

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

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E.C., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Riverdale, GA, Employer )

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**Docket No. 10-170  
Issued: February 16, 2010**

*Appearances:*  
*Appellant, pro se*  
*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 October 13, 2009 appellant filed a timely appeal from the April 23 and September 1, 2009 schedule award decisions of the Office of Workers' Compensation Programs and an October 7, 2009 Office decision denying his application for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the appeal.

**ISSUES**

The issues are: (1) whether appellant has more than a 17 percent left leg impairment or a 2 percent right leg impairment; and (2) whether the Office properly determined that appellant's application for reconsideration was insufficient to warrant further merit review of the claim.

**FACTUAL HISTORY**

On August 18, 2007 appellant, then a 50-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging planter fasciitis as a result of his federal employment. The Office accepted the claim for aggravated bilateral plantar fibromatosis/fasciitis. Appellant underwent left foot surgery on May 20, 2008.

In a report dated November 13, 2008, Dr. R. Howard Pike, an attending orthopedic surgeon, reported a failed surgical procedure on the left foot. He stated that appellant had reached maximum medical improvement and had a seven percent whole person impairment. In a report dated March 2, 2009, Dr. Pike indicated that appellant had a leg impairment due to muscle weakness. He reported that appellant had “4/5 plantar flexion strength” for the ankle. An Office medical adviser reviewed the medical evidence and in a report dated March 9, 2009 indicated that the left foot surgery on May 20, 2008 was not successful. He opined that under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5<sup>th</sup> ed.) appellant had a 17 percent left leg impairment based on Tables 17-7 and 17-8.

By decision dated April 23, 2009, the Office issued a schedule award for a 17 percent left leg impairment. The period of the award was 48.96 weeks commencing November 13, 2008.

In a report dated June 3, 2009, Dr. Pike opined that under the sixth edition of the A.M.A., *Guides*, appellant had a 17 percent right lower extremity impairment due to pain, with plantar fasciitis impeding full plantar flexion strength. He stated that this was the same impairment rating that he was given for the left leg and a 17 percent lower extremity impairment is equivalent to a 7 percent whole person impairment.

The evidence was referred to an Office medical adviser for review. In a report dated July 2, 2009, the medical adviser opined that under the sixth edition, appellant had a two percent right leg impairment. The medical adviser identified Table 16-2 for a Class 1 impairment.

By decision dated September 1, 2009, the Office indicated that it was modifying the April 23, 2009 decision. It found that the evidence was sufficient to establish a two percent right leg permanent impairment, payable after the current schedule award expired.

Appellant requested reconsideration of his claim in a letter dated September 25, 2009. He stated that he still had heel pain and did not believe that the two percent award was fair. As to medical evidence, appellant submitted a September 17, 2009 report from Dr. Pike, who opined that appellant had a 17 percent lower extremity impairment on the postoperative lower extremity because of persistent symptoms plantar fasciitis despite surgery leading to 4 out of 5 plantar flexion strength at the ankle. Dr. Pike stated that the contralateral limb also had a 17 percent lower extremity impairment because he has the same diagnosis and the same findings. He concluded that there was no change in his opinion.

By decision dated October 7, 2009, the Office determined that the application for reconsideration was insufficient to warrant merit review of the claim.

### **LEGAL PRECEDENT -- ISSUE 1**

Pursuant to 5 U.S.C. § 8107, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>1</sup> Neither the Federal Employees’

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<sup>1</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

Compensation Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>2</sup> As of February 1, 2001, the fifth edition of the A.M.A., *Guides* was to be used to calculate schedule awards.<sup>3</sup>

### ANALYSIS -- ISSUE 1

With respect to the April 23, 2009 decision, the Board notes that the proper edition of the A.M.A., *Guides* for the evaluation of the permanent impairment was the fifth edition. For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.<sup>4</sup> The April 23, 2009 decision found that appellant had a 17 percent permanent impairment to the left leg. The attending physician, Dr. Pike, described a muscle weakness based on ankle plantar flexion. He did not discuss any specific tables under the A.M.A., *Guides*. The Office medical adviser identified Table 17-8, which provides for impairments due to leg muscle weakness, based on muscle groups.<sup>5</sup> Table 17-7 provides grades of severity and a Grade 4 is “active movement against gravity with some resistance.”<sup>6</sup> For ankle plantar flexion, a Grade 4 impairment is a 17 percent leg impairment.

The probative medical evidence therefore established that appellant had a 17 percent left leg impairment. The Office medical adviser provided a rationalized medical opinion based on the findings of Dr. Pike. This represents the weight of the medical evidence.

With respect to the right leg, Dr. Pike opined in his June 3, 2009 report that appellant also had 17 percent leg impairment, using the sixth edition. He does not, however, provide any explanation as to how he applied the sixth edition of the A.M.A., *Guides*. This edition provides a different diagnosis based method of evaluation. The only medical report discussing the relevant tables in the sixth edition is the July 2, 2009 report of the Office medical adviser. The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).<sup>7</sup> The net adjustment formula is (GMFH-CDX) + (GMPE - DCX) + (GMCS- CDX). The Office medical adviser identified Table 16-2 and found a Class 1 soft tissue diagnosis, which results in a CDX of 1. He found a net adjustment of +1 by applying the above formula to a GMFH of 1, GMPE of 2 and GMCS of 1. Under Table 16-2, this results in a two percent leg impairment.

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<sup>2</sup> A. George Lampo, 45 ECAB 441 (1994).

<sup>3</sup> FECA Bulletin No. 01-05 (issued January 29, 2001).

<sup>4</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>5</sup> A.M.A., *Guides* 532, Table 17-8.

<sup>6</sup> *Id.* at 531, Table 17-7.

<sup>7</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008) 494-531.

The Office medical adviser provided a rationalized medical opinion on the issue. It represents the weight of the medical evidence, as Dr. Pike did not provide a rationalized opinion under the sixth edition. There is no probative evidence to establish greater than a two percent right leg impairment.<sup>8</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.<sup>9</sup> The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”<sup>10</sup>

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent evidence not previously considered by the Office.<sup>11</sup>

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

In his September 25, 2009 application for reconsideration appellant indicated that he did not believe a two percent right leg impairment was fair, since he continued to have pain. He did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. As to new evidence, appellant submitted a September 17, 2009 report from Dr. Pike, who reiterated his opinion that appellant had a 17 percent bilateral leg impairment. The evidence submitted is duplicative of the physician’s opinion which was previously considered by the Office.<sup>13</sup> The Board finds that appellant did not submit relevant and pertinent evidence not previously considered by the Office.

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<sup>8</sup> The Office did not issue a separate decision establishing the weeks of compensation for a two percent right leg impairment. On return of the case record, it should issue a proper decision as to a schedule award for the right leg.

<sup>9</sup> 5 U.S.C. § 8128(a).

<sup>10</sup> 20 C.F.R. § 10.605 (1999).

<sup>11</sup> *Id.* at § 10.606(b)(2).

<sup>12</sup> *Id.* at § 10.608.

<sup>13</sup> *See David J. McDonald*, 50 ECAB 185 (1998).

Because appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2), the Office properly denied merit review in this case.

**CONCLUSION**

The Board finds that the probative evidence does not establish more than a 17 percent left leg impairment or 2 percent right leg impairment. In his application for reconsideration, appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2) and the Office properly refused to reopen the case for merit review.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 7, September 1 and April 23, 2009 are affirmed.

Issued: February 16, 2010  
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