United States Department of Labor
Employees' Compensation Appeals Board

B.Q., Appellant	)	
and	)	**Docket No. 10-729**
	)	**Issued: December 16, 2010**
DEPARTMENT OF THE NAVY, AIR SYSTEMS COMMAND HEADQUARTERS OFFICE, Patuxent River, MD, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 25, 2010 appellant filed a timely appeal from the November 4, 2009 schedule award denial of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant sustained permanent impairment of her left foot or lower extremity.

FACTUAL HISTORY

On May 8, 2007 appellant, then a 60-year-old financial management analyst, injured her left foot while walking with coworkers to dinner while on official travel. The Office accepted her claim for plantar fascia tear of the left foot. Appellant stopped work on February 11, 2008 and returned on April 14, 2008.

Appellant was initially treated on May 29, 2007 by Dr. Jeffrey D. Sabloff, an orthopedic surgeon, who noted an x-ray of the left foot revealed calcaneus and a small spur on the plantar

surface and diagnosed tear of the plantar fascia. Appellant sought treatment from Dr. Ahmed Kafaji, a Board-certified neurologist, who performed an electromyogram (EMG) on June 21, 2007. Dr. Kafaji diagnosed severe chronic distal axonal polyneuropathy, etiology unclear. In reports dated July 19, 2007 to January 31, 2008, he treated appellant for peripheral neuropathy, hypertension and diabetes mellitus .

From February 1 to July 2, 2008, appellant came under the treatment of Dr. Rakhi Krishnan, Board-certified in infectious disease, for left foot neuropathy and osteomyelitis. Dr. Krishnan noted that she underwent a computerized tomography (CT) scan of the left foot on February 11, 2008 which revealed significant destructive changes of the joints of the left foot and cuneiform bones suggestive of osteomyelitis. He had appellant hospitalized from February 13 to 18, 2008 and diagnosed left foot osteomyelitis and neuropathy. Dr. Krishnan diagnosed acute and chronic osteomyelitis, worsening of abscesses. A February 14, 2008 x-ray of the left foot revealed bony irregularity at the base of the third metatarsal with bony sequestrum dorsally suspicious for osteomyelitis.

Appellant was treated by Dr. John Harvey, a Board-certified vascular surgeon, who on February 15, 2008 performed an incision and drainage of the left foot, debridement of the skin, subcutaneous tissue and bone biopsy and diagnosed osteomyelitis with abscess of the left foot. On May 20, 2008 Dr. Harvey noted appellant's history of neuropathy and biopsy of the bone and incision drainage of the abscess on February 15, 2008.[1] He noted that appellant was subsequently treated with intravenous antibiotic for a protracted period with worsening of the osteomyelitis. Dr. Harvey readmitted appellant on May 20, 2008 for reexploration with incision and drainage of abscess and recommended a course of protracted antibiotics.

On September 16, 2008 appellant filed a claim for a schedule award. On October 31, 2008 the Office requested that she submit a detailed report from her treating physician which provided an impairment evaluation pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] (A.M.A., *Guides*).

Appellant submitted a November 20, 2008 report from Dr. Harvey who noted treating her for an abscess of the left foot related to peripheral neuropathy, diminished sensation and injury. Dr. Harvey noted that appellant had two surgeries and he last treated her on September 29, 2008 and opined that she had reached maximum medical improvement. He noted significant restriction in movement in the left foot, Charcot joints, abnormal adduction, abduction and rotation, decreased strength in the muscles of the foot, deformity of the foot with loss of the plantar arch, minimal sensation in the foot. Dr. Harvey did not have a copy of the A.M.A., *Guides* but estimated that appellant had 20 percent impairment.

After the Office requested additional evidence regarding the cause of nonaccepted conditions, appellant submitted a March 19, 2009 report from Dr. Harvey who noted first treating appellant on February 14, 2008. Dr. Harvey indicated that he did not examine appellant prior to May 8, 2007 or the period after this date and was unable to comment regarding the state of her left foot at the time of the incident.

[1] This procedure was not authorized by the Office.

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

The Office referred Dr. Harvey's report and the case record to an Office medical adviser. In an April 11, 2009 report, the Office medical adviser stated that appellant had no impairment of the left leg due to the accepted plantar fascia tear. He found no evidence of permanent impairment and opined that the 20 percent impairment, rating provided by Dr. Harvey was merely an estimate and not based on the A.M.A., *Guides*. The Office medical adviser noted that the changes that Dr. Harvey described as the reason for the impairment were secondary to the osteomyelitis, which was not an accepted condition. He stated that to a reasonable degree of medical certainty there was no evidence of impairment based on the accepted condition of plantar fascia tear and the restricted motion in the foot was secondarily due to the Charcot joints and the sequelae of osteomyelitis.

By decision dated May 4, 2009, the Office denied appellant's claim for a schedule award.

On May 9, 2009 appellant requested an oral hearing which was held on September 3, 2009. She submitted an x-ray of the left foot and reports from Dr. Sabloff, Dr. Krishnan and Dr. Harvey all previously of record. A January 10, 2008 magnetic resonance imaging (MRI) scan of the left foot revealed moderate diffuse cellulitis reactive marrow transformation involving the cuneiform bone with mild chronic plantar fasciitis. A May 7, 2009 MRI scan of the left foot revealed stable appearance of marrow edema, bony erosions along the metatarsals, chronic osteomyelitis with moderate arthritic changes. A February 11, 2008 CT scan of the left foot revealed septic arthritis in the second, third and fourth tarsometatarsal joints with osteomyelitis in the cuneiform tarsal bones. A May 9, 2008 MRI scan of the left foot revealed chronic osteomyelitis, worsening destruction of the metatarsophalangeal joints with septic arthritis.

In a decision dated November 4, 2009, the hearing representative affirmed the May 4, 2009 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] 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 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.[5]

ANALYSIS

On appeal, appellant contends that she is entitled to a schedule award for the left lower extremity. To be entitled to a schedule award she must establish that she sustained permanent

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

impairment of a scheduled member of the body due to an employment injury.[6] Appellant's condition was accepted for plantar fascia tear of the left foot. In a letter dated October 31, 2008, the Office requested that she submit medical opinion from a treating physician addressing the degree of permanent impairment under the A.M.A., *Guides*, the date of maximum medical improvement and whether the preexisting peripheral neuropathy was aggravated by her work injury. However, appellant failed to submit sufficient medical evidence to establish that the accepted plantar fascia tear of the left foot caused permanent impairment.

The Board has carefully reviewed Dr. Harvey's November 20, 2008 report which estimated appellant's left lower extremity impairment at 20 percent. This rating is of diminished probative value as it is not clear how he came to this rating in accordance with the relevant standards of the A.M.A., *Guides*.[7] Rather, Dr. Harvey noted that he did not have a copy of the A.M.A., *Guides* for reference.

Dr. Harvey noted that appellant was status post two surgeries for an abscess of the left foot related to peripheral neuropathy. Appellant's condition was accepted for plantar fascia tear of the left foot and was not accepted for peripheral neuropathy.[8] Dr. Harvey noted findings for the left foot of diminished sensation, significant restriction in movement in the left foot, Charcot joints, abnormal adduction, abduction and rotation, decreased strength in the muscles of the foot and deformity of the foot with loss of the plantar arch. He did not address whether any of these findings were due to the accepted plantar fascia tear or how his impairment rating was derived. Dr. Harvey also did not clearly address if the impairment rating was for the foot or the leg.

The Office medical adviser reviewed Dr. Harvey's November 20, 2008 report and determined that appellant had no permanent impairment attributable to the accepted condition. He noted that the 20 percent impairment provided by Dr. Harvey was not based on the A.M.A., *Guides*. The medical adviser noted Dr. Harvey's findings, upon which his impairment rating was based, was secondary to the osteomyelitis and Charcot joints which were not accepted conditions. He opined that to a reasonable degree of medical certainty there was no evidence of impairment based on the accepted condition of plantar fascia tear.

There is no other medical evidence of record addressing permanent impairment, pursuant to the A.M.A., *Guides*, of the left foot or leg that is attributable to the accepted plantar fascia tear.

Without the necessary reasoned medical opinion evidence supporting that the accepted condition caused permanent impairment and explaining how such impairment was calculated

[6] *Veronica Williams*, 56 ECAB 367 (2005) (a schedule award can be paid only for a condition related to an employment injury; the claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment).

[7] *Lela M. Shaw*, 51 ECAB 372 (2000) (where the Board found that a physician's opinion which does not explicitly define impairment in terms of the A.M.A., *Guides*, *i.e.*, whether it be based on findings of pain, loss of range of motion or loss of strength, is insufficient to establish that appellant sustained any permanent impairment due to her accepted employment injury).

[8] *See Veronica Williams*, *supra* note 6. *See Alice J. Tysinger*, 51 ECAB 638 (2000) (for conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship).

under the A.M.A., *Guides*, appellant has failed to establish that she sustained a permanent impairment of the left foot or leg as a result of her accepted condition.

On appeal appellant asserts that Dr. Harvey's November 20, 2008 report was taken out of context and that there were typographical errors which have subsequently been corrected. She submitted a revised November 20, 2008 report from Dr. Harvey. However, the Board notes that its jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision; therefore, the Board is unable to review new evidence submitted by appellant on appeal.[9]

CONCLUSION

The Board finds that appellant failed to establish that she is entitled to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2009 decision of the Office of Workers' Compensation Programs is affirmed

Issued: December 16, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[9] 5 U.S.C. § 501.2(c)