United States Department of Labor
Employees' Compensation Appeals Board

S.I., Appellant	)	
and	)	**Docket No. 09-1048**
	)	**Issued: February 16, 2010**
U.S. POSTAL SERVICE, AIRPORT MAIL FACILITY, Baltimore, MD, Employer	)	

Appearances:
J. Steven Huffines, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 12, 2008 appellant, through counsel, filed an appeal of a December 9, 2008 merit decision of the Office of Workers' Compensation Programs regarding a schedule award for his left lower extremity impairment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has more than a 17 percent impairment of the left lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On June 24, 2003 appellant, then a 48-year-old mail handler, filed a traumatic injury claim alleging that on that date he sprained his left ankle when it got caught in a general purpose mail container webbing and he fell to the ground. The Office accepted the claim for a left ankle fracture.

In a progress note dated December 16, 2004, Dr. E.C. Fulton, an attending Board-certified orthopedic surgeon, reported mild-to-moderate ankle swelling on the lateral side with tenderness and palpable crepitus on passive motion. He noted that appellant continued to have complaints of pain which limited his left ankle activity and that the ankle occasionally gives out on him. Range of motion included full dorsiflexion, 20 degree plantar flexion, 10 degrees inversion and 10 degrees eversion. Using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (1991), Dr. Fulton found a 17 percent impairment of the left lower extremity using Table 17-5,[1] page 529 for decreased range of motion; a 10 percent left lower extremity impairment for decreased plantar flexion using Table 17-11, page 537; a 3 percent left lower extremity impairment for loss of eversion using Table 17-12, page 537; and a 10 percent impairment due to pain, loss of endurance and weakness. In concluding, he determined appellant had a total 40 percent left lower extremity impairment.

On December 12, 2007 and February 6, 2008 appellant filed a claim for a schedule award.

In a March 14, 2008 report, Dr. Robert W. Macht, a treating Board-certified surgeon, diagnosed a left ankle fracture. Appellant related complaints of moderate-to-severe left ankle pain, that his ankle swells, gives way and feels weak. A review of x-ray interpretations revealed left ankle accessory ossification of the lateral malleolus center inferior. Range of motion for the left ankle included 20 degrees flexion, 5 degrees extension, 5 degrees eversion and 20 degrees inversion. A physical examination revealed that left ankle was two centimeters larger than the right ankle, no atrophy, a normal gait and "[m]ild weakness in all planes." Using the A.M.A., *Guides*, Dr. Macht determined appellant had a total 55 percent left lower extremity impairment. Using Tables 17-11, page 537 and 17-12, page 537, he found appellant had a 10 percent left foot impairment for loss of flexion (Table 17-11), a 10 percent left foot impairment for loss of extension (Table 17-11), a 3 percent foot impairment for inversion and a 3 percent foot impairment for eversion (Table 17-12), which resulted in a 26 percent left foot impairment. Dr. Macht, using Table 17-8, page 532, determined that appellant had a 55 percent left foot impairment based on a Grade 4 weakness of his ankle in all planes. Using Table 17-37, page 552, he concluded that appellant had a 14 percent left foot impairment due to medial and lateral plantar nerve sensory impairment.[2] Dr. Macht determined that appellant had 36 percent left foot impairment for sensation loss and range of motion loss by combining the 26 percent loss of motion with the 14 percent sensation loss. In concluding, he opined:

> "Therefore, based on the range of motion and sensation loss models, there is a 36 percent permanent partial impairment of his left foot and based on the weakness model alone, there is a 55 percent permanent partial impairment of his left foot."

In an April 2, 2008 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and Office medical adviser, reviewed Dr. Macht's March 14, 2008 report and determined that appellant had a 17 percent left lower extremity impairment using the fifth edition of the A.M.A.,

[1] This table is used to determine lower limb impairment due to gait derangement.

[2] Table 17-37, page 552 shows seven percent foot impairment for medial plantar nerve deficits and seven percent foot impairment for lateral plantar nerve deficits.

Guides. Using Table 17-11, he noted appellant had a seven percent impairment of the left lower extremity for 20 degrees left ankle flexion and 7 percent impairment for 5 degrees left ankle extension. Using Table 17-12 Dr. Berman noted 2 percent impairment for 5 degrees left ankle eversion and a 2 percent impairment for 20 degrees left ankle inversion, resulting in a total 17 percent impairment using the Combined Values Chart, page 604. He determined that appellant was not entitled to an impairment rating for left ankle weakness as no atrophy was found and appellant had a normal gait. Lastly, Dr. Berman noted that the A.M.A., *Guides* at section 16.8, page 508 precluded adding decreased strength and painful conditions or decreased motion together. He also noted there was no evidence supporting any sensory loss of the lateral and medial plantar nerves.

By decision dated April 8, 2008, the Office issued an award for a 17 percent left lower extremity impairment. The award ran from March 14, 2008 to February 19, 2009. The Office calculated appellant's weekly pay based upon a 2/3 compensation rate.

In a letter dated April 21, 2008, appellant's counsel noted that the Office incorrectly calculated appellant's pay rate as he is married and is entitled to the 75 percent rate. He also requested information on receiving the schedule award in a lump sum.

On April 28, 2008 the Office issued an amended schedule award for a 17 percent left lower extremity impairment using a 75 percent compensation rate.

On May 2, 2008 appellant's counsel requested a hearing before an Office hearing representative regarding the calculation of the schedule award, which was held on October 29, 2008. Appellant contended that he was entitled to a 55 percent impairment for the left lower extremity and not the 17 percent impairment he was awarded.

In a letter dated June 19, 2008, appellant's counsel submitted a May 1, 2008 report from Dr. Macht and contended that the Office medical adviser incorrectly used the A.M.A., *Guides* when he calculated appellant's impairment rating. Appellant also argued that the Office should have referred appellant for an impartial medical examination due to the conflict in the medical opinion evidence. On June 27, 2008 the Office received a May 1, 2008 letter from Dr. Macht who noted that section 16.8A, page 508 refers to the upper extremities and is not relevant to the calculation of schedule awards for the lower extremity. Dr. Macht stated that there is a table for the lower extremity regarding combination of evaluation methods and that Dr. Berman incorrectly quoted page 508.

By decision dated November 18, 2008, the Office hearing representative remanded the case to the Office medical adviser for further development of the evidence based upon Dr. Macht's May 1, 2008 report.

In a December 1, 2008 report, Dr. Berman reviewed Dr. Macht's May 1, 2008 report and reiterated his opinion that appellant was not entitled to more than 17 percent impairment for his left lower extremity. The Office medical adviser disagreed with the 26 percent impairment that Dr. Macht found for left foot weakness as he opined that "this is not an acceptable test" and no

weakness would be found based upon a normal gait and no atrophy. As to sensory loss and tarsal tunnel syndrome, Dr. Berman reported the following:

> "The issue of sensory loss findings is not anticipated with the lateral malleolus fracture that was treated non-operative. There is a further explanation of my previously submitted memorandum of [April] 2[, 20]08, and it is recognized that if the claimant underwent open reduction and internal fixation with a plate and screws or other device, then it could be anticipated that there could be a sensory nerve loss as a result of the surgical exposure.
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> "However, tarsal tunnel syndrome is not the accepted complication of a minor nonoperatively treated lateral malleolus fracture. Unless there were sensory abnormalities noted in the treating physician's clinical notes that were noted contemporaneously with the treatment program, I would not accept a finding of sensory loss and tarsal tunnel syndrome in this clinical situation. On a clinical basis, it does not occur typically."

By decision dated December 9, 2008, the Office found the evidence insufficient to warrant including a 26 percent left lower extremity impairment for weakness of the left foot.[3] In reaching this determination, the Office found the report of the Office medical adviser, Dr. Berman, constituted the weight of the evidence.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] 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.[6] 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.[7]

FECA Bulletin No. 01-5 provides that, in making an impairment rating for the lower extremities, different evaluation methods cannot be used in combination. For example, arthritis

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[3] The Board notes that following the December 9, 2008 decision, the Office received additional evidence. In addition appellant submitted additional evidence with his appeal. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007). *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

[4] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[5] 20 C.F.R. § 10.404.

[6] *Id.* at § 8107(c)(19).

[7] *Id.* at § 10.404; *see I.F.*, 60 ECAB ___ (Docket No. 08-2321, issued May 21, 2009); *A.A.*, 59 ECAB ___ (Docket No. 08-951, issued September 22, 2008).

impairments obtained from Table 17-31 cannot be combined with impairment determinations based on gait derangement (Table 17-5); muscle atrophy (Table 17-6); muscle strength (Tables 17-7 and 17-8) or range of motion loss (section 17.2f). Before finalizing any physical impairment calculation, the Office medical adviser is to verify the appropriateness of the combination of evaluation methods with that listed in Table 17-2, the cross-usage chart.[8]

ANALYSIS

The Office accepted the claim for left ankle facture. The issue to be resolved is whether appellant has established that he is entitled to greater than 17 percent left lower extremity impairment, for which he received a schedule award. On appeal appellant contends the evidence establishes that he is entitled to a 55 percent left lower extremity impairment for muscle weakness. Appellant's counsel also argues that there is an unresolved conflict in the medical opinion evidence. For the reasons discussed below, the Board finds that there is no conflict in the medical opinion evidence and that appellant is not entitled to a 55 percent left lower extremity impairment for muscle weakness.

In a December 16, 2004 report, Dr. Fulton, an attending Board-certified orthopedic surgeon concluded that appellant had a total 40 percent left lower extremity impairment. In reaching this determination, he found a 17 percent impairment of the left lower extremity using Table 17-5, page 529; a 10 percent left lower extremity impairment for decreased plantar flexion using Table 17-11, page 532; a 3 percent left lower extremity impairment for loss of eversion using Table 17-12, page 532; and a 10 percent impairment due to pain, loss of endurance and weakness. However, Dr. Fulton did not offer any description of appellant's pain or weakness in support of his conclusion or provide the table he used to determine appellant had 10 percent impairment for pain, weakness and loss of endurance. He also did not provide the figures or otherwise explain how he applied the A.M.A., *Guides* in reaching his conclusion beyond noting the tables he utilized in calculating appellant's impairment rating. It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment and the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.[9]

On March 14, 2008 Dr. Macht, a treating Board-certified surgeon, concluded that appellant had a total 55 percent left foot impairment using Table 17-8, page 532 based on his classification of appellant's ankle impairment as a Grade 4. However, he did not offer any description of appellant's pain or weakness in support of his conclusion. Dr. Macht also did provide the figures or otherwise explain how he applied the A.M.A., *Guides* in reaching his conclusion beyond noting he used Table 17-8 to find a total 55 percent left foot impairment. As noted above, it is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment and the Office may rely on the opinion of

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[8] *See* FECA Bulletin No. 01-5 (issued January 29, 2001); *see also* A.M.A., *Guides* 526, Table 17-2 (5th ed. 2001).

[9] *J.Q.*, 59 ECAB ___ (Docket No. 06-2152, issued March 5, 2008); *Linda Beale*, 57 ECAB 429 (2006).

its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.[10]

Dr. Berman, a Board-certified orthopedic surgeon and Office medical adviser, correctly correlated Dr. Macht's findings when he determined appellant had a 17 percent left lower extremity impairment using the fifth edition of the A.M.A., *Guides*. He determined to base his impairment rating upon appellant's loss of range of ankle motion. Using Table 17-11, page 537 Dr. Berman determined appellant had a seven percent left lower extremity impairment for 20 degrees ankle, flexion, a seven percent left lower extremity impairment for 5 degrees ankle extension, a two percent left lower extremity impairment for 5 degrees ankle eversion and a two percent left lower extremity impairment for 20 degrees ankle inversion. He added the percentages of impairment from the same tables: 7 plus 7 to get 14 percent for ankle motion impairment estimates; and 2 percent plus 2 percent for 4 percent for hind foot impairment estimates. Dr. Berman used the Combined Values Chart, page 604, to compute a 17 percent impairment of the left lower extremity. He related that appellant was not entitled to an impairment rating for left ankle weakness as no atrophy was found and he had a normal gait. The Office medical adviser also found no evidence supporting any sensory loss of the lateral and medial plantar nerves and, thus, the use of Table 17-37, page 552 was not appropriate.

In a supplemental December 1, 2008 report, Dr. Berman disagreed with the 26 percent impairment that Dr. Macht found for left foot weakness using Tables 17-11, 17-12 and 17-37. In support of his opinion, he related that "this is not an acceptable test" and no weakness would be found based upon a normal gait and no atrophy. As to sensory loss and tarsal tunnel syndrome, Dr. Berman concluded the objective evidence failed to support that appellant had tarsal tunnel syndrome or sensory loss. He reiterated his opinion that appellant had only a 17 percent left lower extremity impairment.

The Board finds that Dr. Berman, the Office medical adviser, properly applied the A.M.A., *Guides* to the findings of Dr. Macht in calculating an impairment rating of a 17 percent left lower extremity permanent impairment. There is no other evidence of record, conforming to the A.M.A., *Guides*, indicating that appellant has any greater impairment

CONCLUSION

The Board finds that appellant has no more than a 17 percent left lower extremity impairment.

[10] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 9, 2008 is affirmed.

Issued: February 16, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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