United States Department of Labor
Employees' Compensation Appeals Board

R.D., Appellant	)	
and	)	**Docket No. 09-1383**
	)	**Issued: May 20, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Bustleton, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 5, 2009 appellant, through his attorney, filed a timely appeal from an April 27, 2009 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant sustained any permanent impairment to his left leg causally related to his February 23, 2006 employment injury.

On appeal, appellant contends that the Office should have issued a schedule award based on the opinion of his attending physician.

FACTUAL HISTORY

On February 23, 2006 appellant injured his left ankle when he tripped over a curb and fell while in the performance of duty. On June 16, 2006 the Office accepted his claim for closed fracture of the lateral malleolus and sprain of the left ankle. Appellant filed a claim for a schedule award.

In a December 20, 2007 report, Dr. Daisy A. Rodriguez, a Board-certified internist, reviewed a history of appellant's injury and medical treatment. She rated impairment to his left leg at 30 percent. Dr. Rodriguez advised that she used the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). She noted that appellant had a three millimeter (mm) cartilage interval in the ankle joint, which represented five percent impairment under Table 17-31 for arthritis.[1] Under Table 17-8, Dr. Rodriguez rated 12 percent impairment based on Grade 4 dorsiflexion of the ankle for muscle weakness. She stated that she rated sensory impairment with reference to peripheral nerve impairment under Table 17-37, which provides a maximum sensory impairment of five percent for the superficial peroneal nerve. Dr. Rodriguez graded the extent of sensory deficit as Grade 4 or 25 percent to find a total of 1 percent sensory loss. In rating loss of range of motion to the left ankle, she noted "Motion E, Range degrees, Deficit percentage 15."[2] Dr. Rodriguez advised that the combined impairment to the lower extremity was 30 percent.[3]

In a January 10, 2008 x-ray report, Dr. Howard C. Hutt, a Board-certified radiologist, noted an unremarkable study of the left ankle with no fractures.

On March 29, 2008 an Office medical adviser noted his disagreement with the impairment rating by Dr. Rodriguez, as her findings were not consistent with the other physicians of record. He found that Dr. Hutt did not make any reference to significant arthritis in the left ankle. The Office medical adviser recommended a second opinion.

On July 2, 2008 the Office referred appellant to Dr. Bong S. Lee, a Board-certified orthopedic surgeon, for a second opinion examination. In a July 17, 2008 report, Dr. Lee reviewed appellant's history of injury and medical treatment. He noted that appellant underwent new x-rays of the left ankle, which were reviewed and found to be completely normal. Dr. Lee advised that appellant complained primarily of pain outside the left ankle. He set forth findings on physical examination, noting a normal sensory examination and muscle motor tests. On range of motion, Dr. Lee found 20 degrees extension and 30 degrees flexion which were within the normal range. He stated that the October 25, 2006 magnetic resonance imaging scan showed that the accepted fracture had healed. Dr. Lee found that appellant had a normal orthopedic examination with no permanent impairment to the left ankle or leg and that any residuals of the accepted condition had resolved without disability.

On September 10, 2008 the Office medical adviser reviewed the records and noted that Dr. Lee found a normal left ankle without impairment, which was consistent with other medical providers. In addition, he noted that no diagnostic studies had been provided which established impairment due to significant joint space narrowing of the left ankle. The Office medical adviser found that there was no ratable impairment to appellant's left leg.

[1] Dr. Rodriguez did not cite to the A.M.A., *Guides* for this calculation but is referring to page 544, Table 17-31 of the A.M.A., *Guides*.

[2] To the extent that Dr. Rodriguez was referring to five degrees of extension under Table 17-11, it appears this would correspond with impairment up to 7 percent for mild loss of motion rather than 15 percent moderate loss.

[3] Dr. Rodriguez made no reference to the Combined Values Chart at 17-2. It precludes combining loss of muscle strength with either arthritis or peripheral nerve injury (sensory loss).

The Office found a conflict in medical opinion arose between Dr. Rodriguez and Dr. Lee as to the nature and extent of any impairment to appellant's left ankle due to the accepted injury. On January 23, 2009 it referred him to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination. In a February 5, 2009 report, Dr. Glenn reviewed appellant's history of injury and medical treatment. On examination, he described the left and right ankles as symmetrical without any evidence of swelling and normal range of motion in dorsiflexion and plantar flexion. Motor tone and strength was excellent and symmetrical in both lower extremities as were reflexes. There was no evidence of muscle atrophy or fasciculation. Sensory pattern was described as preserved throughout both lower extremities without tenderness about either ankle joint. Dr. Glenn advised that all physical findings were normal as to range of motion, sensory pattern, reflexes and strength. X-rays were obtained in the AP projection with and without weight bearing which he reviewed and interpreted as normal without evidence of any arthritic changes. Dr. Glenn advised that he measured the ankle cartilage interval on the left as 3.5 mm which, under Table 17-31, did not rise to the level of ratable impairment. He described the change as an anatomical variant and not as a consequence of any direct trauma to the ankle. Dr. Glenn stated that appellant was not under any active medical treatment and had long reached maximum medical improvement without ratable permanent impairment. He noted that the A.M.A., *Guides* provide on page 544 that if there is any doubt or controversy about the suitability of the radiographic method in a specific individual, range of motion techniques may be used instead. As the range of motion in the left ankle was normal, appellant did not have any impairment from the February 23, 2006 injury.

In an April 23, 2009 report, the medical adviser reviewed the medical evidence of record and noted that Dr. Glenn reported a normal examination of appellant's left ankle.

In an April 27, 2009 decision, the Office denied appellant's schedule award claim, finding that the weight of medical opinion failed to establish any permanent impairment.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[4] set 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.[5] 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 and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[6] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[7]

Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the

[4] 5 U.S.C. §§ 8101-8193.

[5] *Id*. at § 8107.

[6] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[7] 20 C.F.R. § 10.404.

opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8]

ANALYSIS

The Office found a conflict in medical opinion between Dr. Rodriguez, who rated impairment to appellant's left leg of 30 percent, and Dr. Lee, who found that appellant had no ratable permanent impairment of his left ankle or lower extremity. It properly referred appellant to Dr. Glenn, selected as the impartial medical specialist to address the nature and extent of any permanent impairment related to his accepted injury.

On examination, Dr. Glenn reported normal findings with regard to sensory evaluation, strength and range of motion of the left ankle. He advised that there was no evidence of muscle atrophy and that x-rays were obtained and reviewed which showed a 3.5 mm cartilage interval of the left ankle joint. Referring to Table 17-31, Dr. Glenn noted that permanent impairment was rated at 3mm or less, such that appellant did not have ratable impairment due to arthritis of the left ankle.[9] He described this finding as an anatomical variant not due to any trauma related to the accepted left ankle injury. Dr. Glenn did not support the arthritis impairment rating found by Dr. Rodriguez. Rather, he supported the finding by Dr. Lee that appellant did not have any permanent impairment involving the left ankle or lower extremity.

On appeal, it is contended that the Board should modify the determination of the Office and find impairment based on the report of Dr. Rodriguez. It is well established, however, that when a case is referred to an impartial medical specialist to resolve a conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, will be given special weight.[10] The Board finds that, the report of the impartial medical examiner, Dr. Glenn, is based on an accurate factual history of the claim, a review of the medical evidence of record and findings on examination of appellant. He provided a reasoned opinion explaining the basis for his opinion that appellant did not sustain any impairment to his left ankle based on the February 23, 2006 employment injury. Dr. Glenn obtained additional diagnostic testing of the left ankle and found that x-rays did not support impairment due to arthritis, as was mentioned by Dr. Rodriguez. His opinion constitutes the special weight of medical evidence and establishes that appellant does not have any permanent impairment of his left ankle.

CONCLUSION

The Board finds that appellant has not established that he sustained permanent impairment related to his February 23, 2006 injury.

[8] *Darlene Kennedy*, 57 ECAB 414 (2006).

[9] *See* A.M.A., *Guides*, 544, Table 17-31.

[10] *See Daniel F. O'Donnell*, 54 ECAB 456 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 27, 2009 is affirmed.

Issued: May 20, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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