United States Department of Labor
Employees' Compensation Appeals Board

LEE BLACK, Appellant	)	
and	)	
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, OFFICE OF FAIR HOUSING & EQUAL OPPORTUNITY, Washington, DC, Employer	)	**Docket No. 05-218** **Issued: December 14, 2005**

Appearances:
Lee Black, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 26, 2004 appellant timely filed an appeal from a June 20, 2004 decision by the Office of Workers' Compensation Programs, which found that he was not entitled to an increased schedule award. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether appellant has established that he is entitled to an increased schedule award for permanent impairment of his feet.

FACTUAL HISTORY

The case has previously been on appeal.[1] In a December 4, 2000 decision, the Board noted that on August 25, 1997, the Office issued schedule awards for an 11 percent permanent impairment of the left arm, an 8 percent permanent impairment of the right leg and a 5 percent permanent impairment of the left leg. The Board found that appellant had not established that he had greater impairment. The Board also found that the Office had properly suspended appellant's compensation for obstruction of a medical examination directed by the Office. The Board remanded the case for a hearing on appellant's request for medical benefits to cover pain management.

In a September 17, 2002 report, Dr. Hampton Jackson, a Board-certified orthopedic surgeon, stated that appellant did not have diabetes and had no documentation that suggested that he ever had diabetes. His examination of appellant's feet showed traumatic arthritis and restrictions in the motion of the ankles, great toes and lesser toes. Dr. Jackson reported that appellant had ankle dorsiflexion of 20 degrees bilaterally, plantar flexion of 45 degrees bilaterally, ankle inversion of 20 degrees bilaterally and ankle eversion of 5 degrees bilaterally. In the great toe, he found dorsiflexion of 75 degrees bilaterally, plantar flexion of 20 degrees bilaterally. Dr. Jackson noted that appellant had metatarsal phalangeal joint motion of 75 degrees bilaterally. The interphangeal proximal joint had motion of 45 degrees bilaterally. Dr. Jackson stated that the left toes had metatarsal phalangeal joint flexion of 20 degrees in each direction and extension of 80 degrees in each direction. In the interphalangeal joints for the toes, he stated that appellant had flexion of 75 degrees in each direction and extension of 80 degrees in each direction. Dr. Jackson stated that appellant's loss of motion equaled 22 percent in the right leg and 17 percent in the left leg. He added 5 percent for the development of post-traumatic arthritis for each leg, which equaled a 27 percent permanent impairment of the right leg and a 22 percent permanent impairment of the left leg. Dr. Jackson stated that appellant reached maximum medical improvement as of May 24, 2001.

In a January 13, 2003 report, Dr. William A. Hanff commented that appellant had been referred to him for a second opinion examination to evaluate the impairment to appellant's feet. He stated that appellant did not have diabetes and noted that another physician indicated that appellant did not have diabetes. He reviewed the medical evidence of record and concurred with Dr. Jackson's conclusion that appellant had permanent impairments of 27 percent in the right leg and 24 percent in the left leg.

In a December 3, 2003 report, Dr. Willie E. Thompson, a Board-certified orthopedic surgeon, stated that the accepted condition on May 24, 2002 was bilateral metatarsalagia of the feet. Dr. Thompson reviewed Dr. Jackson's report. He indicated that the specific matter to be addressed was appellant's impairment for residuals of metatarsalgia, an inflammation of the heads of the metatarsals to the feet. He stated that the condition did not involve the hindfoot, the ankles or the toes, which Dr. Jackson had discussed in determining permanent impairment. Dr. Thompson stated that the only basis for a rating of impairment due to the injury or

[1] Docket Nos. 99-347 and 99-620 (issued December 4, 2000); Docket No. 91-1194 (issued December 24, 1991). The history of the case is contained in the prior appeal and is incorporated into this decision by reference. Appellant has appealed decisions in other claims to the Board which are not relevant to the current appeal.

impairment of the metatarsals would be based on forefoot deformity, primarily due to fractures and the residuals of fractures to the metatarsals. He opined that there was no basis for an impairment rating for the diagnosis of metatarsalgia in regard to loss of motion at the ankle, the hindfoot or the toes.

In a February 4, 2005 report, Dr. James V. Luck, a Board-certified family practitioner, noted that appellant's joints were mobile so the appropriate protocol to use were the tables for rating range of motion in the ankle, foot and toes. He stated that appellant's ankle motions were near normal and did not warrant any impairment rating. Dr. Luck stated that appellant's hindfoot eversion was limited to five degrees, which represented a three percent impairment of the foot or a two percent permanent impairment of the leg. He commented that appellant's toe motion was nearly normal and did not warrant an additional impairment rating. He indicated that x-rays of the feet showed that there was no arthritic degeneration. Dr. Luck noted that appellant had some small bone fragments at the lateral edge of the cuboid bilaterally that were not ratable under any of the diagnostic codes but might be ratable based on physical examination if there was associated pain or tenderness. He could not find documentation to support Dr. Jackson's impairment rating. He stated that the only ratable findings were for limited inversion of 20 degrees right and left, which equaled 3 percent of the foot or 2 percent of the leg and loss of eversion at 5 degrees ratable at 3 percent for the foot or 2 percent for both legs.

In a February 6, 2004 report, Dr. Paul Cooper, a Board-certified orthopedic surgeon, stated that x-rays showed a mild hallux valgus, on the left more than the right and osteoporosis around the metatarsal heads. He diagnosed longstanding metatarsalgia and sesamoiditis. He indicated that appellant had a moderately tight Achilles tendon complex. Dr. Cooper reported that appellant had a loss of 5 degrees of dorsiflexion in ankle joint and 40 degrees of plantar flexion. He indicated that the subtalar motion was seven degrees eversion and five degrees of inversion. He stated that metatarsalgia was due to the restricted range of motion in the ankle joint. Dr. Cooper pointed out that appellant's sensation was intact.

In a February 9, 2004 report, Dr. Sonya N. Bethel, a Board-certified family practitioner, noted that the Office had accepted appellant's claim for metatarsalagia in both feet, based on Dr. Hanff's report of May 24, 2001. She commented that the sequalae affecting his feet involved the forefoot, hindfoot, midfoot and ankles due to injury and chronic pain causally related to the April 2, 1978 employment injury and consequential conditions of his nerve deficits in the low back, based on the accepted injury of April 5, 1979. She noted that Dr. Cooper had reviewed appellant's condition and diagnosed equines contracture in the feet bilaterally with involvement of the long-standing metatarsalgia, the ankle and ankle motion deficits. She stated that appellant had a 10 percent permanent impairment for the right foot and 7 percent for the left foot due to arthritis and metatarsals, 10 percent bilaterally for ankle motion, 12 percent each bilaterally for nerve deficits at L4-5, and S1 and 5 percent for pain.

In a February 10, 2004 report, Dr. Richard G. Lee, a podiatrist, stated that appellant had 5 degrees of passive dorsiflexion in the right ankle and 10 degrees in the left ankle. He indicated that, because the ankle required at least 10 degrees of passive dorsiflexion during the gait cycle, the restricted motion could result in metatarsalagia secondary to increased, repetitive trauma to the forefoot during the contact phase of the gait cycle.

The Office referred appellant to Dr. David C. Johnson, a Board-certified orthopedic surgeon, for an examination and second opinion. In a February 26, 2004 report, Dr. Johnson stated that appellant walked without a limp but had pronation deformities of both feet with mild pes planus. He found tenderness beneath the sesamoids of both great toes and across the metatarsal heads. Dr. Jackson indicated that appellant had a very minimal hallux valgus bilaterally. He stated that appellant had a tightness of the Achilles tendons bilaterally with an inability to flex both ankles beyond about 90 degrees when the knees were straight and no more than 6 degrees when the knees were flexed. Dr. Jackson commented that this finding suggested equines contracture. He stated that flexion of both ankles was approximately 40 degrees. Dr. Jackson indicated that subtalar motion was seven degrees of eversion and five degrees of inversion for both hindfeet. He reported that mobility of the toes of both feet were normal and symmetrical. Dr. Jackson indicated that x-rays of both feet revealed no bony abnormality. He noted that there were no significant osteoarthritic changes in the midfoot but appellant had some minimal wear and tear changes in the first metatarsal phalangeal joint, consistent with appellant's age. Dr. Jackson saw no fractures of the sesamoids. He diagnosed metatarsalgia of both feet secondary to equines contracture and tightness of the Achilles tendon, unrelated to appellant's employment injuries. Dr. Jackson commented that appellant had preexisting degenerative disc disease of the cervical and lumbar spine. He stated that the work-related injuries appellant sustained 26 years prior might have caused a temporary aggravation of symptoms but subsequent x-rays and magnetic resonance imaging (MRI) scans had not revealed any significant evidence of specific trauma that could be attributed to those injuries. The x-rays and MRI scans more likely showed normal progression of the preexisting degenerative disc disease. Dr. Johnson stated that appellant's current symptoms were not related to the accepted injuries but was related to the normal progression of multilevel degenerative disc disease in the cervical and lumbar spines. He commented that, in relation to appellant's arms, electromyograms showed bilateral ulnar neuropathies. He could not attribute this condition to appellant's injuries because there was no evidence that appellant ever struck his elbows or had any symptoms referable to ulnar neuritis following the employment injuries. Dr. Johnson noted no significant evidence of radiculitis from the cervical spine. He indicated that his examination did not reveal ongoing cervical radiculitis or any evidence of ongoing lumbar radiculitis. He stated that appellant had some radiculitis due to degenerative disc disease but the physician did not attribute this to the 1978 or 1979 injury. Dr. Johnson concluded that appellant did not have any impairment rating to the legs or arms that could be attributed to his employment injuries. He noted that appellant injured his right foot in the 1978 employment injury but pointed out that the record did not contain any reference of foot pain until 1981, when the complaint involved the left foot. Dr. Johnson could not attribute any of appellant's left foot pain to the employment injury. He commented that appellant's main complaints have been metatarsalgia but that the impairment ratings based on loss of mobility of the ankle and subtalar joints had no relationship with the 1978 employment injury. Dr. Johnson stated that his examination and radiographic studies did not reveal any acute abnormality that could be attributed to a specific injury. He concluded that appellant's chronic metatarsalgia was related to causes other than the employment injury and that appellant was not entitled to an impairment rating of either foot due to the employment injury.

In a February 27, 2004 report, Dr. Luck reviewed the x-rays taken of both feet on February 3, 2004. He indicated that the left foot had pes planus, mild hallux valgus with some sclerosis of the subchondral cortex of the base of the proximal phalanx and ossification in the soft tissue over the lateral aspect of the cuboid. He noted that x-rays of the right foot had similar

findings of pes planus and a smaller ossific density opposite the lateral border of the cuboid. He stated that the hallux valgus was less on the right than on the left. Dr. Luck indicated that appellant had 9 degrees of dorsiflexion on the right ankle and 12 degrees dorsiflexion in the left ankle. He indicated that appellant had a seven percent permanent impairment of the right leg based on his calculations of appellant's range of motion. He commented that the left side was not ratable. He also noted that appellant's hallux valgus was relatively mild and not ratable. Dr. Luck stated that the ossific fragmentation opposite the lateral border of the cuboid was presently to some degree bilaterally and might be congenital. He indicated that the condition was not ratable but could be rated if associated with loss of range of motion or significant foot deformity. He noted that appellant's condition did not meet that requirement.

In a June 17, 2004 decision, the Office found that appellant's accepted foot condition of bilateral metatarsalgia did not cause any permanent impairment and that appellant had not established that the current diagnosed conditions of his feet and ankles were causally related to the 1978 employment injury and therefore was not entitled to increased schedule awards for these conditions.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] sets 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 shall be determined. For consistent results and to ensure equal justice under the law to 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[4]

Schedule awards are payable for permanent impairments caused by the accepted employment injury and preexisting impairments of the scheduled members.[5]

ANALYSIS

The Board notes that the only accepted condition of appellant's feet is metatarsalgia. Appellant would be entitled to a schedule award for a permanent impairment caused by this condition or due to a condition which preexisted the 1978 employment injury.

Dr. Jackson stated that appellant had a 27 percent permanent impairment of the right leg and a 22 percent permanent impairment of the left leg. However, as Dr. Luck pointed out,

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id*.

[5] *Peter C. Belkind,* 56 ECAB _____ (Docket No. 05-658, issued June 6, 2005).

Dr. Jackson used tables from the A.M.A., *Guides* that related to an ankylosis or fixed position of the ankle at various degrees. Dr. Jackson did not give any opinion on whether appellant's permanent impairment was causally related to his accepted employment injuries or was a condition which preexisted appellant's employment injury. His report is of diminished probative value and is insufficient to show that appellant had an increased permanent impairment due to his employment injuries. Dr. Hanff concurred with Dr. Jackson's report. His separate report therefore also has limited probative value.

Dr. Thompson stated that appellant's accepted condition was bilateral metatarsalgia of the feet. He noted that this condition did not involve the hindfoot, the ankles or the toes, which Dr. Jackson had rated in making his permanent impairment assessment. Dr. Thompson stated that the only basis for a rating of impairment due to an injury of the metatarsals would be based on forefoot deformity, primarily due to fractures of the metatarsals. He noted that appellant had no basis for an impairment rating for a diagnosis of metatarsalgia that would involve loss of motion in the ankle, hindfoot or toes.

Dr. Cooper, on the other hand, stated that appellant's metatarsalgia was due to the restricted motion of the ankle. In this case, the Office has not accepted any ankle injury. As Dr. Cooper did not provide an explanation on how appellant's impairment would be related to the accepted condition or preexisting conditions, his report is of limited probative value.

Dr. Bethel stated that the sequalae involving appellant's bilateral foot condition was the forefoot, midfoot, hindfoot and ankles for injury and chronic pain causally related to the employment injuries. Dr. Bethel offered an opinion, but did not support her opinion with any medical rationale explaining how the accepted bilateral metatargial condition would in fact cause sequalea. Her report therefore has limited probative value.

Dr. Lee indicated that the restricted motion in appellant's ankle could result in metatarsalgia secondary to increased, repetitive trauma to the forefoot during the contact phase of the gait cycle. He did not discuss, however, whether the loss of motion he described in appellant's ankles were causally related to the employment injuries. Dr. Lee's report therefore is also deficient in providing probative value to appellant's claim.

Dr. Johnson reviewed appellant's claim. He pointed out that appellant claimed to have injured his right foot in the 1978 employment injury but did not make any complaints about his feet until 1981 when he complained about his left foot. Dr. Johnson commented that any radiculitis appellant had was due to degenerative disc disease and not his employment injuries. He concluded that appellant's legs and arms did not have any permanent impairment that could be related to the employment injuries. Dr. Johnson therefore concluded that appellant was not entitled to any impairment rating of either leg due to appellant's employment injuries.

Appellant has not met his burden of proof to establish entitlement to an additional schedule award because he has not submitted evidence that his accepted bilateral metatargial foot condition caused a permanent impairment or that his other diagnosed feet conditions preexisted the employment injury or that his current conditions were caused by the employment injury.

CONCLUSION

Appellant did not meet his burden of proof in establishing that the medical condition of his feet was causally related to his employment injuries and therefore entitled him to an increased schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 17, 2004 is affirmed.

Issued: December 14, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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