United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 08-2384**
	)	**Issued: July 27, 2009**
U.S. POSTAL SERVICE, HILLTOP STATION, Columbus, 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:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2008 appellant, through his attorney, filed a timely appeal of the January 29 and August 6, 2008 merit decisions of the Office of Workers' Compensation Programs and Office hearing representative, respectively, finding that he had no more than an 11 percent impairment of the right lower extremity, for which he received a schedule award. 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 has more than an 11 percent impairment of the right lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On October 16, 2001 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim alleging that on that date he sustained a right ankle sprain as a result of slipping on a porch with a wet green moss-like substance on it. The Office accepted his claim for right ankle sprain

and impingement and authorized arthroscopic surgery which was performed on August 8, 2002 by Dr. Benjamin J. Hackett.[1]

On July 24, 2004 appellant filed for a schedule award accompanied by medical evidence, in his May 13, 2004 report, Dr. Charles J. Kistler, Jr., a family practitioner, reviewed the history of appellant's October 16, 2001 employment injury and medical treatment and social background. He determined that appellant sustained a 15 percent impairment of the right lower extremity based on Table 17-11 on page 537 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

By letter dated October 28, 2004, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. James H. Rutherford, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In a November 17, 2004 report, Dr. Rutherford reviewed the history of appellant's October 16, 2001 employment injury and medical treatment and determined that appellant sustained a seven percent impairment of the right lower extremity causally related to the accepted employment-related injury based on his range of motion measurements (A.M.A., *Guides* 537, Table 17-11).

On December 13, 2004 Dr. Michael J. Lee, an Office medical adviser, reviewed Dr. Rutherford's November 17, 2004 findings. He determined that appellant sustained a seven percent impairment of the right lower extremity (A.M.A., *Guides* 537, Tables 17-11 and 17-12).

On January 20, 2005 the Office found a conflict in the medical opinion evidence between Drs. Kistler and Rutherford regarding the extent of appellant's permanent impairment.

In an April 27, 2005 decision, the Office granted appellant a schedule award for a seven percent impairment of the right lower extremity.

By letter dated June 13, 2005, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. John W. McGrail, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a July 7, 2005 report, Dr. McGrail reviewed the history of appellant's October 16, 2001 employment injury and medical treatment. On physical examination, he reported no atrophy in the right lower extremity. Dr. McGrail further reported normal plantar flexion, 95 degrees of dorsiflexion, 5 degrees of eversion and 5 degrees of inversion. He stated that there was decreased range of motion of the lateral three toes on the right foot with a palpable suggestion of capsulitis and swelling in this area. Stability of the ankle appeared to be within normal limits. There was some residual swelling and deep tenderness in the anterolateral sulcus and peroneal area of the right ankle. Dr. McGrail opined that appellant had reached maximum medical improvement. He determined that appellant's limitation in dorsiflexion caused a limp and pain which placed him in a mild-to-moderate category which constituted a five percent

[1] The Board is unable to verify Dr. Hackett's specialty.

impairment of the whole person (A.M.A., *Guides* 537, Table 17-11). Dr. McGrail further determined that appellant's mild inversion and eversion measurements each constituted one percent impairment, resulting in a two percent impairment of the whole person (A.M.A., *Guides* 537 and Table 17-12). He concluded that appellant sustained a seven percent impairment of the whole person.

On August 24, 2005 an Office medical adviser reviewed Dr. McGrail's July 7, 2005 findings. He determined that 95 degrees of dorsiflexion represented a 7 percent impairment, and mild limited inversion and eversion each constituted 2 percent impairment, resulting in an 11 percent impairment of the right lower extremity. (A.M.A., *Guides* 537, Tables 17-11 and 17-12).

By decision dated September 28, 2005, the Office granted appellant a schedule award for an additional four percent impairment of the right lower extremity.

On May 18, 2006 the Office approved right ankle arthroscopy with extensive debridement which was performed on July 17, 2006 by Dr. Thomas H. Lee, a Board-certified orthopedic surgeon. In an August 22, 2006 treatment note, Dr. Lee stated that appellant complained about numbness along the inner border of his great toe and he was unable to move his second, third and fourth toes.

In a May 8, 2007 report, Dr. Richard M. Ward, a Board-certified orthopedic surgeon, reviewed the history of appellant's October 16, 2001 employment injury and medical treatment. He noted that despite appellant's prior surgeries, he experienced pain on the lateral side of his right ankle which radiated down and over the top of his foot and into the top of his lateral three toes. On physical examination of the right ankle, Dr. Ward reported three arthroscopic surgical scars, pain and tenderness laterally, complete loss of dorsiflexion, 15 degrees of plantar flexion and stable ligaments. He noted that appellant did not have any voluntary dorsiflexion of the lateral three toes on his right foot. Dr. Ward opined that appellant sustained a right ankle sprain as a result of the October 16, 2001 employment injury. He determined that he sustained a seven percent impairment of the right lower extremity (A.M.A. *Guides*, 537, Table 17-11). Dr. Ward noted that appellant's problems with his toes had not been medically evaluated. He stated that his impairment rating did not take into consideration appellant's inability to dorsiflex his toes.

On July 23 and September 27, 2007 appellant requested an additional schedule award.

On October 22, 2007 Dr. Jason D. Eubanks, an Office medical adviser, reviewed appellant's case record including, Dr. Ward's report. He stated that the medical record contained insufficient definitive information to provide an impairment rating for appellant's right lower extremity. Dr. Eubanks stated that Dr. Ward's finding that appellant had lost all of his dorsiflexion implied that he sustained a foot drop which would be highly unusual. He recommended that Dr. Ward clarify this issue. If Dr. Ward determined that appellant sustained a foot drop, Dr. Eubanks stated that Dr. Ward needed to grade the muscle strength. He further stated that if it was a matter of range of motion, then Dr. Ward needed to provide the range of motion. Dr. Eubanks noted appellant's sensory complaints and stated that no official sensory examination had been provided by Dr. Ward. He stated that a formal sensory examination with specific attention to the distribution of the deficit and character of the deficit was necessary.

By letter dated December 5, 2007, the Office requested that Dr. Ward provide a supplemental report based on Dr. Eubanks' October 22, 2007 report. Appellant was afforded 30 days to submit the requested evidence. The Office also advised appellant that it was his responsibility to assure that the report was timely submitted. Dr. Ward did not respond within the allotted time period.

By decision dated January 29, 2008, the Office found that appellant was not entitled to an additional schedule award for his right lower extremity. It found the evidence insufficient to establish that he sustained more than an 11 percent impairment of the right lower extremity. In a letter dated January 31, 2008, appellant, through his attorney, requested an oral hearing before an Office hearing representative.

In an April 29, 2008 report, Dr. Thomas H. Lee noted appellant's complaint that he could not move or flex his right toes. He stated that, despite experiencing sensation in the toe region, appellant did not have a hammertoe or claw toe deformity. Dr. Lee was concerned that the flexor digitorum longus (FDL) tendon may have been tethered down in and around the Knot of Henry. He recommended a magnetic resonance imaging (MRI) scan. Dr. Lee did not believe that appellant's toe problems were work related.

A May 20, 2008 treatment note, containing an illegible signature addressed appellant's diagnostic testing and treatment plan.

A May 2, 2008 electromyogram (EMG) report of Dr. Shelley K. Boone, a Board-certified physiatrist, stated that appellant sustained right peroneal nerve injury of the ankle and left C6-7 radiculopathy.

By decision dated August 6, 2008, an Office hearing representative affirmed the January 29, 2008 decision. He found the evidence insufficient to establish that appellant had more than an 11 percent impairment of the right lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[4] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[5]

[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.404.

[4] 5 U.S.C. § 8107(c)(19).

[5] 20 C.F.R. § 10.404.

ANALYSIS

The Office accepted appellant's claim for right ankle sprain and impingement. On April 27, 2005 appellant received a schedule award for a seven percent impairment of the right lower extremity. By decision dated September 28, 2005, the Office granted him a schedule award for an additional 4 percent impairment, totaling an 11 percent impairment of the right lower extremity. In decisions dated January 29 and August 6, 2008, it found that appellant was not entitled to any additional schedule award. The Board finds that appellant has not met his burden to establish that he has impairment greater than that already awarded.

Dr. Ward's May 8, 2007 report stated that appellant sustained a right ankle sprain as a result of the October 16, 2001 employment injury. His findings on physical examination included three arthroscopic surgical scars, pain and tenderness laterally, complete loss of dorsiflexion, 15 degrees of plantar flexion and stable ligaments. Dr. Ward noted that appellant did not have any voluntary dorsiflexion of the lateral three toes on his right foot. He determined that appellant sustained a seven percent impairment of the right lower extremity (A.M.A., *Guides,* 537, Table 17-11). Dr. Ward stated that his impairment rating did not take into consideration appellant's inability to dorsiflex his toes which had not been medically evaluated. He did not opine that appellant has more than an 11 percent impairment of the right lower extremity. Therefore, the Board finds that Dr. Ward's report does not establish appellant's entitlement to an additional schedule award.

The Board notes that Dr. Ward was advised by the Office's December 5, 2007 letter to submit a supplemental report clarifying whether appellant sustained a foot drop or any impairment due to loss of range of motion or sensory deficit based on Dr. Eubanks' October 22, 2007 report, which stated that the case record did not contain definitive information sufficient to rate appellant's right lower extremity impairment. The Office also advised appellant that it was his responsibility to assure that the report was timely submitted. No report was submitted by Dr. Ward.

Dr. Thomas H. Lee's August 22, 2006 treatment note stated that appellant complained about numbness along the inner border of his great toe and he was unable to move his second, third and fourth toes. He opined that his toe problems were not work related. In an April 29, 2008 report, Dr. Lee stated that appellant could not move or flex his right toes. He further stated that, despite experiencing sensation in the toe region, appellant did not have a hammertoe or claw toe deformity. Dr. Lee recommended an MRI scan due to his concern that the FDL tendon may have been tethered down in and around the Knot of Henry. He did not believe that appellant's toe problems were work related. The Board notes that the record does not indicate that an MRI scan was performed. Dr. Boone's May 2, 2008 electromyogram demonstrated a right peroneal nerve injury of the ankle and left C6 and 7 radiculopathy. Neither Drs. Lee nor Boone addressed the relevant issue of whether appellant sustained any additional permanent impairment of the right lower extremity based on the appropriate tables and figures of the A.M.A., *Guides*.[6] The Board finds that the treatment note and reports of Drs. Lee and Boone are insufficient to establish appellant's claim for an additional schedule award.

[6] *Lela M. Shaw*, 51 ECAB 372 (2000).

A May 20, 2008 treatment note, containing an illegible signature addressed appellant's diagnostic testing and treatment plan. As the report bears an illegible signature, it does not constitute probative medical evidence.[7] Additionally, the report did not address the relevant issue of whether appellant sustained any additional permanent impairment of the right lower extremity based on the appropriate tables and figures of the A.M.A., *Guides*. The Board finds that appellant has no more than an 11 percent impairment of the right lower extremity.

CONCLUSION

The Board finds that appellant has failed to establish that he has more than an 11 percent impairment of the right lower extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 6 and January 29, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 27, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[7] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2).