United States Department of Labor
Employees' Compensation Appeals Board

R.H., Executrix of the Estate of B.H., Appellant	)	
and	)	**Docket No. 07-2286**
	)	**Issued: September 19, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Cinnaminson, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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 September 5, 2007 appellant, through counsel, filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative decision of March 22, 2007 finding that the employee had no more than 27 percent impairment of her left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award.

ISSUE

The issue is whether the employee had more than 27 percent permanent impairment of her left lower extremity, for which she received schedule awards.

FACTUAL HISTORY

This case was previously before the Board. In a January 18, 2006 decision, the Board set aside a May 11, 2005 Office decision denying the employee's request for an additional schedule

award.[1] The employee submitted an August 27, 2002 report from Dr. David Weiss, an osteopath, who calculated a 34 percent impairment rating to the employee's left leg based on muscle strength loss and pain.[2] On review, an Office medical adviser discounted the 17 percent impairment Dr. Weiss allowed for left ankle plantar flexion weakness, finding 20 percent impairment of the left leg.[3] The Office issued a December 6, 2002 schedule award for 20 percent impairment of the left lower extremity. Thereafter, it referred the employee to Dr. Marc Kahn, a second opinion Board-certified orthopedic surgeon, for an impairment rating. Following examination, he rated impairment as five percent of the employee's left leg.[4] The Board set aside this determination, noting that Dr. Kahn did not provide an impairment rating for appellant's preexisting arthritis or address how he rated pain with reference to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. On remand, the Office was directed to further develop the medical evidence. The facts and history of the case are set forth in the Board's prior decision and incorporated herein by reference.

On remand, the Office requested the Office medical adviser to review the medical evidence and determine the employee's left lower extremity impairment, including any impairment due to her preexisting arthritis and loss of motion. On March 1, 2006, Dr. H. Magliato, an Office medical adviser, reviewed the report of Dr. Kahn and found 10 percent left lower extremity impairment. The Office medical adviser stated that the employee had seven percent impairment for loss of dorsiflexion to neutral under Table 17-11, page 537, and three percent pain-related impairment under Figure 18-1 at page 574 of Chapter 18. He noted that there was no evidence that the cartilage interval had ever been measured or that the x-rays obtained had mentioned arthritis. Dr. Magliato noted that Dr. Kahn had reported finding normal strength of the left ankle which differed from the findings of Dr. Weiss on which the prior schedule award was based.

In a March 23, 2006 report, Dr. Kahn noted that he was requested to clarify his impairment rating as to arthritis and loss of motion. He stated:

> "The patient lacks 10 degrees of dorsiflexion. Using Table 17-1, [p]age 525, for range of motion, she has a three percent partial permanent disability for the lower extremity. For the arthritis, using [p]age 544, Table 17-31, the patient has mild arthritis. That would be a five percent partial permanent disability for the lower extremity. Adding this up, the patient has an eight percent partial permanent disability for the lower extremity."

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[1] 57 ECAB 329 (2006). On December 11, 2000 the employee, a 58-year-old clerk-dispatcher, sustained injury to her left ankle when a bulk mail center container rolled over her foot. The Office accepted the claim for left ankle sprain. The record reflects that the employee died on August 28, 2005.

[2] Dr. Weiss rating impairment to the left ankle with regard to muscle weakness under Table 17-8, page 532. He found 12 percent impairment for inversion of III/V (Grade 2), 5 percent impairment for eversion of IV/V (Grade 4) and 17 percent impairment for plantar flexion of IV/V (Grade 4). In addition, Dr. Weiss rated pain of 3 percent under Figure 18-1 at page 574.

[3] The Office medical adviser agreed with the other impairment ratings provided by Dr. Weiss.

[4] Dr. Kahn stated that he based his rating on pain. He allowed no rating for arthritis, as this was a preexisting condition due to a prior fracture of the distal fibula with Rush pin in place.

On April 4, 2006 Dr. Magliato reviewed the March 23, 2006 addendum and noted the difference in his impairment rating from that of Dr. Kahn. The Office medical adviser noted that x-rays showed very minimal osteophyte formation which prevented an impairment calculation using Table 17-31, page 544. He advised that he did not see where Dr. Kahn derived his five percent rating and opined that no additional loss was warranted based on the employee's preexisting arthritis. Dr. Magliato noted that the prior 20 percent impairment rating had been based on Dr. Weiss' finding of motor weakness impairment and pain.[5] He stated that Dr. Kahn had now rated seven percent impairment based on loss of dorsiflexion which was not included in the 2002 schedule award. Dr. Magliato advised that the employee was not entitled to more than three percent for pain as previously awarded.

By decision dated April 14, 2006, the Office granted the employee a schedule award for an additional seven percent impairment to the left lower extremity.

In a letter dated April 21, 2006, appellant's representative requested an oral hearing before an Office hearing representative.

By decision dated July 20, 2006, the Office hearing representative set aside the April 14, 2006 decision and remanded the case to the Office to obtain clarification from the Office medical adviser regarding left lower extremity impairment supported by the A.M.A., *Guides* and the medical evidence.

On July 17, 2006 Dr. Magliato advised that the employee had a 10 percent total impairment of the left leg based on Dr. Kahn's report of pain and loss of motion. He noted the employee was not entitled to an impairment rating for arthritis as "no one measured a decreased cartilage interval on x[-]ray to support add[itiona]l percent for arthritis."

By decision dated October 5, 2006, the Office denied appellant's request for an additional schedule award for the employee. It found that the employee had no more than 27 percent impairment of the left lower extremity.

In a letter dated October 11, 2006, appellant's representative requested an oral hearing before an Office hearing representative, which was held on February 6, 2007.

By decision dated March 22, 2007, the Office hearing representative found the employee had no more than 27 percent left lower extremity impairment, for which she received schedule awards.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing regulation[7] set forth the number of weeks of compensation payable to employees

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[5] The Office medical adviser noted this was 17 percent for motor weakness plus 3 percent for pain.

[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8107.

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 regulation as the appropriate standard for evaluating schedule losses.[8] Effective February 1, 2001, the fifth edition of the A.M.A., *Guide*s is used to calculate schedule awards.[9]

In rating impairment based on manual muscle testing in the application of Table 17-8, the A.M.A., *Guides* note that test results are dependent on the examinee's cooperation and subject to his or her control.[10] Measurements can be made by one or two observers, but should be consistent between examiners as tests results may vary. If the results vary by more than one grade between observers or by the same examiner on separate occasions, the measurement should be considered invalid. Moreover, individuals whose performance is inhibited by pain or fear of pain are not good candidates for manual muscle testing. In turn, Table 17-2, the cross-usage chart, provides which evaluation methods and impairment ratings may be appropriately combined in rating lower extremity impairment.

ANALYSIS

On appeal, appellant contends that the employee had a total 34 percent impairment to the left leg based on the impairment rating provided by Dr. Weiss. In the alternative, it is contended that a conflict of medical opinion arose between Dr. Weiss and the Dr. Magliato as to the extent of permanent impairment.

The Board notes that the impairment rating provided by Dr. Weiss was based on an evaluation of muscle strength under section 17.2e of the A.M.A., *Guides*. This section speaks to the subjective nature of such testing as dependent on the cooperation of the examinee. It provides that measurements made by one or more examiners should be consistent on different occasions and should not vary by more than one grade. If test results are found to vary more than one grade between examinations or by different observers, the measurements should not be considered as valid.[11] The report of Dr. Weiss does not establish that the muscle strength results reported were based on more than one evaluation of the employee, as is required when there is one observer. Moreover, the muscle strength results reported by Dr. Weiss were not reproduced during the subsequent evaluation of Dr. Kahn, a second observer, who reported normal strength of the employee's left ankle. Therefore, the impairment rating provided by Dr. Weiss does not conform to the requirements of section 17.2e as the evaluation of the employee's left ankle

[8] 20 C.F.R. § 10.404. *See D.F.*, 59 ECAB ___ (Docket No. 07-1607, issued December 21, 2007); *J.C.*, 58 ECAB ___ (Docket No. 07-1165, issued September 21, 2007); *Thomas O. Bouis*, 57 ECAB ___ (Docket No. 06-692, issued June 7, 2006).

[9] *See E.P.*, 58 ECAB ___ (Docket No. 07-1244, issued September 25, 2007); *Jesse Mendoza*, 54 ECAB 802 (2003).

[10] A.M.A., *Guides* 531 at § 17.2e.

[11] *Id*.

muscle strength varied significantly on examination. In addition, Dr. Weiss allowed three percent impairment for pain under Chapter 18. However, Table 17-2, the cross-usage chart, does not indicate that a rating for pain may be combined with a muscle strength impairment rating.[12] Absent any explanation of how his evaluation of the employee conformed to the protocols of the A.M.A., *Guides*, the Board finds that the 34 percent impairment rating of Dr. Weiss is of reduced probative value.

Despite these restrictions, an Office medical adviser allowed several of the muscle strength impairment estimates made by Dr. Weiss: the 12 percent rating for inversion of the left ankle and 5 percent rating for eversion of the left ankle. In addition, the medical adviser accepted the 3 percent impairment rating for pain without addressing the limitation of Table 17-2. This formed the basis for the initial schedule award granted for 20 percent impairment of the left leg. Subsequently, the Office medical adviser also allowed 7 percent for loss of dorsiflexion under Table 17-11, page 537, a range of motion impairment. This formed the basis for the additional schedule award of 7 percent, for a total of 27 percent impairment received for the employee's left ankle impairment. Again, the medical adviser did not comment on Table 17-2, which also precludes combining range of motion impairment estimates with muscle strength loss. The Board notes that the Office developed the medical evidence with regard to the preexisting condition of arthritis of the employee's left ankle; however, Table 17-2 again precludes combining an impairment rating for arthritis with that of muscle strength loss. The remaining medical evidence of record does not establish greater impairment to the employee's left ankle. Any impairment due to pain or to arthritis may not be combined under Table 17-2 with the impairment allowed in this case for loss of muscle strength.

CONCLUSION

The Board finds that the employee has no more than a 27 percent impairment of the left lower extremity, for which a schedule award was issued.

[12] *Id*. at 526, Table 17-2.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 22, 2007 is affirmed.

Issued: September 19, 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