry's knot. Dr. Okin further stated that "the symptomatology which the patient was complaining of is lateral plantar in the sense that he has numbness in distribution of his lateral two toes. There is no evidence of a lateral plantar nerve delay in conduction. In fact, the test done contemporaneously with his injury had no evidence of a tarsal tunnel syndrome."

Dr. Okin concluded that the only positive clinical finding was signs consistent with a peroneal tendon tendinitis on the left, "which is an acute problem and it is not entitled to a permanent impairment rating. [Appellant's] ankle sprain had resolved. He no longer has

[2] The record contains a March 11, 2008 electromyogram (EMG) and nerve conduction velocity (NCV) from Dr. William Wolfe, Board-certified in neurology.

evidence of an Achilles tend[i]nitis. Therefore, my recommendation would be that [appellant's] impairment rating for the left lower extremity be zero."

In a report dated January 12, 2011, OWCP's medical adviser reviewed the medical evidence of record. Its medical adviser noted the results on examination by Dr. Okin and concurred with the opinion that appellant had no employment-related ratable permanent impairment to the left leg.

By decision dated January 19, 2011, OWCP determined appellant was not entitled to a schedule award based on the weight of the medical evidence.

LEGAL PRECEDENT

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[3] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[4] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[5]

FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.[6] The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or OWCP's medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[7]

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[8]

[3] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[4] *A. George Lampo*, 45 ECAB 441 (1994).

[5] FECA Bulletin No. 09-03 (March 15, 2009).

[6] 5 U.S.C. § 8123.

[7] 20 C.F.R. § 10.321 (1999).

[8] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

ANALYSIS

A conflict of medical opinion arose between an attending physician, Dr. Rodriguez, and a second opinion physician, Dr. Smith, as to the nature and extent of employment-related permanent impairment to appellant's left leg under 5 U.S.C. § 8107. Dr. Rodriguez found that appellant had tarsal tunnel syndrome and a resulting left leg permanent impairment, as well as an impairment based on loss of range of motion for the ankle. Dr. Smith found that appellant did not have any employment-related tarsal tunnel and he provided different results for range of motion.

To resolve the conflict, OWCP appropriately referred appellant to a physician selected as a referee physician, Dr. Okin. In a November 23, 2010 report, Dr. Okin provided a detailed history and review of medical records, as well as results on physical examination. He clearly explained his opinion that there was no employment-related tarsal tunnel syndrome, noting the March 11, 2008 EMG/NCV, physical examination findings and the report of Dr. Solberg. The Board finds that Dr. Okin represents the weight of the evidence with respect to an employment-related permanent impairment based on tarsal tunnel syndrome.

With respect to an impairment based on loss of range of motion, however, Dr. Okin did not provide sufficient medical rationale. The Board notes that both Dr. Rodriguez and Dr. Smith had found an impairment for loss of range of motion in the left ankle. Dr. Okin's examination findings reported 30 degrees for plantar flexion, 5 degrees dorsiflexion, and 15 degrees for both inversion and eversion. Under the A.M.A., *Guides*, 5 degrees of dorsiflexion is a mild leg impairment (seven percent) according to Table 16-22[9] and 15 degrees inversion is a mild leg impairment (two percent) under Table 16-20.[10] It is not clear whether Dr. Okin was unaware that the range of motion would result in an impairment under these tables. He did not fully address whether he was finding no impairment because the left ankle motion ranges were the same as the right[11] or whether he felt that any loss of range of motion was not from an employment-related condition. Dr. Okin stated that the sprain had resolved without further discussion of the range of motion results. Since the prior physicians of record made findings attributing loss of range of motion in the left ankle as employment related, he must provide a rationalized medical opinion on the issue to resolve the conflict.

The case will be remanded to OWCP to secure a supplemental report from Dr. Okin that clarifies his opinion with respect to an employment-related permanent impairment based on loss of range of motion. After such further development as OWCP deems necessary, it should issue an appropriate decision.

[9] A.M.A., *Guides* 549, Table 16-22.

[10] *Id.*, Table 16-20.

[11] The A.M.A., *Guides* state that if the opposite extremity is uninjured, this may be used as a baseline for the individual and "adjust individual components accordingly." A.M.A., *Guides* 548.

CONCLUSION

The Board finds that the weight of the medical evidence does not establish an employment-related permanent impairment based on tarsal tunnel syndrome. The case is remanded for further clarification from the referee physician as to an impairment based on loss of range of motion.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 19, 2011 is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: October 14, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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