United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 09-5**
	)	**Issued: March 12, 2009**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Pittsburgh, PA, 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 September 30, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated May 21 and September 22, 2008 that denied his claim for 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 met his burden of proof to establish that he has an impairment caused by his accepted bilateral ankle sprains that would entitle him to a schedule award.

FACTUAL HISTORY

On March 19, 2007 appellant, then a 55-year-old electronic technician, sustained employment-related bilateral ankle sprains when he fell from a ladder at work. He stopped work that day and received medical treatment at an emergency room where bilateral ankle sprains

were diagnosed. X-rays of both ankles revealed degenerative changes but no acute fracture. On April 17, 2007 Dr. David Life, an attending Board-certified family practitioner, advised that appellant could return to work with the restriction that he not climb ladders. A left ankle magnetic resonance imaging (MRI) scan of June 17, 2007 demonstrated a long-standing cystic-appearing focus at the distal tip of the fibula. Major ligamentous and tendinous structures were intact. A June 17, 2007 left foot MRI scan demonstrated no abnormalities.

Appellant came under the care of Dr. Harry Fathy, a Board-certified orthopedic surgeon, who provided treatment notes dating from July 6 to September 17, 2007. Dr. Fathy advised that appellant had been improving progressively, but occasionally developed ankle swelling, worse in the evening. Examination findings included minor swelling, intact neurovascular examination, and normal range of motion. Dr. Fathy released appellant from his care to be seen on an "SOS" basis.

Appellant retired on September 3, 2007. On December 17, 2007 he filed a schedule award claim. In a November 29, 2007 report, Dr. Michael J. Platto, a Board-certified physiatrist, noted the history of injury, his review of medical records and appellant's report of pain and swelling along the lateral aspect of both ankles. Appellant also had pain along the lateral aspects of both hips and occasional pain in both knees, made worse with standing for more than half an hour, heavy lifting, prolonged sitting, bending, twisting and worse in cold, damp, rainy weather. Examination findings included full range of motion of hips and knees, full active dorsiflexion and plantar flexion of both ankles, and no deficits in inversion or eversion. Dr. Platto found no excessive pronation or supination deformities at the ankles and only slight tenderness to palpation along the lateral aspect of the left ankle. Motor strength was 5/5 in both lower extremities; sensation was intact and deep tendon reflexes were 2+ bilaterally. Dr. Platto noted that appellant was able to get on and off the examination table independently and did not use a cane or other ambulatory assistive device, but demonstrated a slight antalgic limp with shortened stance on the left. He diagnosed bilateral ankle sprains, status post work injury on March 19, 2007, some moderate underlying degenerative joint disease of the ankles and moderate degenerative joint disease of both knees. Dr. Platto advised that appellant had no definite impairment due to either a preexisting condition or his work injury based on range of motion, muscle atrophy, muscle strength, ankylosis or peripheral nerve injury and had no evidence of ligamentous instability. He stated that the most appropriate determination would be based on gait derangement and advised that, under Table 17-5 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), appellant had a seven percent whole person impairment due to antalgic limp with shortened stance.[1]

In a March 15, 2008 report, an Office medical adviser reviewed Dr. Platto's report. He advised that appellant was not entitled to a schedule award on either a decreased range of motion basis or a gait deficit basis, stating that one of the requirements for a gait impairment rating is that a claimant use an assistive device for walking.

[1] A.M.A., *Guides*; *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002). Appellant also submitted bilateral knee x-rays that demonstrated mild degenerative osteophytosis of the left patellofemoral compartment.

By decision dated May 21, 2008, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence did not establish that the accepted condition resulted in a permanent impairment.

On June 24, 2008 appellant, through his attorney, requested reconsideration. He submitted bilateral ankle x-rays dated June 10, 2008 that demonstrated small bony plantar spurs bilaterally, very small enthesophytes bilaterally, small ossicles adjacent to the left medial malleolus compatible with small old ununited fracture fragments, mild left tibiotalar degenerative joint disease and probably left tibiotalar joint effusion with no other bony, soft tissue or joint space abnormality. In a June 11, 2008 report, Dr. Platto reviewed the x-rays and provided cartilage interval measurements. He determined that, in accordance with Table 17-31 of the A.M.A., *Guides*, appellant had a five percent impairment of the left lower extremity due to a lateral component cartilage interval of 2.7 millimeters and advised that the right ankle showed no significant degeneration.

In an August 2, 2008 report, an Office medical adviser reviewed Dr. Platto's June 11, 2008 report and advised that appellant had made a full recovery of his bilateral ankle sprains which had returned to normal. He found no aggravation or acceleration of the preexisting osteoarthritis and no impairment to the lower extremities. By decision dated September 22, 2008, the Office denied modification of the May 21, 2008 decision.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[2] and section 10.404 of the implementing federal regulations,[3] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[4] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[5]

Section 17.2c of the fifth edition of the A.M.A., *Guides*, precludes the use of gait derangement to calculate impairment if a more specific method is available to assess the impairment. It provides that impairment rating due to a gait derangement should be supported by pathologic findings, such as x-rays and that, except as otherwise noted, the percentages given in

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] A.M.A., *Guides*, *supra* note 1.

[5] *See Joseph Lawrence, Jr.*, *supra* note 1; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

Table 17-5 are for full-time gait derangements of persons who are dependent on assistive devices.[6]

It is well established that, in determining the degree of impairment for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body member are to be included in the evaluation of the permanent impairment.[7] The Board has noted *Larson's* explanation that this principle is sometimes expressed by saying that the employer takes the employee as it finds that employee.[8] However, where a claimant does not demonstrate any permanent impairment caused by the accepted occupational exposure, a claim is not ripe for consideration of any preexisting impairment.[9]

ANALYSIS

The Board finds that this case is not in posture for decision. The physician who provided the latest physical findings was Dr. Platto, who examined appellant in November 29, 2007 and provided physical examination findings. He diagnosed bilateral ankle sprains and advised that it would be most appropriate to rate appellant's impairment based on gait derangement and found that, under Table 17-5 of the A.M.A., *Guides*, he had a seven percent whole person impairment.

The Board finds that, as Dr. Platto did not provide an opinion that appellant's accepted bilateral ankle sprains had resolved, this case is not in posture for decision. While the Office medical adviser concluded that appellant's ankle sprains had totally resolved, he did not examine appellant and the opinion of an examining physician in an appropriate field of medicine takes precedence over the opinion of an Office medical adviser when considering subjective factors.[10] Furthermore, the Office medical adviser's erred in stating that an assistive device must be used for a gait derangement impairment rating under the A.M.A., *Guides*. Section 17.2c of the A.M.A., *Guides* provides that impairment due to gait derangement is for persons who are dependent on assistive devices, except as otherwise noted and under Table 17-5, Grade A and B mild impairments do not require assistive devices.[11] Dr. Platto granted appellant a mild, Grade A impairment. On reconsideration, in his June 11, 2008 report, he advised that, under Table 17-31 of the A.M.A., *Guides*, appellant had no impairment of the right lower extremity and a five percent impairment of the left lower extremity, based on x-ray determined cartilage intervals. Dr. Platto advised that, upon his review of the June 10, 2008 x-ray, appellant had a 1.7 millimeters (mm) cartilage interval of the left ankle and Table 17-31 provides that an ankle cartilage interval of 3 mm equals a five percent lower extremity impairment.[12]

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[6] A.M.A., *Guides*, *supra* note 1 at 529; *see Rose V. Ford*, 55 ECAB 449 (2004).

[7] *D.F.*, 59 ECAB ____ (Docket No. 07-1607, issued December 21, 2007).

[8] *See A. Larson, The Law of Workers' Compensation* § 9.02 (2002).

[9] *Thomas P. Lavin*, 57 ECAB 353 (2006).

[10] *Michelle L. Collins*, 56 ECAB 552 (2005).

[11] A.M.A., *Guides*, *supra* note 1 at 529.

[12] *Id*.

It is well established that proceedings under the Act, are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[13] The case shall therefore be remanded to the Office. On remand, the Office shall refer appellant, an appropriate statement of accepted facts that includes a description of the employment injury and the medical evidence of record to an appropriate Board-certified specialist for an examination, diagnosis and a rationalized opinion regarding whether appellant's accepted bilateral ankle sprains have resolved and if he has a permanent impairment caused by the accepted conditions. If so, the physician should provide an impairment analysis in accordance with the A.M.A., *Guides*. After this and such further development deemed necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant is entitled to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 22 and May 21, 2008 be set aside and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: March 12, 2009
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

[13] *See Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).