United States Department of Labor
Employees' Compensation Appeals Board

B.S., claiming as administratrix of the estate of I.S., Appellant	)	
and	)	**Docket No. 08-1690** **Issued: March 25, 2009**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA, 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
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 29, 2008 appellant, through her attorney, filed a timely appeal from September 6, 2007 and February 6, 2008 merit decisions of the Office of Workers' Compensation Programs granting the employee a schedule award.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decisions.

ISSUE

The issue is whether the employee had more than a three percent permanent impairment of the left lower extremity.

[1] Appellant is the employee's widow and administratrix of his estate. The employee died on March 18, 2004.

FACTUAL HISTORY

On October 25, 2002 the employee, then a 49-year-old contact representative, filed a claim alleging that he broke his foot on October 21, 2002 when he stumbled while walking. He did not stop work. The Office accepted the claim for a fracture of the left fifth metatarsal bone.

Dr. David A. Cautilli, a Board-certified orthopedic surgeon, treated the employee subsequent to his employment injury. On December 19, 2002 he diagnosed a healing left fifth metatarsal Jones fracture. On physical examination Dr. Cautilli found pitting edema in both lower extremities with reduced tenderness of the metatarsal base. He opined that the employee could continue weight bearing with a walker boot. On January 8, 2003 Dr. Cautilli found no tenderness on examination and that x-rays revealed a healed fracture. He diagnosed a clinically healed left fifth metatarsal shaft Jones fracture.

On November 11, 2003 the employee, through his attorney, requested a schedule award. He submitted an August 14, 2003 impairment evaluation from Dr. Nicholas Diamond, an osteopath. Dr. Diamond discussed the employee's complaints of pain in the left knee joint and over the fifth metatarsal area of the left foot and difficulties performing activities of daily living. He noted that the employee had a history of bilateral rheumatoid/psoriatic knee arthritis. On examination, Dr. Diamond found "pain to palpation over the left fifth metatarsal dorsum of the foot," "abnormal muscle tonus of the left gastrocnemius" and tenderness and effusion of the knee with flexion and extension of 0 to 105/140. He diagnosed a left foot fifth metatarsal fracture, an aggravation of preexisting left knee pathology and derivative aggravation of the right knee. Dr. Diamond opined that the employee's work injury caused the subjective and objective findings. Citing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), he concluded that the employee had a 10 percent impairment for loss of left knee flexion,[2] a 12 percent impairment due to a motor strength deficit of the left quadriceps,[3] a 17 percent impairment due to a motor strength deficit of the left gastrocnemius[4] and a 12 percent impairment due to a motor strength deficit in left ankle flexion.[5] Dr. Diamond combined his impairment findings and concluded that the employee had a 42 percent left lower extremity impairment. He determined that the employee had an additional 3 percent impairment due to pain under Chapter 18, which he added to find a 45 percent left lower extremity impairment. Dr. Diamond also found that the employee had 45 percent right lower extremity impairment.

On December 1, 2003 an Office medical adviser reviewed the medical evidence and noted that on January 8, 2003 Dr. Cautilli diagnosed a clinically healed fracture without pain. Dr. Diamond, in contrast, found muscle weakness and bilateral knee impairment. The Office medical adviser recommended a second opinion examination to determine whether the employee had any impairment causally related to his accepted employment injury.

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[2] A.M.A., *Guides* at 537, Table 17-10.

[3] *Id*. at 532, Table 17-8.

[4] *Id*.

[5] *Id*.

On February 12, 2004 the Office referred the employee for a second opinion examination. On March 18, 2004 the employee died. On April 22, 2004 a court authorized appellant, his widow, to administer his estate.

On July 16, 2007 an Office claims examiner requested that an Office medical adviser review the medical record and evaluate whether he had a work-related impairment. The Office medical adviser reviewed in detail the medical evidence of record. He noted that Dr. Diamond relied on a history of bilateral knee injuries which were not accepted as related to the employee's employment or mentioned by Dr. Cautilli. The Office medical adviser stated:

> "In addition, it is specifically noted that the [employee] was weight bearing on his foot and leg within two months, according to the December 19, 2002 note from Dr. Cautilli. Therefore, based on this favorable clinical course it would not be expected that there would be any atrophy or weakness in either leg, and, in fact, Dr. Cautilli, in his notes, did not mention any evidence of any injury to either knee. There was some swelling; however, this would have been expected with a fracture of this type, and it appeared to have cleared at the time of discharge."

The Office medical adviser concluded that Dr. Diamond's findings were inconsistent with the findings of Dr. Cautilli. He stated:

> "For all of the above reasons I find it difficult to accept motor strength abnormalities of 45 percent right lower extremity and 45 percent left lower extremity.
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> "In addition, based on the [A.M.A., *Guides*] page 507 and 508, it states that strength measurements cannot be imposed for impairment ratings in the presence of pain since the pain would be expected to limit the ability to objectively measure the strength.
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> "Based upon the pain that is documented and could be possible in an instance such as this, it would be my recommendation that a schedule award be granted with an impairment rating of three percent for the left lower extremity based upon page 574, [F]igure 18-1 of the [A.M.A., *Guides*], and the date of maximum medical improvement is Dr. Cautilli's last office visit of January 8, 2003."

By decision dated September 6, 2007, the Office granted the employee's estate a schedule award for a three percent permanent impairment of the left lower extremity. The period of the award ran for 60.48 days from January 8 to March 9, 2003.

On September 12, 2007 appellant, through her attorney, requested an oral hearing. At the hearing, held on December 11, 2007, counsel argued that the Office medical adviser's opinion could not constitute the weight of the evidence as he did not examine the employee. He requested that the case be remanded for review of the record by an appropriate specialist.

By decision dated February 6, 2008, the Office hearing representative affirmed the September 6, 2007 decision. She noted that the record contained no evidence that the employee sought treatment for continuing symptoms after January 2003, when he was dismissed from

treatment or that he sustained additional left leg impairment due to his October 21, 2002 employment injury.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[6] and its implementing federal regulations,[7] 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* as the uniform standard applicable to all claimants.[8] 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.[9]

Section 8123(a) 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.[10] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[11]

ANALYSIS

The Office accepted that the employee sustained a fracture of the left fifth metatarsal bone when he stumbled at work. He received treatment following his injury from Dr. Cautilli. On January 8, 2003 Dr. Cautilli diagnosed a healed left fracture of the fifth metatarsal shaft.

In a report dated August 14, 2003, Dr. Diamond discussed the employee's complaints of pain in the fifth metatarsal area of the left foot and left knee joint and his history of bilateral knee rheumatoid/psoriatic arthritis. He determined, based on his application of the A.M.A., *Guides*, that the employee had a 42 percent left lower extremity impairment due to motor strength deficits of the left quadriceps, left gastrocnemius and left ankle flexion and loss of range of motion in left knee flexion.[12]

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[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] 20 C.F.R. § 10.404(a).

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

[10] 5 U.S.C. § 8123(a).

[11] 20 C.F.R. § 10.321.

[12] A.M.A., *Guides* at 537, 532, Tables 17-10, 17-8.

The Office referred the employee for a second opinion examination to determine whether he had any impairment causally related to his accepted employment injury; however, he died before attending the examination. An Office medical adviser reviewed the case record and determined that there was no evidence that the employee experienced any muscle weakness or atrophy or any injury to his knees due to his accepted fracture of the left fifth metatarsal bone based on the findings of Dr. Cautilli. He found that Dr. Diamond's report was inconsistent with Dr. Cautilli's report and insufficient to support that the employee had any impairment due to loss of strength. The Office medical adviser found that pain "could be possible" with the employee's injury and provided him with three percent impairment due to pain under Chapter 18 of the A.M.A., *Guides*.

The Board finds that the record contains a conflict in opinion between Dr. Diamond, who found that the employee had a 45 percent left lower extremity impairment due to loss of range of motion, loss of strength and pain and the Office medical adviser, who found that he had a 3 percent impairment due to pain. Section 8123(a) of the Act provides that, if there is a 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.[13] The case, therefore, is remanded for the Office to refer the case record to an appropriate Board-certified specialist to resolve the conflict in opinion, to be followed by a *de novo* decision.

CONCLUSION

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

[13] 5 U.S.C. § 8123(a); *Alfred R. Anderson*, 54 ECAB 179 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 6, 2008 and September 6, 2007 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: March 25, 2009
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