United States Department of Labor
Employees' Compensation Appeals Board

V.J., Appellant	)	
and	)	**Docket No. 07-2171**
	)	**Issued: March 13, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Slidell, LA, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 22, 2007 appellant, through her attorney, filed a timely appeal from an August 2, 2007 merit decision of the Office of Workers' Compensation Programs denying her schedule award claim. 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 a permanent impairment of the left lower extremity.

FACTUAL HISTORY

On May 8, 2004 appellant, then a 49-year-old carrier, sustained a fracture to the left leg when an all purpose container fell from a lift onto her leg. She stopped work on that date. The Office accepted the claim for an open fracture of the upper end of the left tibia and fibula and left ankle sprain. On May 9, 2004 appellant underwent an open reduction and internal fixation of the fracture. The Office placed her on the periodic rolls effective July 16, 2004. On March 24, 2005

appellant underwent a removal of the plate and screws in her left tibia. She returned to full-time employment with restrictions on June 16, 2005.

On April 6, 2006 appellant filed a claim for a schedule award. By letter dated May 11, 2006, the Office requested that her attending physician determine the extent of any permanent impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). On September 6, 2006 Dr. Charles W. Krieger, Jr., an attending Board-certified orthopedic surgeon, indicated that appellant had a 23 percent permanent impairment of the foot, a 44 percent permanent impairment of the lower extremity and a 12 percent whole person impairment.[1] On October 19, 2006 the Office requested that Dr. Krieger further describe his application of the A.M.A., *Guides* and the relevant objective findings.

On December 28, 2006 an Office medical adviser stated that Dr. Krieger's September 6, 2006 report was insufficient to support an impairment rating as it contained no clinical findings. On January 25, 2007 the Office referred appellant to Dr. William Ross Knight, an osteopath, for an impairment evaluation. In an undated report received on March 20, 2007, Dr. Knight discussed appellant's complaints of pain and tenderness to touch in the lateral leg below the knee into the left ankle and foot. He noted that a computerized tomography (CT) scan obtained on January 12, 2006 revealed a three to four millimeter "linear calcified density in the medial aspect of the posterior facet of the subtalar joint having the appearance of a small intraarticular loose body." Dr. Knight measured range of motion of the left lower extremity and performed manual muscle testing. He found that appellant had a 35 percent impairment due to knee flexion contracture, a 48 percent impairment due to a gait impairment from causalgia, a 12 percent impairment due to weakness in left knee flexion, a 12 percent impairment due to weakness in left knee extension and a 15 percent impairment due to arthritis as demonstrated by CT scan. Dr. Knight combined the impairment findings and concluded that she had a 78 percent permanent impairment of the left lower extremity.

On April 17, 2007 an Office medical adviser reviewed Dr. Knight's report and noted that it was not probative for the Office's adjudication. In his calculation, Dr. Knight had combined several lower extremity impairments which cannot be combined. He recommended that the Office refer appellant for an evaluation by a physician who was familiar with the A.M.A., *Guides*.

On May 14, 2007 the Office informed appellant that she would be referred for another impairment evaluation. On May 17, 2007 the Office received her authorization of an attorney to represent her in her claim. On May 18, 2007 the Office's scheduling service referred appellant for an examination with Dr. Thomas Jeffcoat, a Board-certified orthopedic surgeon.

[1] On January 13, 2006 Dr. Krieger requested authorization to perform a left subtalar fusion. An Office medical adviser reviewed the evidence on April 26, 2006 and opined that the subtalar fusion was warranted due to her employment injury. He noted that, in a March 15, 2006 progress report, Dr. Krieger recommended deferring surgery as appellant's pain had decreased. Appellant continued to have limited movement of the hind foot.

On May 29, 2007 appellant's attorney challenged the need for another second opinion examination. He questioned why the Office medical adviser did not provide an impairment determination based on the findings from Dr. Knight's report or ask the physician to clarify his report.

On June 6, 2007 Dr. Jeffcoat measured full extension and flexion of the left knee to 125 to 130 degrees. He found no instability, swelling or effusion of the knee. For the left ankle, he measured 10 degrees dorsiflexion and 40 degrees plantar flexion with "good eversion and inversion of the subtalar joint." Dr. Jeffcoat interpreted x-rays performed that day as showing a healed fracture with no joint space narrowing and perfect alignment. He found that a January 12, 2006 CT scan of the ankle showed "a little sclerosis at the ankle joint" but good joint space. Dr. Jeffcoat indicated that appellant had an exaggerated pain response on examination. He concluded that she had no permanent disability.

In a report dated June 15, 2007, an impairment rater reviewed Dr. Knight's medical report and applied the provisions of the A.M.A., *Guides* to his clinical findings. Dr. Craig M. Uejo, who is Board-certified in preventative medicine, concurred with the findings of the impairment rater. He determined that appellant had a 35 percent lower extremity impairment due to flexion contracture of the left knee according to Table 17-10 on page 537 of the A.M.A., *Guides*. Dr. Uejo further found that she had a three percent impairment due to sensory loss and dysesthesia of the sural nerve.[2] He opined that appellant did not have a ratable impairment due to gait derangement as more specific methods for rating impairment were available. Dr. Uejo further explained that impairment due to manual muscle testing was inappropriate according to section 17.2e of the A.M.A., *Guides*. He found no additional impairment due to arthritis as Dr. Knight did not address whether the January 12, 2006 CT scan revealed joint space narrowing and no impairment due to causalgia or reflex sympathetic dystrophy. Dr. Uejo concluded that appellant had a 35 percent impairment due to loss of range of motion and a 3 percent impairment due to a peripheral nerve impairment, for a total left lower impairment of 37 percent.

On July 9, 2007 an Office medical adviser found that, based on Dr. Jeffcoat's June 6, 2007 evaluation, appellant had no impairment of the left lower extremity.

By letter dated July 19, 2007, appellant's attorney contended that she was not provide with the opportunity to participate in the selection of the new second opinion examiner. He noted that all of the other physicians of record found that appellant had clinical findings showing an impairment.

By decision dated August 2, 2007, the Office found that appellant was not entitled to a schedule award for a permanent impairment of the left lower extremity.

[2] A.M.A., *Guides* 552, Table 17-37.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing federal regulations,[4] set 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]

ANALYSIS

The Office accepted that appellant sustained an open fracture of the upper end of the tibia and fibula and a left ankle sprain due to an injury on May 8, 2004. Appellant underwent an open reduction and internal fixation of the fracture on May 9, 2004. On June 16, 2005 she resumed work with restrictions. Appellant filed a claim for a schedule award on April 6, 2006.

In a report dated September 6, 2006, Dr. Krieger found that appellant had a 23 percent permanent impairment of the foot, a 44 percent permanent impairment of the lower extremity and a 12 percent whole person impairment. He did not, however, provide the clinical findings from his physical examination upon which he based his impairment determination. Thus his impairment rating is of diminished probative value.

In a report received on March 20, 2007, Dr. Knight, an Office referral physician, discussed appellant's complaints of pain and tenderness to touch in the lateral leg below the knee into the left ankle and foot. He noted that a CT scan showed a calcified density in the subtalar joint and arthritic changes. Dr. Knight measured range of motion of the left lower extremity and performed manual muscle testing. He found that appellant had a 35 percent impairment due to knee flexion contracture, a 48 percent impairment due to a gait impairment from causalgia, a 12 percent impairment due to weakness in left knee flexion, a 12 percent impairment due to weakness in left knee extension and a 15 percent impairment due to arthritis as demonstrated by CT scan. Dr. Knight combined these findings and concluded that she had a left lower extremity impairment of 78 percent.

An Office medical adviser reviewed Dr. Knight's report and found that he had improperly utilized the A.M.A., *Guides* in reaching his impairment rating. He recommended

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. at § 10.404(a).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

referring appellant for another examination. On May 18, 2007 the Office scheduled another second opinion examination.[7]

In a report dated June 6, 2007, Dr. Jeffcoat found no knee instability, swelling or effusion. He measured left knee full extension and flexion to 125 to 130 degrees. For the left ankle, Dr. Jeffcoat measured 10 degrees dorsiflexion and 40 degrees plantar flexion with "good eversion and inversion of the subtalar joint." He found that x-rays showed no joint space narrowing or improper alignment and a January 12, 2006 CT scan of the ankle showed "a little sclerosis at the ankle joint" but good joint space. Dr. Jeffcoat asserted that appellant had an exaggerated pain response on examination. He found that she had no impairment of the left lower extremity. On July 9, 2007 an Office medical adviser concurred with Dr. Jeffcoat's finding that there was no evidence of an impairment. The Board notes, however, that 10 degrees of dorsiflexion or extension, of the ankle constitutes a seven percent impairment of the lower extremity according to Table 17-11 on page 537 of the A.M.A., *Guides*.[8] It does not appear, consequently, that Dr. Jeffcoat's finding that appellant had no impairment of the lower extremity comports with the A.M.A., *Guides*. Moreover, in concluding that appellant had no left lower extremity impairment, the Office medical adviser did not discuss the June 15, 2007 report from Dr. Uejo. He did not address the probative value of the respective reports of Dr. Knight and Dr. Jeffcoat given their disparate clinical findings on physical examination within a short period of time. For these reasons the case will be remanded to the Office for further development of the medical evidence, to be followed by a *de novo* decision.

CONCLUSION

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

[7] Appellant's attorney noted that the Office had not informed him of the second opinion examination and thus he was not provided the opportunity to participate in the selection of the physician. The attorney, however, challenged the merits of referring appellant for another second opinion examination on May 29, 2007, prior to the examination on June 6, 2007. He did not request the opportunity to participate in the selection of the physician.

[8] *See generally D.R.*, 57 ECAB ___ (Docket No. 06-668, issued August 22, 2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 2, 2007 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: March 13, 2008
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board