United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 06-752**
	)	**Issued: September 7, 2006**
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:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 10, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 1, 2006 merit decision finding that he had no more than a 10 percent impairment of his left lower extremity. Pursuant to 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 met his burden of proof to establish that he has more than 10 percent impairment of his left leg for which he received a schedule award.

FACTUAL HISTORY

On March 21, 2001 appellant, then a 52-year-old postal carrier, filed a traumatic injury claim alleging that he fractured his left ankle when he fell at work on March 15, 2001. The Office accepted that he sustained a left ankle fracture and authorized an open reduction internal fixation operation which was performed on March 16, 2001. Appellant stopped work on

March 15, 2001 and returned to light-duty work in May 2001 and full-duty work in June 2001. On December 22, 2003 he filed a claim for a schedule award due to his accepted injury.

On March 11, 2004 Dr. George L. Rodriguez, an attending Board-certified physical medicine and rehabilitation physician, submitted an impairment evaluation based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). He stated that, based on Tables 17-11 and 17-12 of the A.M.A., *Guides*, appellant's left ankle dorsiflexion of zero degrees equaled a seven percent impairment and his left ankle eversion of five degrees equaled a two percent impairment. Dr. Rodriguez then added a 7 percent impairment rating for limited dorsiflexion with a 4 percent impairment rating for limited eversion[1] to total 11 percent impairment for loss of range of motion. Based on Tables 15-15 and 17-35, he graded appellant's sensory loss associated with the medial plantar nerve as Grade 3 and concluded that he had a 3 percent impairment of the left lower extremity for this sensory loss. Dr. Rodriguez then combined these impairment ratings to reach a total left leg impairment of 14 percent. He noted that appellant reached maximum medical improvement on October 5, 2001.

On October 10, 2004 the Office medical adviser reviewed appellant's medical records and determined that he had 10 percent impairment of the left leg based on a 7 percent impairment for limited dorsiflexion, a 2 percent impairment for limited eversion and a 1.25 percent impairment for sensory loss associated with the medial plantar nerve. He asserted that appellant had a Grade 4, rather than a Grade 3, sensory loss associated with the medial plantar nerve.

By decision dated November 2, 2004, the Office granted appellant a schedule award for a 10 percent permanent impairment of the left leg.

Appellant requested an oral hearing on November 8, 2004 and on June 15, 2005 the hearing representative remanded the case to the Office for further medical development. The hearing representative found that Dr. Rodriguez failed to explain why he provided a 4 percent impairment for eversion when the A.M.A., *Guides* provided for a 2 percent impairment for 5 degrees loss of eversion and why he rated appellant's loss of sensation at Grade 3. He also noted that the Office medical adviser did not explain why he disagreed with Dr. Rodriguez' Grade 3 classification.

On July 5, 2005 the Office referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion evaluation of his left leg impairment. In a report dated July 20, 2005, he stated that the only objective ratable finding in the ankle was one half inch (or 1/3 centimeter) atrophy of the left calf. He indicated that, findings for range of left ankle motion showed plantar flexion of 30 degrees and 15 degrees of dorsiflexion. Dr. Hanley indicated that, under Table 17-6 of the A.M.A., *Guides*, appellant's left calf muscle atrophy warranted an eight percent impairment of the left leg.

[1] Dr. Rodriguez did not explain why he assigned a four percent value for limited eversion, rather than a two percent value, when making this addition calculation.

The Office determined that there was a conflict in the medical evidence between Dr. Rodriguez and Dr. Hanley regarding appellant's left leg impairment. On September 7, 2005 it referred him to Dr. Maxwell Stepanuk, an osteopath and Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 11, 2005, Dr. Stepanuk indicated that appellant's left ankle motion upon palmar flexion, dorsiflexion, inversion and eversion was 10 degrees in each plane. He also found some weakness of the left ankle with strength of 3/5 and a left calf muscle atrophy of ½ centimeter. Dr. Stepanuk stated that, based on Tables 17-7 and 17-8 of the A.M.A., *Guides*, appellant had a seven percent impairment to the whole person based on flexion weakness and a five percent impairment to the whole person based on extension weakness. He noted that appellant's left ankle weakness was supported by his calf atrophy. Dr. Stepanuk concluded that he had a total impairment of the whole body of 12 percent.

On November 18, 2005 the Office medical adviser reviewed the impartial medical examiner's findings and determined that appellant had a nine percent left leg impairment. He stated that the A.M.A., *Guides* prohibits combining muscle atrophy with muscle strength or muscle weakness calculations. The Office medical adviser also noted that appellant's 10 degrees of plantar flexion and his 10 degrees of extension would result in a 7 percent impairment under Table 17-11 of the A.M.A., *Guides* and that loss of inversion/eversion of 10 degrees would result in a 2 percent impairment under Table 17-12. He indicated that combining these impairments under the Combined Values Chart yielded a total left leg impairment of nine percent. In a report dated January 6, 2006, the Office medical adviser provided a similar assessment of appellant's left leg impairment.

By decision dated February 1, 2006, the Office denied appellant's claim for an additional impairment rating of the left lower extremity. The Office noted that the medical evidence did not support an award greater than the 10 percent schedule award already granted.

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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[4]

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Id*.

Section 8123(a) of the Act provides in pertinent part: "If there is 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 an examination."[5] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[6]

In a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[7]

ANALYSIS

The Office accepted that appellant sustained an employment-related left ankle fracture and granted a schedule award for a 10 percent impairment of the left leg. The Office later found a conflict in the medical evidence between Dr. Rodriguez, an attending Board-certified orthopedic surgeon, who found a 14 percent impairment of the left leg and Dr. Hanley, a Board-certified orthopedic surgeon providing a second opinion, who found an 8 percent impairment of the left leg. The Office properly referred appellant to Dr. Stepanuk, an osteopath and Board-certified orthopedic surgeon, for an impartial medical examination and evaluation of his left leg impairment.[8]

In an October 11, 2005 report, Dr. Stepanuk indicated that appellant's left ankle motion upon palmar flexion, dorsiflexion, inversion and eversion was 10 degrees in each plane. He also found some weakness of the left ankle with strength of 3/5 and a left calf muscle atrophy of ½ centimeter. Dr. Stepanuk stated that, based on Tables 17-7 and 17-8 of the A.M.A., *Guides*, appellant had a seven percent impairment to the whole person based on flexion weakness and a five percent impairment to the whole person based on extension weakness.[9] However, he did not provide a clear explanation of how he arrived at his assessment of the extent of appellant's muscle weakness, nor did Dr. Stepanuk explain how the application of Tables 17-7 and 17-8 or other relevant portions of the A.M.A., *Guides*, would allow a calculation of muscle weakness impairment for the left leg.[10] In his November 18, 2005 and January 6, 2006 reports, the Office medical adviser properly noted the A.M.A., *Guides* prohibits combining muscle atrophy with muscle strength or muscle weakness calculations and indicated that appellant's 1.3 centimeter

[5] 5 U.S.C. § 8123(a).

[6] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[7] *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

[8] *See supra* notes 5 and 6 and accompanying text.

[9] *See* A.M.A., *Guides* 531-32, Tables 17-7 and 17-8.

[10] The Board notes that a schedule award is not payable under section 8107 of the Act for an impairment of the whole person. *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

calf muscle atrophy by itself would not warrant an impairment of more than 10 percent.[11] However, the Office medical adviser did not adequately consider whether his muscle weakness by itself would warrant a left leg schedule award of more than 10 percent. Therefore, his evaluation of appellant's left impairment would not cure the deficiencies in Dr. Stepanuk's report with regard to consideration of muscle weakness impairment.

Dr. Stepanuk's report is also in need of clarification because he failed to consider whether appellant was entitled to an impairment rating for sensory loss associated with the medial plantar nerve. The medical evidence of record shows some evidence of such a condition and in fact in November 2005 the Office hearing representative remanded the case to the Office for consideration of this and other matters. Although the maximum impairment rating for sensory loss associated with the medial plantar nerve would be five percent,[12] the A.M.A., *Guides* does allow for adding impairments ratings for limited range of motion with impairment ratings for sensory loss associated with periphery nerves.[13] Therefore, this aspect of appellant's left leg impairment rating was not adequately evaluated by Dr. Stepanuk or the Office district medical adviser.

For these reasons, the opinion of Dr. Stepanuk is in need of clarification and elaboration. In order to resolve the conflict in the medical opinion, the case will be remanded to the Office for referral of the case record, a statement of accepted facts and, if necessary, appellant, to Dr. Stepanuk for a supplemental report regarding the extent of his left leg impairment. If Dr. Stepanuk is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office should submit the case to a second impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.[14] After such further development as the Office deems necessary, an appropriate decision should be issued regarding the extent of appellant's left leg impairment.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he has more than 10 percent impairment of his left leg for which he received a schedule award. The case shall be remanded to the Office for further development, including an attempt to obtain a supplemental report from the impartial medical specialist, to be followed by an appropriate decision regarding appellant's left leg impairment.

[11] *Supra* note 9 at 526, 530, Tables 17-2, 17-6.

[12] *Id.* at 424, 552, Tables 15-15, 17-37.

[13] *Id.* at 526, Table 17-2. The Board notes that the Office medical adviser had properly indicated that appellant's 10 degrees of plantar flexion and 10 degrees of extension would result in a 7 percent impairment under Table 17-11 of the A.M.A., *Guides* and that his loss of inversion/eversion of 10 degrees would result in a 2 percent impairment under Table 17-12. *Id.* at 537, Tables 17-11 and 17-12.

[14] *Harold Travis*, 30 ECAB 1071, 1078 (1979).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 1, 2006 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 7, 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