United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 09-2191**
	)	**Issued: May 14, 2010**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Morrisville, NC, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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 September 1, 2009 appellant, through her attorney, filed a timely appeal from August 17 and 24, 2009 merit decisions of the Office of Workers' Compensation Programs granting a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUE

The issue is whether appellant has more than a four percent permanent impairment of the right leg for which she received a schedule award.

FACTUAL HISTORY

On August 4, 2005 appellant, then a 44-year-old transportation security screener, filed an occupational disease claim alleging that she experienced right heel pain due to factors of her federal employment. The Office accepted the claim for right plantar fascial fibromatosis.

In a February 19, 2009 impairment evaluation, Dr. Mark A. Rowley, a Board-certified orthopedic surgeon, diagnosed plantar fasciitis and foot pain. He discussed appellant's complaints of bilateral heel pain with radiation into the foot. She also experienced increased pain with standing and some mild swelling with activity. Dr. Rowley noted that appellant had preexisting chondromalacia of both knees. He opined that she had a five percent permanent impairment of both lower extremities due to chondromalacia patella using Table 16-3 on page 510 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[1] Dr. Rowley noted that the A.M.A., *Guides* did not provide an impairment rating for the diagnosed condition of chondromalacia. He utilized the diagnosis-based estimate for the condition of mild patellar instability, found within the diagnosis of patellar dislocation, of seven percent. Dr. Rowley concluded that as she had not experienced a traumatic dislocation the rating should be downgraded to five percent. He further found that appellant had a two percent lower limb impairment due to plantar fasciitis using the diagnosis-based estimate set forth in Table 16-2 on page 501 of the A.M.A., *Guides*. Dr. Rowley characterized the plantar fasciitis as a Class 1, diagnostic criteria with a severity grade of D. He explained, "The average severity grade is a C but since she reports pain and dysfunction more than average, I assigned a severity grade of D. This then correlates with the next line in the table which is a [two percent] impairment rating of the lower extremity. Since the condition is bilateral, the total lower extremity impairment rating would be [four percent] regarding the foot condition." Dr. Rowley added the impairments on either side to find a total impairment to both lower extremities of 14 percent.

On May 5, 2009 appellant filed a claim for a schedule award. On May 8, 2009 an Office medical adviser noted that Dr. Rowley had considered her nonemployment-related chondromalacia in his impairment rating. Considering only the employment-related plantar fasciitis, he concurred with Dr. Rowley's finding that she had a Class 1, Grade D impairment, which constituted a two percent impairment of the right lower extremity using Table 16-2 on page 501 of the A.M.A., *Guides*.

By decision dated May 26, 2009, the Office granted appellant a two percent permanent impairment of the right lower extremity. The period of the award ran for 5.76 weeks from February 19 to March 31, 2009.

On June 2, 2009 appellant, through her attorney, requested reconsideration. He argued that the Office medical adviser failed to consider her preexisting right knee impairment in calculating the impairment rating.

On July 1, 2009 the Office medical adviser noted that the chondromalacia should be included in the calculation of appellant's impairment rating as it was a preexisting condition. He used the diagnosis-based estimate for a strain or tendinitis to find that she had a Class 1, Grade C, or two percent impairment of the lower extremity using Table 16-3 on page 509 of the A.M.A., *Guides*. The Office medical adviser added the impairment due to plantar fasciitis and chondromalacia to find a four percent right lower extremity impairment.

[1] A.M.A., *Guides* (6th ed. 2009). Dr. Rowley referred to Table 2 rather than Table 3; however, this appears to be a typographical error.

By decision dated August 17, 2009, the Office modified its May 26, 2009 decision to reflect that appellant had a four percent impairment of the right leg. On August 24, 2009 it granted her a schedule award for an additional two percent permanent impairment of the right leg.

On appeal appellant's attorney requests that the Board modify the schedule award decision to Dr. Rowley's finding of 14 percent impairment. He also asks that the Board instruct the Office to issue a decision regarding left foot impairment.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[2] and its implementing federal regulations,[3] 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.[4] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[5]

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).[6] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[7]

ANALYSIS

The Office accepted that appellant sustained right plantar fascial fibromatosis due to factors of her federal employment. In a February 19, 2009 impairment evaluation, Dr. Rowley diagnosed bilateral plantar fasciitis and preexisting chondromalacia of the knees. Using the diagnosis-based assignment for plantar fasciitis, he found that appellant had a Class 1, or mild problem, which he graded in severity as D, which is one grade up in severity than average for a Class 1 assignment. Dr. Rowley explained that he used the severity Grade D based on her

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Id*. at § 10.404(a).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[6] A.M.A., *Guides* 494-531.

[7] *Id.* at 521.

above-average pain and loss of use.[8] He concluded that appellant had a two percent impairment of each lower extremity due to plantar fasciitis. On May 8, 2009 an Office medical adviser concurred with Dr. Rowley's finding of two percent impairment right lower extremity impairment.

Dr. Rowley further determined that appellant had an impairment due to preexisting chondromalacia.[9] He noted that the A.M.A., *Guides* did not provide diagnosis-based criteria for the condition of chondromalacia. Dr. Rowley used the diagnosis of patellar subluxation or dislocation, which he found yielded seven percent impairment for mild patellar instability under Table 16-3 on page 510 of the A.M.A., *Guides*. He then downgraded the severity of the impairment as she had not experienced a dislocation to find five percent impairment. On July 1, 2009 an Office medical adviser determined that appellant's chondromalacia should be considered under the diagnosis-based criteria for tendinitis. He opined that she had a Class 1, Grade C or two percent impairment due to tendinitis using Table 16-3 on page 509 of the A.M.A., *Guides*. Neither Dr. Rowley nor the Office medical adviser, however, explained the basis for their selection of either a patellar dislocation or tendinitis as an appropriate alternative diagnosis for chondromalacia. The A.M.A., *Guides* provides, "In the event that a specific diagnosis is not listed in the diagnosed-based impairment grid, the examiner should identify a similar listed condition to be used as a guide to the impairment calculation. The rationale for this decision should be described."[10] Neither Dr. Rowley nor the Office medical adviser provided adequate rationale for their selection. The Board, consequently, finds that there is not an opinion on appellant's impairment rating for chondromalacia consistent with the A.M.A., *Guides*. The case will be remanded for further development of the medical evidence. After such development as deemed necessary, the Office should issue a *de novo* decision.

On appeal appellant's attorney argues that the Board should instruct the Office to issue a decision regarding appellant's left foot condition and impairment. The Board's jurisdiction, however, is limited to reviewing final decisions of the Office.[11]

CONCLUSION

The Board finds that the case is not in posture for decision.

[8] The A.M.A., *Guides* at 515 to 522 provides that the final impairment value may be increased or decreased depending on functional history, physical examination and clinical studies.

[9] While chondromalacia has not been accepted as employment related, it is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included. *See Clary J. Cleary*, 57 ECAB 563 (2006); *Mike E. Reid*, 51 ECAB 543 (2000); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (June 2003).

[10] *Id*. at 499.

[11] 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the August 24 and 17, 2009 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 14, 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