

**United States Department of Labor
Employees' Compensation Appeals Board**

C.S., Appellant)	
)	
and)	Docket No. 10-401
)	Issued: August 16, 2010
U.S. POSTAL SERVICE, MAIN POST OFFICE,)	
Philadelphia, PA, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 30, 2009 appellant timely appealed the August 24, 2009 merit decision of the Office of Workers' Compensation Programs, which denied her claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the schedule award claim.¹

ISSUE

The issue is whether appellant has a ratable impairment of the left lower extremity.

FACTUAL HISTORY

Appellant, a 46-year-old letter carrier, has an accepted claim for left ankle sprain and fracture of the fifth metatarsal of the left foot, which arose on August 13, 2002. The fracture was surgically repaired on April 29, 2003. Appellant received appropriate wage-loss compensation. On August 29, 2006 she filed a claim for a schedule award. She submitted two impairment

¹ The record on appeal contains evidence received after the Office issued its August 24, 2009 decision. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. 20 C.F.R. § 501.2(c) (2009).

ratings from Dr. David Weiss, an osteopath. The first rating, dated May 11, 2004, was a combined 19 percent impairment of the left lower extremity. Dr. Weiss' 2004 rating included 4/5 left ankle motor strength deficits for dorsiflexion (12 percent) and eversion (5 percent). He also found three percent impairment for pain. When Dr. Weiss examined appellant on March 30, 2006, he again found 19 percent impairment of the left lower extremity. The 2006 rating included the same 3 components as the 2004 rating except that the 4/5 motor strength deficit for left ankle eversion that Dr. Weiss previously rated at 5 percent now represented 12 percent impairment.

On July 11, 2006 Dr. Morley Slutsky, the Office medical adviser, reviewed the case records, including Dr. Weiss' impairment rating.² He noted an inconsistent physical examination compared to the various medical records, he recommended that appellant be examined by an orthopedic surgeon specializing in diseases of the foot and ankle. Alternatively, Dr. Slutsky determined that the examination findings of Dr. Weiss supported that appellant had 17 percent impairment of the left leg. He concurred with the motor strength deficit rating for ankle dorsiflexion, but noted that Dr. Weiss erroneously documented 12 percent impairment for ankle eversion. Dr. Slutsky explained that five percent was the proper rating for 4/5 motor strength deficit -- left ankle eversion. He also explained that the additional three percent pain-related impairment Dr. Weiss provided was inappropriate because the left ankle motor strength deficit rating adequately addressed the extent of appellant's lower extremity impairment pain.

The Office referred appellant to Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, who examined her on April 18, 2007 and diagnosed healed left fifth metatarsal fracture and left ankle sprain. Dr. Valentino found appellant had fully recovered from the accepted injury, noting there was no evidence of impairment or disability. He explained that she had no impairment given her completely normal examination. There was no evidence of weakness, no limitation of motion and no ankylosis. Dr. Valentino stated that appellant was capable of gainful employment, including resumption of her preinjury position without restriction. He concluded that she was fully recovered without ongoing residual.

The Office found a conflict in medical opinion based on the disagreement between Dr. Weiss and Dr. Valentino regarding whether appellant had a ratable impairment of the left leg. It selected Dr. Joseph A. Jelen, Jr., a Board-certified orthopedic surgeon, to conduct an impartial medical evaluation. In a June 24, 2008 report, Dr. Jelen found that appellant had fully recovered from her August 13, 2002 employment injury. On physical examination there was no evidence of calf muscle atrophy. Appellant's calf circumference measured 16³/₈ inches bilaterally. With respect to ankle range of motion, Dr. Jelen noted that bilateral dorsiflexion of 30 degrees, bilateral plantar flexion of 50 degrees, ankle inversion of 15 degrees bilaterally and 10 degrees eversion bilaterally. He also indicated that muscle strength testing was 5/5 bilaterally. Dr. Jelen explained that when appellant was initially asked to maintain dorsiflexion there was some giving away during examination, however, after repetitive tests her strength was good and indeed measured 5/5 in both lower extremities. He stated appellant's muscle strength testing included dorsi- and plantar flexion and ankle inversion and eversion. Additionally, Dr. Jelen found no sensory abnormality especially on the dorsal aspect of the foot and over the incision site. He noted that when he applied pressure over the fracture and incision site, appellant reported mild discomfort. Appellant similarly reported mild discomfort when Dr. Jelen applied pressure over

² Dr. Slutsky is Board-certified in occupational medicine.

the Achilles tendon and plantar fascia area. He indicated that when he asked appellant to stand on each foot and raise herself three times, she was able to raise herself on both feet, yet she did not voluntarily lift herself as high on the left side as on the right. Dr. Jelen also reported that appellant was able to walk on her heels without difficulty. He commented that she came to his office wearing nonsupportive, loose fitting sandal-type shoes, without orthotics and without support. Appellant did not appear to be in any distress or any limp when Dr. Jelen observed her walking in the examining room. His clinical impression was healed fracture of the fifth metatarsal of the left foot and resolved ankle sprain. Dr. Jelen indicated that appellant's prognosis was good. Appellant's medical treatment had reached a plateau, she was very functional and she did not require any additional treatment. Regarding appellant's subjective complaints, Dr. Jelen indicated that, although she stated there was pain, the physical examination and records indicated that her fracture had healed and that any symptoms waxed and waned and were not evident on his examination, which he characterized as "normal."

Dr. Jelen reviewed both the reports Dr. Weiss and Dr. Valentino. He advised that appellant had fully recovered and had no residual disability as a result of the injuries involving the fifth metatarsal. Dr. Jelen stated she had returned to a normal level. He noted that appellant had many complaints during the examination, including foot, lateral and dorsal paraesthesias, cramping of the muscles, pain that she rated as 7/10, occasional hip, right leg and left shoulder symptoms. However, none of her subjective complaints were due to her employment injury or could be identified on physical examination. Dr. Jelen stated that appellant had sustained a significant injury, but she had proper medical treatment and time to heal and recover. The small one-centimeter incision over the fifth metatarsal was benign and there was no tenderness in that area. Dr. Jelen could not identify any other specific abnormalities in the foot or ankle region on examination. He stated that appellant was able to walk into his office in an unsupported fashion with loose fitting sandals and was not in distress. Dr. Jelen found that appellant had recovered completely and suffered no disability as a result of her fracture.

On December 18, 2008 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and Office medical adviser, reviewed the record and recommend an impairment rating of zero percent based upon Dr. Jelen's findings of normal range of motion and normal strength. He further noted that appellant reached maximum medical improvement as of June 24, 2008.

In a decision dated December 22, 2008, the Office denied appellant's claim for a schedule award.

Appellant requested an oral hearing, which was held on May 28, 2009. In an August 24, 2009 decision, the Office affirmed the December 22, 2008 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.³ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results

³ For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2006).

and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.

ANALYSIS

The Office properly found there was a conflict of medical opinion between appellant's physician, Dr. Weiss, and the Office referral physician, Dr. Valentino. Because of this conflict, the Office referred appellant to an impartial medical examiner to resolve the issue of the extent of her left lower extremity permanent impairment. Dr. Jelen, the impartial medical examiner, found that appellant had fully recovered from her August 13, 2002 employment injury. Dr. Berman, the Office medical adviser, reviewed the record, including Dr. Jelen's June 24, 2008 report, and advised that appellant had zero percent impairment under the A.M.A., *Guides* (5th ed. 2001). He based his recommendation on the recent "findings of normal range of motion and normal strength." Dr. Berman referenced the very same sections of the A.M.A., *Guides* that Dr. Weiss utilized to justify his 19 percent impairment rating.⁴

Appellant's counsel argues that Dr. Jelen's June 24, 2008 report cannot carry the weight of the medical evidence particularly in the face of Dr. Weiss' finding. Counsel claims that Dr. Jelen failed to indicate what testing he used in determining that appellant did not have a motor strength deficit in ankle dorsiflexion. Regarding her muscle strength, the impartial medical examiner commented as follows: "Muscle strength testing is 5/5 bilaterally. Initially, when the patient was asked to maintain dorsiflexion there was some giving away during examination, however, after repetitive tests, the strength is good and does indeed measure 5/5 in both lower extremities. This was tested in ankle dorsi- and plantar flexion and ankle inversion and eversion." The information regarding muscle testing provided by Dr. Jelen was no more or less comprehensive than that provided by Dr. Weiss in either of his two impairment reports. Based on the impartial medical examiner's June 24, 2008 examination findings that the Office medical adviser reasonably concluded that there was no impairment due to ankle muscle weakness.⁵

Counsel also takes issue with Dr. Jelen's report because he did not specifically refer to the A.M.A., *Guides*. While Dr. Jelen did not reference the A.M.A., *Guides*, his examination findings were sufficiently detailed to allow the Office medical adviser to find zero percent impairment under the A.M.A., *Guides*. Also, Dr. Jelen was not particularly influenced by appellant's complaints of pain. However, counsel argues that a schedule award for pain is appropriate. Dr. Jelen specifically commented that none of appellant's many complaints were either related to her employment injury or could be identified on physical examination that day.

⁴ Both Dr. Berman and Dr. Weiss cited Table 17-8, A.M.A., *Guides* 532 and Figure 18-1, A.M.A., *Guides* 574.

⁵ See Table 17-8, A.M.A., *Guides* 532.

Thus, there is no basis for an award for pain.⁶ The Office properly accorded determinative weight to Dr. Jelen's findings, as he was the impartial medical examiner.⁷ As outlined above, his opinion is well reasoned and based upon a proper factual background. Accordingly, Dr. Jelen's June 24, 2008 findings represented the weight of the medical evidence. Moreover, the Office medical adviser's December 18, 2008 impairment rating conforms to the A.M.A., *Guides* (5th ed. 2001).

CONCLUSION

Appellant does not have a ratable impairment of the left lower extremity. Consequently, she is not entitled to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 24, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁶ The A.M.A., *Guides* limit the circumstances under which a pain-related impairment may be assessed under Chapter 18. If an impairment can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*, such as Chapters 13, 16 and 17, then pain-related impairments should not be assessed using Chapter 18. The A.M.A., *Guides* provide for an incremental adjustment of up to three percent for pain when the conventional rating system does not adequately encompass the burden of the individual's condition. Where the pain-related impairment appears to increase the burden of the individual's condition "slightly," the physician can increase the percentage found under the conventional rating system by up to three percent. Section 18.3(d), the A.M.A., *Guides* 573; Figure 18-1, the A.M.A., *Guides* 574.

⁷ Gary R. Sieber, 46 ECAB 215 (1994).