

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMUEL LEE RATCLIFF and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

*Docket No. 01-196; Submitted on the Record;
Issued March 6, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has more than a 17 percent impairment of his left foot for which he has received a schedule award.

On January 25, 1994 appellant filed a claim for traumatic injury. The Office of Workers' Compensation Programs accepted a January 17, 1994 left foot fracture, a February 1, 1994 left foot arthroplasty with joint replacement, a subsequent September 20, 1994 left foot surgery to remove an implant, a May 20, 1998 great toe debridement and fusion and a July 21, 1999 surgery to remove hardware in the left foot. The Office also accepted left foot post-traumatic arthritis.

On January 19, 1995 appellant filed a claim for a schedule award. On July 16, 1996 the Office awarded appellant a schedule award for a 7 percent impairment for the left foot.

In a medical report dated April 2, 1998, Dr. Glenn B. Pfeffer, a Board-certified orthopedic surgeon and a second opinion physician, stated that appellant was "not a good candidate ... for an artificial implant and his first two surgeries have caused more problem than benefit. At this time, [appellant] should have any remaining implant removed from his toe." He noted that fusion of the great toe metatarsophalangeal joint was possible if surgery was performed to remove the implant.

In a report dated June 2, 1998, Dr. Pfeffer stated that appellant was doing well after an operation was performed on May 20, 1998 due to "so much dead bone in his joint." He noted that he had taken a "specialized graft from [appellant's] hip and placed it into the empty shell of his normal toe joint." Dr. Pfeffer indicated that appellant had not reached maximum medical improvement.

In a report dated October 15, 1998, Dr. Pfeffer requested authorization for a computerized tomography (CT) scan to assess whether appellant's great toe fusion had healed. He also noted that appellant remained totally disabled.

On November 17, 1998 appellant filed a claim for a schedule award.

In a report dated November 17, 1998, Dr. Pfeffer stated that appellant's CT scan showed a successful fusion through the metatarsophalangeal joint. He noted that appellant's examination was normal and that he could return to work on January 2, 1999 with restrictions. Dr. Pfeffer reported findings based on a physical examination that day, noting some puffiness in appellant's left foot, tenderness over the scar, discomfort along the medial aspect of the foot with no evidence of nerve injury. He noted objective factors of improvement as no motion in the great left toe metatarsophalangeal joint and 0/20 degrees range of motion in the interphalangeal joint of the left great toe compared to 0/40 degrees of the right. Dr. Pfeffer stated that appellant had a 50 percent loss of motion of the interphalangeal joint of the left great toe. All other range of motion findings for ankle, subtalar and transverse tarsal joints were equal bilaterally. He noted that appellant's "subjective factors of disability include a slight intermittent pain in his left foot."

In a report dated December 31, 1998, Dr. Pfeffer noted that appellant had a slight intermittent pain in the left big toe; range of motion of the intermetatarsophalangeal joint of the affected great toe was 20 degrees versus 40 degrees of the unaffected toe; metatarsophalangeal joint of the affected great toe was 0, the unaffected toe was 50 degrees; and the range of motion for the joints of toes 2 to 5 were normal. He also noted that no weakness, atrophy or additional disabilities were found and noted that the date of maximum medical improvement was November 17, 1998. Appellant returned to work on January 4, 1999.

In a report dated February 23, 1999, Dr. Pfeffer stated that appellant was doing well with his left great toe with a well-healed joint fusion but that he was symptomatic with intermittent significant pain from irritation by the plate that Dr. Pfeffer used to fuse his toe. He recommended that the plate be removed and that appellant would be disabled for a month post-outpatient surgery.

In a report dated July 15, 1999, Dr. Pfeffer stated that appellant would be off work from July 21 to September 1999 "due to surgery on July 21, 1999."

In a report dated August 2, 1999, Dr. Pfeffer stated that he had performed surgery on appellant on July 21, 1999 that removed the deep hardware of the left great toe and that appellant remained totally disabled.

In a report dated August 23, 1999, Dr. Pfeffer stated that screws used in a prior fusion procedure backed out as the fusion healed, causing pain. Dr. Pfeffer removed the screws in a surgical procedure on July 21, 1999.

In a report dated September 7, 1999, Dr. Pfeffer stated that appellant was doing very well following the July 1999 surgery, but that he "still has some expected postoperative discomfort on the dorsum of his foot," but that in two months' time he will "become permanent and stationary. He can return to his job on September 20, 1999." Appellant returned to work on that date.

In a medical report dated November 9, 1999, Dr. Pfeffer stated that, although appellant returned to work, he "continued to have pain in his left great toe area" and "pain in his generalized joint area." He recommended additional work restrictions.

On December 29, 1999 the Office prepared a statement of accepted facts that included appellant's work-related January 17, 1994 left foot fracture, a February 1, 1994 left foot surgery (arthroplasty with joint replacement) and a September 20, 1994 left foot implant removal. The Office noted that Dr. Pfeffer indicated on December 31, 1998 that appellant's date of maximum medical improvement was November 17, 1998 and that Dr. Simpson, the Office medical consultant, had reviewed appellant's schedule award claim previously and recommended a 7 percent impairment for the left foot. The Office did not address appellant's post-traumatic arthritis, or additional surgical procedures performed on May 20, 1998, for a great left toe debridement and fusion, or on July 21, 1999, for left foot hardware removal surgery.

In a medical report dated January 3, 2000, Dr. Simpson reviewed appellant's medical records and recommended an impairment award of 17 percent, noting that the date of maximum medical improvement was reached by November 17, 1998. Dr. Simpson noted that additional surgery was performed on May 20, 1998. He noted Dr. Pfeffer's report dated November 17, 1998, which referred to appellant's subjective complaints of slight intermittent pain in the big toe. Dr. Simpson noted that Dr. Pfeffer's range of motion findings of that date to determine that appellant had a 3 percent impairment for pain and 9 percent impairment for fusion which was a 12 percent impairment of the left lower extremity or a 17 percent impairment of the left foot. He noted that appellant's date of maximum medical improvement was November 17, 1998.

By decision dated January 19, 2000, the Office awarded appellant an additional 10 percent impairment for the left foot.

By letter dated February 16, 2000, appellant requested review of the written record.

In a decision dated July 20 and finalized on July 24, 2000, the hearing representative affirmed the Office's decision to award appellant an additional 10 percent impairment for his left foot.

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

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations² set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of body members listed in the schedule. The Act, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method for making such a determination rests in the sound discretion of the Office.³ The Office has adopted and the Board has approved, the use of the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment*,⁴ as an appropriate standard for evaluating schedule losses.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ *Daniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

⁴ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

In this case, the statement of accepted facts that the Office prepared and referred to the Office medical adviser for a determination of appellant's impairment rating was incomplete. It failed to address Dr. Pfeffer's reports after November 17, 1998, which include a February 23, 1999 report noting appellant's intermittent significant pain as a result of a surgical plate implant; the additional surgery performed on July 21, 1999 for removal of hardware of the left great toe, or the postsurgical reports in which Dr. Pfeffer addressed appellant's continuing symptoms of pain. Although Dr. Simpson graded appellant's pain as a maximal Grade III under the A.M.A., *Guides*, it appears that he relied on Dr. Pfeffer's November 17, 1998 report, which noted that "subjective factors of disability include a slight intermittent pain in his left foot." Not addressed are the postsurgical reports of 1999, which described appellant's pain in his left great toe area.

Dr. Simpson relied on an incomplete statement of accepted facts and noted a date of maximum medical improvement prior to the July 1999 surgery. Further, Dr. Pfeffer was not requested to provide a postsurgery physical evaluation of impairment. The Board finds that the Office's January 19, 2000 decision was not based on a complete and accurate medical record and will remand the case for further development. On remand, the Office should prepare a complete statement of accepted facts, including the July 1999 surgery, and refer appellant to Dr. Pfeffer for a new evaluation of permanent impairment, to be followed by a *de novo* decision.

The July 24 and January 19, 2000 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to the Office for further development consistent with this decision.

Dated, Washington, DC
March 6, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member