United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
	)	
and	)	**Docket No. 06-668**
	)	**Issued: August 22, 2006**
DEPARTMENT OF THE TREASURY,	)	
INTERNAL REVENUE SERVICE,	)	
Bloomington, IL, Employer	)	
	)	

Appearances:
D.R., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 30, 2006 appellant filed a timely appeal from a November 21, 2005 merit decision of a hearing representative of the Office of Workers' Compensation Programs affirming a schedule award for the left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a 13 percent permanent impairment of the left lower extremity for which he received a schedule award.

FACTUAL HISTORY

On January 29, 1996 appellant, then a 49-year-old shipping clerk, filed a claim for an injury occurring on that date in the performance of duty. He did not stop work. The Office accepted the claim for periositis and fibrositis of the left foot and left lower limb mononeuritis.

On February 26, 2004 appellant filed a claim for a schedule award. By letter dated March 9, 2004, the Office requested that Dr. Carl J. Cortese, appellant's attending podiatrist, evaluate him to determine the extent of any permanent impairment of the left lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

In an impairment evaluation dated April 8, 2004, Dr. Cortese found that appellant had limited motion of the subtalar joint of the left foot due to pain and instability on uneven ground, a loss of dorsiflexion due to muscle weakness and pain in the subtalar joint on inversion and eversion. He determined that appellant had no loss of range of motion of the toes but had weakness of the extensor tendons and peronlateral tendon of the left foot. Regarding the left ankle, Dr. Cortese determined that appellant had a loss of function due to a painful talor dome of the left foot with limited range of motion due to tightness and decreased dorsiflexion on the left due to tightness of the Achilles tendon. He noted that appellant experienced significant pain radiating from the ankle joint up the lateral aspect of the lower leg with extensive walking or standing. Dr. Cortese measured range of motion of the ankle as five degrees of dorsiflexion and three degrees of eversion with the remaining measurements within normal limits. He further found that appellant had atrophy of the gastrocnemius, which was measured as 14 inches on the left as opposed to 14½ inches on the right. Dr. Cortese graded appellant's strength as 3/5 on the left and 5/5 on the right. He concluded that the date of maximum medical improvement (MMI) was "undetermined."

An Office medical adviser reviewed the report of Dr. Cortese on June 19, 2004.[1] He noted appellant's complaints of "intermittent sharp ankle pain with some instability on uneven ground." The Office medical adviser stated:

> "Physical exam[ination] demonstrates restriction of movement in his subtalar joint and five [degrees] of dorsiflexion and three [degrees] of eversion. Inversion was WNL [within normal limits]. He has a plantar grade foot and can walk without support. He uses regular shoewear without orthoses. Dorsiflexion is rated 3/5 for strength. [Appellant] has a normal neurovascular examination of his left foot."

He determined that appellant had a three percent impairment due to pain in the medial plantar nerve of the left foot and a three percent impairment due to pain in the lateral plantar nerve of the left foot according to Tables 16-10 and 17-37 on pages 482 and 552 of the A.M.A., *Guides*. Citing to Table 17-11 on page 537 of the A.M.A., *Guides*, the Office medical adviser further found that appellant sustained a five percent impairment due to loss of dorsiflexion and a two percent impairment due to loss of eversion. He utilized the Combined Values Chart and concluded that appellant had a 13 percent permanent impairment of the left lower extremity.[2]

[1] The Office medical adviser also indicated that he had reviewed a report of Dr. James Milgram, a Board-certified orthopedic surgeon. In a report dated October 19, 1999, Dr. Milgram discussed appellant's continued complaints of pain in his ankle and diagnosed a cystic region related to his January 1996 injury "without any other known joint trauma."

[2] A.M.A., *Guides* 604.

The Office medical adviser stated: "Date of MMI is set at January 29, 1997, which is one year from the date of injury. No documentation within the provided medical narrative is available to substantiate a later MMI."

By decision dated October 4, 2004, the Office issued appellant a schedule award for a 13 percent permanent impairment of the left lower extremity. The Office paid him compensation for 37.44 weeks from January 29 to October 18, 1997.

On October 20, 2004 appellant requested an oral hearing on his claim. At the hearing, held on July 14, 2005, he related that he believed that the schedule award was inadequate given his pain.

By decision dated November 21, 2005, the hearing representative affirmed the October 4, 2004 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing federal regulation,[4] 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 for all claimants, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.[5] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[6]

It is well established that the period covered by the schedule award commences on the date that the employee reaches MMI from the residuals of the accepted employment injury. The Board has explained that MMI means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician, which is accepted as definitive by the Office.[7]

ANALYSIS

The Office accepted that appellant sustained periositis and fibrositis of the left foot and left lower limb mononeuritis. He filed a claim for a schedule award on February 26, 2004. At the request of the Office, appellant's attending physician, Dr. Cortese, evaluated him to

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] 20 C.F.R. § 10.404(a).

[6] *See* FECA Bulletin No. 01-5, issued January 29, 2001.

[7] *Mark A. Holloway*, 55 ECAB ___ (Docket No. 03-2144, issued February 13, 2004).

determine the extent of his permanent impairment of the left lower extremity on April 8, 2004. He found that appellant had no loss of range of motion of the toes but measured range of motion of the left ankle as five degrees of dorsiflexion and three degrees eversion, with the remaining measurements within normal limits. Dr. Cortese noted that appellant experienced left foot pain and instability on uneven ground, significant pain radiating from the ankle into the lower leg with prolonged walking or standing and pain in the subtalar joint on inversion and eversion. He further found that appellant had gastrocnemius atrophy, measured as 14 inches on the left versus 14½ inches on the right and strength graded as 3/5 on the left and 5/5 on the right.[8] Dr. Cortese, however, did not apply the tables and pages of the A.M.A., *Guides* to his findings or provide a specific impairment determination.

An Office medical adviser reviewed Dr. Cortese's findings and determined that appellant had a three percent impairment due to pain in the medial planter nerve and a three percent impairment due to pain in the lateral plantar nerve according to Tables 16-10 and 17-37on pages 482 and 552 of the A.M.A., *Guides*. The Board notes that this would comport with the A.M.A., *Guides*, as a grade of 3 for pain would warrant a sensory deficit percentage of between 26 and 60 percent. The Board further notes that, if the maximum sensory deficit percentage of 60 is multiplied by 5, which is the impairment for the medial and lateral plantar nerves provided in Table 17-37 on pages 552, the result is a 3 percent for pain for each nerve. Combining the three percent for pain in the medial nerve and the three percent for pain in the lateral plantar nerve yields a six percent impairment due to sensory deficit.

The Office medical adviser further reviewed Dr. Cortese's findings of five degrees of dorsiflexion and three degrees of eversion and concluded that appellant had a five percent impairment due to loss of dorsiflexion and a two percent impairment due to loss of eversion pursuant to Table 17-11 on page 537 of the A.M.A., *Guides*. The Board notes, however, that five degrees of dorsiflexion constitutes a seven percent impairment. Adding the range of motion impairment findings as provided by the A.M.A., *Guides* yields a nine percent lower extremity impairment.[9] When combined with the 6 percent impairment due to pain, appellant's left lower extremity impairment totals 14 percent. The Board finds that the weight of the medical evidence establishes that appellant has a 14 percent left lower extremity impairment.

The Office medical adviser found that appellant reached MMI on January 29, 1997, one year after his injury, as "[n]o documentation within the provided medical narrative is available to substantiate a later MMI." The Office specified that the period of the schedule award ran from January 29 to October 18, 1997. It is well established that the period of a schedule award commences on the date that the employee reaches MMI from the residuals of the accepted employment injury. The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation

[8] The A.M.A., *Guides* at Table 17-2 on page 526 preclude combining atrophy with either sensory impairments or values for loss of range of motion. In this case, appellant would only be entitled to between a 3 and 8 percent impairment for atrophy according to Table 17-6 on page 530 and thus the Office medical adviser properly evaluated him according to loss of range of motion and sensory deficit. Additionally, the A.M.A., *Guides* provides that manual muscle testing is not applicable when the weakness has a "primary neurologic basis" and cannot be combined with range of motion losses. *See* A.M.A., *Guides*, Table 17-6 at 530; section 17.2e at 531.

[9] A.M.A., *Guides* 533.

by the attending physician which is accepted as definitive by the Office.[10] The Board has noted a reluctance to find a date of MMI which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits.[11] The Board, therefore, requires persuasive evidence of MMI for selection of a retroactive date of MMI.[12] In this case, Dr. Cortese found that the date of MMI was "undetermined." The Office medical adviser found that appellant reached MMI on January 29, 1997 as no evidence substantiated a later date; however, this falls short of providing the persuasive proof necessary to support a retroactive date of MMI.[13] The Board, therefore, finds that the period of the schedule award should commence on April 8, 2004, the date of the evaluation by Dr. Cortese which was accepted as definitive by the Office. The case will be remanded for the Office to determine whether the change in the date of commencement of the schedule award changes the pay rate applicable to the schedule award and to award appellant an additional one percent left lower extremity impairment.

CONCLUSION

The Board finds that appellant has a 14 percent permanent impairment of the left lower extremity.

[10] *Mark A. Holloway, supra* note 7.

[11] *James E. Earle*, 51 ECAB 567 (2000).

[12] *Id*.

[13] The Board further notes that appellant received treatment from Dr. Milgram in October 19, 1999, for pain in his ankle. Dr. Milgram diagnosed a cystic region due to his employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 21, 2005 is affirmed in part as modified and set aside in part and remanded for further proceedings consistent with this decision of the Board.

Issued: August 22, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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