United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 08-2380**
	)	**Issued: July 7, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Newark, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2008 appellant filed a timely appeal from an August 5, 2008 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award claim.[1]

ISSUE

The issue is whether appellant has established more than 10 percent right lower extremity impairment or more than 7 percent left lower extremity impairment, for which she received a schedule award.

[1] The record also contains a January 14, 2008 decision pertaining to an overpayment of $1,751.44 for which appellant was found to be without fault, but denied waiver. Appellant did not appeal this decision.

FACTUAL HISTORY

On July 21, 1999 appellant, then a 31-year-old letter carrier, filed an occupational disease claim alleging that the severe pain in her feet was caused by walking at work.[2] The Office accepted the claim for temporary aggravation of bilateral plantar fasciitis and bilateral tarsal tunnel syndrome. Appellant underwent a left distal tarsal tunnel release with partial plantar fasciotomy on October 31, 2000 and a right distal tarsal tunnel release with partial plantar fasciotomy on June 16, 2001. She returned to limited duty following each surgery and the Office paid compensation benefits. Following a recurrence of disability on April 14, 2003, appellant was referred to the Office's vocational rehabilitation program as the employing establishment was unable to accommodate her restrictions. On March 9, 2005 she began a trial work program at the United Way. Appellant's treating physician subsequently found her temporarily totally disabled. Her rehabilitation file was closed on March 31, 2005. Appellant subsequently elected disability retirement benefits from the Office of Personnel Management effective May 18, 2005. In a July 25, 2005 decision, the Office found she was not entitled to total disability compensation as the medical evidence supported that she could perform full-time, limited-duty work.

On May 31, 2005 appellant filed a claim for a schedule award. In a November 29, 2005 report, Dr. Manhal Ghanma, a Board-certified orthopedic surgeon and Office referral physician, found that appellant had no impairment of her lower extremities under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

In an April 3, 2006 report, an Office medical adviser reviewed the medical evidence of record and opined that appellant had seven percent permanent impairment to each lower extremity as a result of her tarsal tunnel surgery.

By decision dated May 2, 2006, the Office granted appellant a schedule award for seven percent impairment to the right lower extremity and seven percent impairment to the left lower extremity.[4]

Appellant requested an oral hearing before an Office representative. In a March 23, 2006 report, Dr. Brian F. Griffin, an emergency medicine specialist, opined that appellant had not reached maximum medical improvement and disagreed with Dr. Ghanma's opinion. By decision dated June 23, 2006, the Office hearing representative found a conflict in medical opinion between Dr. Ghanma and Dr. Griffin. The Office was directed to refer appellant for an impartial medical evaluation.

The Office referred appellant to Dr. John W. McGrail, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In an October 18, 2006 report, Dr. McGrail found appellant's left foot had recovered without measurable or objective residuals. He advised

[2] This case was previously before the Board. By decision dated January 3, 2008, the Board affirmed an Office decision dated November 8, 2006 which found that appellant received $1,751.44 overpayment of compensation but set aside the Office's finding that appellant was at fault.

[3] A.M.A., *Guides* (5th ed. 2001).

[4] On July 11, 2007 the Office expanded appellant's claim to include reflex sympathetic dystrophy.

that appellant sustained a permanent partial impairment of her right foot as there was residual atrophy of the right calf. Dr. McGrail did not specify an impairment percentage or reference particular provisions of the A.M.A., *Guides.*

By decision dated March 8, 2007, the Office denied an additional schedule award based on Dr. McGrail's impartial report.

Appellant requested an oral hearing before an Office representative. By decision dated August 9, 2007, the Office hearing representative remanded the case, finding that Dr. McGrail did not adequately address permanent impairment under the A.M.A., *Guides*. The hearing representative directed the Office to prepare a revised statement of accepted facts to include the accepted condition of reflex sympathetic dystrophy and to refer appellant for a new impartial examination.

The Office referred appellant, together with the case record, a statement of accepted facts and a list of questions, to Dr. James Rutherford, a Board-certified orthopedic surgeon. In an October 23, 2007 report, Dr. Rutherford noted the history of injury, reviewed the statement of accepted facts and the medical records, and presented findings on physical examination. Appellant reported right buttock pain and she had a slight limp on the right side in her gait. She could only do 75 percent of a deep knee bend primarily because of right calf symptoms. Dr. Rutherford found mild decreased sensation on the medial aspect of the right lower leg and foot and numbness in the right great toe while there was normal sensation of the left leg. He opined that appellant had reached maximum medical improvement and provided an impairment rating under the A.M.A., *Guides*. For the left lower extremity, Dr. Rutherford opined that appellant had no impairment beyond the previous seven percent rating. For the right lower extremity, he opined that appellant had a 10 percent impairment based on decreased sensation under Table 17-37 on page 552 of the A.M.A., *Guides.* Dr. Rutherford stated that appellant had 5 percent impairment in the superficial peroneal distribution of the right foot and 5 percent impairment over the medial plantar nerve of the right foot, which had a combined value of 10 percent impairment for the right lower extremity. He found that she had an additional three percent impairment of the right lower extremity beyond the previously awarded seven percent rating.

On February 6, 2008 an Office medical adviser reviewed Dr. Rutherford's October 23, 2007 medical report and concurred with the result.

By decision dated February 22, 2008, the Office granted appellant an additional 3 percent permanent impairment of the right lower extremity, for a total of 10 percent. The award covered the period October 23, 2007 to February 1, 2008, or 14.45 weeks of compensation.

On February 24, 2008 appellant requested a telephonic hearing, which was held June 3, 2008. Medical evidence received subsequent to the hearing included progress notes dated February 7 to July 24, 2008 from appellant's treating physician that discussed her symptoms and medication regimen. A December 27, 2007 emergency record from Licking Memorial Hospital diagnosed an acute exacerbation of chronic pain and reflex sympathetic dystrophy. By decision dated August 5, 2008, an Office hearing representative affirmed the February 22, 2008 Office decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulations[6] 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. The Act, however, 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.[7]

Section 8123(a) of the Act provides that, 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.[8] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[9]

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.[10]

ANALYSIS

The Office accepted that appellant sustained temporary aggravation of preexisting bilateral plantar fasciitis, bilateral tarsal tunnel syndrome with release and partial fasciotomy surgeries, and reflex sympathetic dystrophy. It previously granted schedule awards for seven percent impairment of both lower extremities.

The Office found a conflict in medical opinion between Dr. Griffin, appellant's treating physician, and Dr. Ghanma, the second opinion examiner. It initially referred appellant for an impartial medical examination with Dr. McGrail. However, an Office hearing representative determined that his report was incomplete because he did not adequately reference the A.M.A., *Guides*. The hearing representative properly directed the Office to prepare a revised statement of

[5] 5 U.S.C. §§ 8101-8193.

[6] 20 C.F.R. § 10.404.

[7] *Ronald R. Kraynak,* 53 ECAB 130 (2001).

[8] 5 U.S.C. § 8123(a); *see Geraldine Foster,* 54 ECAB 435 (2003).

[9] *Manuel Gill*, 52 ECAB 282 (2001).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

accepted facts and refer appellant for another impartial examination. On remand, the Office referred appellant to Dr. Rutherford to resolve the conflict.

In an October 23, 2007 report, Dr. Rutherford opined that appellant had reached maximum medical improvement. On examination of appellant, he noted more pronounced findings for the right leg, advising that appellant had decreased sensation on the medial aspect of the right lower leg and foot and numbness in the right great toe but had normal sensation of the left leg. Under the A.M.A., *Guides*, Dr. Rutherford found that appellant had no additional impairment for the left lower extremity beyond the previously awarded seven percent rating. However, he found that appellant had an additional three percent permanent impairment of the right lower extremity. Dr. Rutherford opined that appellant had 10 percent impairment based on decreased sensation under Table 17-37 on page 552 of the A.M.A., *Guides*. He stated that appellant had 5 percent impairment in the superficial peroneal distribution of the right foot and 5 percent impairment over the medial plantar nerve of the right foot, which had a combined value of 10 percent impairment for the right lower extremity.[11] The medical adviser agreed that Dr. Rutherford properly used the A.M.A., *Guides*.

The Board finds that the report of Dr. Rutherford, the impartial medical specialist, is based upon a correct application of the A.M.A., *Guides* and is entitled to special weight. Dr. Rutherford examined appellant, took measurements, referred to Table 17-37 and explained his calculations. An Office medical adviser reviewed Dr. Rutherford's finding and concurred in his impairment finding.

Appellant submitted additional evidence. However, it does not address the permanent impairment of her legs or otherwise establish greater impairment to her lower extremities. Appellant did not submit any medical evidence conforming with the A.M.A., *Guides* establishing greater impairment.[12]

Appellant previously received schedule awards for seven percent impairment of the left lower extremity and seven percent impairment of the right lower extremity. Her previous impairment must be included in calculating the percentage of loss. The Office properly issued a schedule award for an additional 3 percent permanent impairment to the right lower extremity, for a total 10 percent impairment.[13]

[11] *See* Combined Values Chart page 604, A.M.A., *Guides*.

[12] The Board notes that appellant retains the right to file a claim for an increased schedule award based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).

[13] The Office procedures provide that any previous impairment to a member under consideration is included in calculating the percentage of loss. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(a)(2) (August 2002).

CONCLUSION

The Board finds that appellant has no greater than 7 percent impairment to her left lower extremity and 10 percent impairment to her right lower extremity, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 7, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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