United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 09-1726**
	)	**Issued: June 8, 2010**
DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE POLICE, Fort Dix, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 June 16, 2009 appellant, through his attorney, filed a timely appeal from July 24, 2008 and February 25, 2009 merit decisions of the Office of Workers' Compensation Programs denying 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 the case.

ISSUE

The issue is whether appellant established that he sustained any permanent impairment to his left lower extremity causally related to his accepted December 15, 2003 employment injury, warranting a schedule award.

On appeal, appellant's representative contends that Dr. Roy Friedenthal, a Board-certified orthopedic surgeon, does not carry the weight of the medical evidence because his report was not based on a proper factual background and was not in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[1] Counsel argues in the alternative that a conflict of opinion exists between Dr. Nicholas P. Diamond, an

[1] 5th ed. 2001.

osteopath, and Dr. Friedenthal regarding whether appellant sustained a permanent impairment due to his employment injury.

FACTUAL HISTORY

On December 15, 2003 appellant, then a 53-year-old materials handler, sustained a fracture of the second metatarsal of the left foot when a box dropped on his foot while he was issuing boots to troops. He stopped work from January 21 to February 4, 2004, when he returned to light duty. Appellant's contract was terminated on February 22, 2004. The Office terminated compensation benefits on June 8, 2004.[2]

On March 13, 2006 appellant, through his representative, filed a request for a schedule award.

In a January 5, 2006 medical report, Dr. Diamond reviewed appellant's medical and occupational history and noted his complaints of intermittent left foot pain, stiffness and swelling. Physical examination of the left foot revealed tenderness over the second tarsal and metatarsal area. Ankle joint circumference taken at 10 centimeters above the patella measured 30 centimeters on the right and 31 centimeters on the left. Plantar flexion and extensions of the left foot were graded at four out of five in motor strength testing. Dr. Diamond diagnosed post-traumatic left foot second metatarsal fracture and post-traumatic osteoarthritis or Charcot arthropathy. He opined that the December 15, 2003 employment injury was the competent producing factor for appellant's subjective and objective findings on examination. Dr. Diamond provided a 15 percent lower extremity impairment rating. Citing Tables 17-37 on page 552 and Table 16-11 on page 484 of the A.M.A., *Guides*, Dr. Diamond added one percent impairment for grade four out of five of the left foot plantar flexion medial, one percent impairment for grade four out of five of the plantar flexion lateral and one percent impairment for grade four out of five for the common peroneal motor strength deficit. Dr. Diamond also added three percent impairment for pain.

On November 3, 2006 the Office forwarded Dr. Diamond's medical report to Dr. Andrew Merola, a Board-certified orthopedic surgeon and an Office medical adviser, for an evaluation of permanent impairment in accordance with the A.M.A., *Guides*.

On November 5, 2006 Dr. Merola advised that there were significant problems with Dr. Diamond's examination and that the case should be referred to an impartial medical examiner.

The Office determined that a conflict of medical opinion existed between Drs. Diamond and Merola regarding appellant's permanent impairment due to his employment injury. It referred appellant to Dr. Thomas J. O'Dowd, a Board-certified orthopedic surgeon, to resolve the conflict.

[2] Based on the report of a second opinion physician, who found that appellant did not continue to experience residuals of his employment injury, the Office terminated compensation benefits by decision dated June 8, 2004. This decision was subsequently affirmed by a June 2, 2005 hearing representative's decision and a January 9, 2007 Office decision.

In a May 14, 2007 medical report, Dr. O'Dowd stated that all examination findings were related to chronic diabetic neuropathic changes, edema and the progressive Charcot changes, which were more evident in the right foot but present to a lesser extent in the left. He opined that the second metatarsal fracture healed without deformity and was not related to any present condition. Dr. O'Dowd noted that it would be useful to review medical reports from appellant's treating physician to confirm his impressions.

By letter dated September 28, 2007 and in an October 3, 2007 telephone call, the Office requested Dr. O'Dowd clarify which documents he wanted to review to confirm his impressions. Dr. O'Dowd did not respond to these requests. It subsequently referred appellant to Dr. Friedenthal, a Board-certified orthopedic surgeon, for a second impartial medical evaluation.

In a February 13, 2008 medical report, Dr. Friedenthal reviewed appellant's medical history, which was significant for diabetes mellitus. Physical examination revealed diffuse swelling and deformity around the right hind foot and mild changes on the left hind foot. The left foot did not show tissue swelling, palpable deformities, localized tenderness or induration. Ranges of motion in the ankles were restricted to less than 5 degrees of dorsiflexion bilaterally, 20 degrees of plantar flexion on the right and 25 degrees of plantar flexion on the left. Subtalar motion was severely decreased on the right and moderately decreased on the left without pain. Neurologic evaluation revealed diffuse decreased sensation in both feet but no focal motor deficit. Ankle reflexes were absent bilaterally. A January 2, 2004 x-ray of the left foot revealed a fracture of the mid shaft of the second metatarsal with a copious callus suggesting that the fracture was six-to-eight weeks old. The x-ray also showed degenerative changes at the first metatarsal phalangeal joint of a mild-to-moderate degree and chronic calcification. Subsequent x-rays through March 31, 2005 revealed a healed fracture of the first and second metatarsal. Dr. Friedenthal diagnosed status post stress fracture in the first and second metatarsal, diabetic peripheral neuropathy, vascular disease and probable neuropathia of both feet. He opined that there was no residual attributable to the fracture of the second left metatarsal, which healed without sequelae. Further, appellant did not complain of any pain in the fractured region and there were no secondary musculoskeletal changes attributable to the fracture. On the basis of radiographic studies, he estimated that maximum medical improvement occurred by approximately May 17, 2004. Dr. Friedenthal noted that appellant had serious conditions causing significant functional disability, including evidence of vascular disease and neuropathy. However, neither of these conditions were caused or exacerbated by the December 15, 2003 employment injury. Further, Dr. Friedenthal stated that, due to historical and radiographic evidence, the second metatarsal fracture was more likely a stress injury related to underlying neuropathia. Although appellant's symptoms were noted in response to work-related physical activity, Dr. Friedenthal opined that it was unlikely the fracture occurred on December 15, 2003 due to the healing revealed by x-ray only 18 days later. He also noted that the x-ray revealed a first metatarsal fracture with evidence of callus formation which likely developed as part of the same underlying process. Dr. Friedenthal concluded that appellant's fractures were appropriately treated and healed in a satisfactory alignment without symptomatic or objective impairment.

On February 29, 2008 the Office referred Dr. Friedenthal's medical report to Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and Office medical adviser, for a determination of appellant's permanent impairment in accordance with the A.M.A., *Guides*. In a March 3,

2008 report, Dr. Magliato reviewed Dr. Friedenthal's medical report and noted his findings that appellant sustained an unrelated impairment of the foot due to Charcot disease. He opined that, even if there was preexisting loss of motion in the foot due to a previous disease, he would assume that the accepted employment injury caused some aggravation of the underlying disease. Using Dr. Friedenthal's findings, Dr. Magliato added seven percent impairment for five degrees of dorsiflexion, according to Table 17-11 on page 537 of the A.M.A., *Guides* and five percent impairment for moderately decreased subtalar motion with no pain, according to Table 17-12 on page 537. He provided a 12 percent impairment rating of appellant's lower extremity.

The Office subsequently requested Dr. Magliato clarify whether his finding of 12 percent permanent impairment included a rating for pain. On April 21, 2008 Dr. Magliato stated that three percent impairment should be included for pain according to Table 18-1 on page 574 of the A.M.A., *Guides*. He found that appellant sustained 15 percent permanent impairment of the left lower extremity.

On June 19, 2008 the Office notified Dr. Magliato that he was only requested to provide a rating based on application of the medical findings to the A.M.A., *Guides* and that he was not to provide a medical opinion on impairment. It asked him to provide a rating based on Dr. Friedenthal's medical report.

In a July 2, 2008 medical report, Dr. Magliato found that, based on Dr. Friedenthal's medical report, appellant did not sustain an objective work-related impairment. He stated that Dr. Friedenthal's findings, including a stress fracture of the second metatarsal, lost ankle motion, decreased sensation and subtalar motion, were due to the unrelated Charcot disease. Dr. Magliato opined his previous rating should be ignored and that there was no lower extremity permanent impairment.

By decision dated July 24, 2008, the Office denied appellant's request for a schedule award on the grounds that the medical evidence did not support a permanent impairment to a scheduled member.

On July 30, 2008 appellant, through his representative, filed a request for an oral hearing before an Office hearing representative. An oral hearing took place on December 3, 2008.

Appellant subsequently submitted an amended copy of Dr. Diamond's medical report dated November 24, 2008. Dr. Diamond changed his rating for grade four out of five motor strength deficit for left foot common peroneal to 10 percent. He continued to find that appellant sustained 15 percent permanent impairment to the left lower extremity.

By decision dated February 25, 2009, the Office hearing representative modified and affirmed the July 24, 2008 decision. She found that no conflict existed between Drs. Diamond and Merola. Thus, Dr. Friedenthal was not an impartial medical adviser but rather a second opinion physician. Regardless, the hearing representative found that Dr. Friedenthal's medical report represented the weight of medical evidence and that Dr. Diamond's medical report was not sufficiently rationalized to create a conflict of medical opinion.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing federal 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[6]

ANALYSIS

The Office accepted that appellant sustained a fracture of the second left metatarsal due to his employment injury on December 15, 2003. The issue is whether appellant sustained any permanent impairment causally related to this injury entitling him to a schedule award. The Board finds he has not met his burden of proof.

On March 13, 2006 appellant filed a request for a schedule award and submitted a January 5, 2006 medical report from Dr. Diamond, who provided a 15 percent impairment rating. Dr. Diamond diagnosed post-traumatic left foot second metatarsal fracture and post-traumatic osteoarthritis or Charcot arthropathy and opined that the conditions were related to appellant's December 15, 2003 employment injury. Based on physical examination findings and Tables 17-37 and 16-11 found on pages 552 and 484 of the A.M.A., *Guides*, respectively he calculated a one percent impairment rating for grade four out of five motor strength deficit of the medial plantar flexion, one percent impairment for grade four out of five motor strength deficit of the lateral plantar flexion and one percent impairment for grade four out of five motor strength deficit of the common peroneal. Dr. Diamond later amended the report to provide 10 percent impairment for grade four out of five motor strength deficit of the common peroneal. He further added 3 percent impairment for pain to total 15 percent permanent impairment.

The Office referred Dr. Diamond's medical report to Dr. Merola, an Office medical adviser, for an evaluation of permanent impairment. On November 5, 2006 Dr. Merola stated that there were significant problems with Dr. Diamond's examination. The Office determined

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. at § 10.404(a).

[6] *See* FECA Bulletin No. 01-5 (issued January 29, 2001); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

that a conflict of medical opinion existed between Drs. Merola and Diamond. It referred the case to Dr. Friedenthal to resolve the conflict.[7]

In a February 13, 2008 medical report, Dr. Friedenthal described a full physical examination and reviewed the results of several x-rays. He diagnosed status post stress fracture of the first and second metatarsal, diabetic peripheral neuropathy, vascular disease and probable neuropathia of both feet. Dr. Friedenthal opined that there were no residuals from the second left metatarsal fracture, which healed without sequelae. Appellant did not complain of any pain and there were no secondary musculoskeletal changes attributable to the fracture. Dr. Friedenthal did note some functional disabilities on examination but opined that they were caused by vascular disease and neuropathy, which were not related to the December 15, 2003 employment injury. He stated that, based on historical and radiographic evidence, the second metatarsal fracture was likely a stress injury related to underlying neuropathy. Based on the healing revealed by an x-ray taken only 18 days after the employment injury, he opined that it was unlikely the fracture occurred on December 15, 2003. Dr. Friedenthal noted that an x-ray also revealed a first metatarsal fracture with evidence of callus formation, which likely developed as part of the same underlying process. He concluded that the employment injury was properly treated and healed in a satisfactory alignment without symptomatic or objective impairment.

The Board finds that Office incorrectly found that a conflict of medical opinion existed between Dr. Diamond and Dr. Merola, the Office medical adviser. Dr. Merola did not provide any medical opinion regarding appellant's lower extremity impairment or address with any specificity his disagreement with Dr. Diamond's findings.[8] Therefore, Dr. Friedenthal was not an impartial medical examiner.[9] Even though his medical report is not entitled to special weight, his report can still be considered for its own intrinsic value and can still constitute the weight of the medical evidence.[10] Dr. Friedenthal provided a comprehensive medical opinion, based on a detailed physical examination and a full review of prior radiographic evidence and determined that any current impairment was not related to appellant's December 15, 2003 employment injury.[11] His opinion was well rationalized and based on a complete and accurate medical and factual history. Therefore, the Board finds that his opinion represents the weight of the medical evidence and establishes that appellant is not entitled to a schedule award.

Further, the Board disagrees with appellant's contention on appeal that a conflict exists between Dr. Diamond and Dr. Friedenthal. In his report, Dr. Diamond provided impairment

[7] The Office initially referred appellant to Dr. O'Dowd. However, Dr. O'Dowd declined to clarify his medical report despite several requests from the Office. As the Office referred appellant to Dr. O'Dowd, it has the duty to secure an appropriate report on the relevant issue. It, therefore, properly referred appellant to Dr. Friedenthal to secure a complete, fully rationalized medical report regarding his degree of permanent impairment. *See Robert Kirby*, 51 ECAB 474 (2000).

[8] *See* 5 U.S.C. § 8123(a); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[9] *See Delphia Y. Jackson*, 55 ECAB 373 (2004); *Cleopatra McDougal-Saddler*, *id*.

[10] *Id*.

[11] A schedule award can only be paid for a condition related to an employment injury. *See Veronica Williams*, 56 ECAB 367 (2005).

ratings for motor strength deficit of the lateral plantar flexion, medial plantar flexion and the common peroneal. Although he referenced Table 17-37, found on page 552 of the A.M.A., *Guides* and Table 16-11 on page 484, he did not explain how he applied the tables to his findings on examination.[12] In determining an impairment rating for neurological motor deficits, the A.M.A., *Guides* instructs the examiner to multiply the maximum impairment for each identified nerve found in Table 17-37, by the grade of impairment according to Table 16-11, which provides a range of impairment for each grade.[13] Dr. Diamond did not specify how he determined the percentage of impairment out of the range provided in Table 16-11 and did not show his calculations or explain how he used the referenced tables of the A.M.A., *Guides* to arrive at his impairment rating.[14] Additionally, he provided three percent impairment for pain. Chapter 18 of the A.M.A., *Guides* provides that examiners should not use a pain impairment rating for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[15] Therefore, the Board finds that Dr. Diamond's impairment rating does not conform to the A.M.A., *Guides* and is of diminished probative value.[16]

The Board notes that Dr. Magliato's medical reports dated March 3 and April 21, 2008 finding 12 and 15 percent permanent impairment are also of diminished probative value as the physician later clarified his opinion to find no impairment causally related to the employment injury.[17]

[12] *See J.G.*, 61 ECAB ___ (Docket No. 09-1128, issued December 7, 2009); *Paul R. Evans, Jr.*, 44 ECAB 646 (1993).

[13] A.M.A., *Guides* 550.

[14] *See Linda Beale*, 57 ECAB 429 (2006). *See also John Constantin*, 39 ECAB 1090 (1998) (a medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value).

[15] A.M.A., *Guides* 571.

[16] *See A.G.*, 58 ECAB 582 (2007); *Linda Beale supra* note 14.

[17] The Board further notes that Dr. Magliato's March 3 and April 21, 2008 medical reports are of diminished probative value as they were not fully rationalized or based on an accurate medical background. Although Dr. Magliato noted Dr. Friedenthal's finding that appellant's lower extremity impairments were unrelated to his employment injury, he apparently disagreed with this finding and assumed that the employment injury caused some aggravation of a preexisting disease. However, he did not rationalize his assumption or otherwise explain why he disagreed with Dr. Friedenthal's finding. Moreover, Dr. Magliato did not base his findings on an accurate reading of Dr. Friedenthal's medical report. He reported Dr. Friedenthal's findings that appellant's impairment was due to his unrelated Charcot disease. This is not accurate. Although Dr. Friedenthal noted that appellant's fracture was likely a stress injury related to underlying neuropathy, he did not attribute the fracture to or even diagnose Charcot disease. Moreover, in the April 21, 2008 medical report, Dr. Magliato added three percent impairment due to pain, despite the fact that Dr. Friedenthal stated several times in his report that appellant did not report any complaints of pain in the fracture area. *See James R. Taylor*, 56 ECAB 537 (2005).

Appellant did not submit any medical evidence providing an impairment rating in accordance with the A.M.A., *Guides*. Therefore, he did not meet his burden of proof to establish his entitlement to a schedule award.[18]

CONCLUSION

The Board finds that appellant did not establish that he sustained a permanent impairment to his left lower extremity, causally related to his accepted December 15, 2003 employment injury, entitling him to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2009 and July 24, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 8, 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

[18] The burden is upon the employee to establish that he is entitled to schedule award compensation. *D.H.*, 58 ECAB 358 (2007); *Harold Hendrix*, 1 ECAB 54 (1947).