United States Department of Labor
Employees' Compensation Appeals Board

THEODORE L. ROTHWELL, Appellant	)	
and	)	**Docket No. 04-1515**
	)	**Issued: October 29, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Clementon, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On May 24, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated January 20, 2004. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award decision.

ISSUE

The issue is whether appellant has more than a one percent permanent impairment to his right and left feet.

FACTUAL HISTORY

Appellant, a 32-year-old warehouse worker, filed a Form CA-2 claim for benefits on July 11, 1997, alleging that he sustained a bilateral plantar fascitis condition causally related to factors of his employment. The Office accepted the claim for bilateral plantar fascitis and bilateral endoscopic plantar fasciotomies. Appellant underwent surgery on his right foot on October 2, 1998 and surgery for his left foot on March 12, 1999.

In a report dated December 10, 1999, Dr. Nicholas P. Diamond, a podiatrist, determined that appellant had a 27 percent impairment of the right and left lower extremities based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (the A.M.A., *Guides)* (fourth edition).

On August 24, 2000 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his right and left lower extremities.

The Office referred appellant for a second opinion examination with Dr. Gerald Packman, a Board-certified orthopedic surgeon, who submitted a report dated August 13, 2001. He stated:

> "In terms of activities of daily living, this gentleman has very minimal impairment. He does not use assistive devices and his gait for the shorter periods of walking that can be demonstrated in this office is not antalgic or asymmetric. Although he has bilateral problems with his feet, these problems are not additive because one does not ordinarily do prolonged standing or prolonged walking on one foot, but does this on both feet at the same time. It is also noted that this is not an unusual, chronic or regional pain syndrome, in the sense that there is a firm diagnosis treated surgically with some presumed alteration in foot mechanics, although this alteration is not easily identified. Therefore, as an individual with pain related to prolonged walking and standing related to plantar fascitis through the mechanical alterations of his surgical treatment, I find his whole person physical impairment to be two percent according to the fifth edition of the A.M.A., *Guides*."

In a supplemental report dated September 13, 2001, Dr. Packman determined that appellant had a one percent impairment to the right and left lower extremities. He stated:

> "Neither x-rays nor physical examination identify bony abnormality, loss of motion, loss of strength or muscle atrophy to provide an objective basis of judgment in this man. . . . the A.M.A., *Guides* impairment of 'gait derangement' seems to most suitably describe this man's major impairment even though it is a slight stretch to include prolonged standing as part of a gait derangement. The gait derangement in [appellant] is quite minimal to the point that one must extrapolate from Table 17.5 in the A.M.A., *Guides*. [Appellant's] derangement is less than the mild derangement listed in Table 17.5. The impairment is also essentially equal bilaterally and the history of the impairment is relatively equal bilaterally, and on that basis I find the gait derangement physical impairment of each lower extremity to be one percent with respect to each lower extremity."

Dr. Packman used the Combined Values Chart on pages 604-06 of the A.M.A., *Guides* to calculate a one percent impairment for both lower extremities.

The Office determined there was a conflict in the medical evidence between the impairment ratings of Drs. Diamond and Packman and it referred appellant, together with a statement of accepted facts and the case record, to Dr. Evan D. O'Brien, a Board-certified

orthopedic surgeon, for an impartial medical evaluation. In a report dated February 19, 2002, Dr. O'Brien determined that appellant had a one percent permanent impairment for loss of use of the right and left lower extremities. He stated:

> "Having reviewed Dr. Diamond's report and Dr. Packman's report, I am in general agreement with Dr. Packman's report. As I reviewed the A.M.A., *Guides*, I find no mention of lower extremity impairment related to plantar fascitis. My examination did not show any significant motor weakness as described by Dr. Diamond in his report dated December 10, 1999.
>
> "Dr. Packman noted that on page 529, there is a section on 'gait derangement,' 17.2c and Table 17.5 titled lower limb impairment due to gait derangement. There are mild, moderate and severe gait derangements. All of these gait derangements require the use of an assist device such as cane walker or wheelchair. Some of the gait derangements involve the use of an ankle foot orthosis. I agree with Dr. Packman that we could extrapolate the painful gait after prolonged standing to a one percent impairment for each lower extremity. The first paragraph of the second column on page 529 notes that 'the lower limb impairment percents shown in Table 17.5 stand alone and are not combined with any another impairment evaluation method.' Furthermore, on the second paragraph in the same column, it states 'section 17.2c does not apply to abnormalities based only on subjective factors such as pain or sudden giving-away, as with, for example, an individual with low back discomfort who chooses to use a cane to assist in walking.'
>
> "Based on this information, an argument could be made that no impairment rating is appropriate; however, I agree with Dr. Packman that plantar fascitis pain after prolonged standing does result in mild impairment. Using the gait derangement method, however, does not require adding the impairment of each lower extremity, as a whole person impairment is generated from Table 17.5. Therefore, I would extrapolate to a whole person impairment of two percent similar to Dr. Packman's final calculation."

In an impairment evaluation dated March 18, 2002, an Office medical adviser found that appellant had a one percent impairment of his left and right lower extremities based on the A.M.A., *Guides*, in accordance with the findings and conclusions of the impartial medical examiner, Dr. O'Brien.

On April 1, 2002 the Office granted appellant a schedule award for a 1 percent permanent impairment of the right and left feet for the period from February 19 to March 31, 2002 for a total of 5.76 weeks of compensation.

By letter dated April 4, 2002, appellant's attorney requested a hearing, which was held on October 22, 2003.

In a decision dated January 20, 2004, an Office hearing representative affirmed the April 1, 2002 Office decision and denied appellant's claim for a greater additional award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[1] set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[2] However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* fifth edition as the standard to be used for evaluating schedule losses.[3]

ANALYSIS

In this case, Dr. O'Brien, the impartial medical specialist, calculated a 1 percent impairment of appellant's right and left lower extremities based on gait derangement pursuant to section 17.2c and Table 17.5 of the A.M.A., *Guides*. Dr. O'Brien noted that Table 17.5 measured impairments based on mild, moderate and severe gait derangements, all of which required the use of an assist device. As appellant did not require such assistance of a gait device, Dr. O'Brien opined that he was only entitled to a minimal degree of impairment based on gait derangement. He noted that section 17.2c did not apply to abnormalities based only on subjective factors such as pain or sudden giving-away and that therefore appellant's impairment was difficult to calculate. Nevertheless, Dr. O'Brien, concurring with Dr. Packman, found that plantar fascitis pain after prolonged standing does result in mild permanent impairment.

While Dr. O'Brien concluded that appellant had a 2 percent whole person impairment, the Board has long held that a schedule award is not payable for an impairment of the whole person.[4] In reviewing the report of the impartial medical specialist, the Office medical adviser correctly concluded that appellant had not established an entitlement to a schedule award for gait impairment because Table 17.5 required use of an assist device. The impartial medical specialist and the Office medical adviser however offered rationale for a finding that appellant was entitled to a minimal impairment rating for pain due to his unratable gait impairment. The Office medical adviser adopted Dr. O'Brien's' findings and supported his rating of one percent impairment in the left and right lower extremities with rationale.

As there is no other probative medical evidence establishing that appellant sustained any additional permanent impairment, the Office properly found that appellant was not entitled to more than a one percent permanent impairment to his right and left feet.

[1] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[2] 5 U.S.C. § 8107(c)(19).

[3] 20 C.F.R. § 10.404.

[4] *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

CONCLUSION

The Board finds that appellant has no more than a one percent permanent impairment to his right and left feet.

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2004 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: October 29, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member