United States Department of Labor
Employees' Compensation Appeals Board

D.E., Appellant	)	
and	)	**Docket No. 09-2291**
	)	**Issued: May 19, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Grand Rapids, MI, Employer	)	

Appearances:
Alan J. Shapiro, 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 September 14, 2009 appellant, through his attorney, filed a timely appeal from an August 19, 2009 merit decision 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 schedule award decision.

ISSUE

The issue is whether appellant has established that he sustained a permanent impairment of the right lower extremity causally related to his November 1, 2002 employment injury.

FACTUAL HISTORY

This case is before the Board for the second time. By decision dated June 3, 2004, the Board set aside a January 21, 2003 decision denying appellant's claim that he sustained a traumatic injury to his right ankle on November 1, 2002 in the performance of duty.[1] The Board

[1] Docket No. 03-1360 (issued June 3, 2004). On December 2, 2002 appellant, then a 39-year-old mail carrier, filed a claim alleging that on November 1, 2002 he twisted his right ankle when he slipped on grass on his route.

found that he had established an injury on November 1, 2002 to his right ankle and remanded the case for the Office to determine whether he sustained any periods of disability. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On July 28, 2004 the Office notified appellant that it had accepted his claim for a right ankle sprain.[2]

On August 13, 2008 appellant, through his attorney, requested a schedule award. In support of his request, he submitted a July 23, 2008 impairment evaluation from Dr. Jeffrey F. Wirebaugh, Board-certified in family practice, who related:

> "[Appellant] was employed by the [employing establishment] and his job required extensive walking and being on his feet for at least eight hours a day. The problems with his right ankle were not due to a specific traumatic injury but developed over a period of time. [Appellant] tells me that he had a prior injury to his right ankle when he was in the military. As he continued his job duties with the [employing establishment] he developed progressive pain, weakness and instability of the ankle."

Dr. Wirebaugh noted that appellant's accepted condition was a sprain of the ankle, not otherwise specified. He discussed his complaints of progressive pain, swelling and instability during the course of his day as a mail handler. Applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), Dr. Wirebaugh opined that appellant had an 11 percent right lower extremity impairment due to loss of range of motion.

By letter dated January 26, 2009, the Office advised Dr. Wirebaugh that the accepted condition was a traumatic injury on November 1, 2002 rather than an injury that occurred over time.[3] It further noted that appellant had received a recommendation for ankle surgery prior to his November 1, 2002 work injury.[4] The Office requested that Dr. Wirebaugh provide a rationalized opinion regarding whether the 11 percent impairment resulted from his employment-related ankle sprain or to a nonemployment-related preexisting condition. In a January 26, 2009 statement of accepted facts, the Office indicated that appellant had preexisting right ankle instability with loose bodies and anterior tibiotalar impingement due to an injury sustained in the

[2] In a decision dated May 24, 2006, the Office denied appellant's claim for intermittent disability compensation from January 2, 2002 to April 17, 2003 on the grounds that the medical evidence was insufficient to show that he was disabled due to his work injury for the relevant periods. It noted that he received treatment two days prior to the work injury for preexisting degenerative arthritis.

[3] By letter dated September 10, 2008, the Office informed appellant's attorney that it required a second opinion regarding whether appellant's impairment was employment related. It noted that a simple ankle sprain should have resolved without permanent impairment. On January 26, 2009 the Office determined that the case was not in posture for a second opinion examination as appellant had not submitted sufficient medical evidence showing a causal relationship between any impairment and his accepted work injury.

[4] In a report dated October 25, 2002, Dr. John G. Anderson, a Board-certified orthopedic surgeon, discussed appellant's history of dislocating his ankle while in the military. He diagnosed chronic right ankle instability with loose bodies and anterior tibiotalar impingement and recommended surgery.

military. Appellant underwent right ankle surgery in January 2003 as a result of his preexisting injury.

On February 5, 2009 Dr. Wirebaugh stated:

> "As much as I would like to do so it is not possible for me to apportion what percentage of [appellant's] right ankle impairment is due to his work[-]related injury and what percentage is related to prior conditions. I never had the opportunity to examine [him] prior to his injury and therefore simply have no basis on which to state what percentage if any of his impairment is from prior conditions. All that I could do was to offer an opinion of the impairment he does have involving his right ankle but for the above stated reason I am unable to apportion the percentages to the work injury and nonwork injury."

By decision dated March 6, 2009, the Office denied appellant's claim for a schedule award. On March 13, 2009 his attorney requested a telephone hearing. A hearing was held on June 9, 2009. Appellant's attorney argued that preexisting conditions were considered in determining the extent of permanent impairment. The hearing representative explained that before preexisting impairments were considered a physician had to determine that at least some of the impairment was due to the accepted employment injury.

By decision dated August 19, 2009, the hearing representative affirmed the March 6, 2009 decision. She found that Dr. Wirebaugh's opinion was insufficient to establish a causal relationship between the impairment rating and the accepted work injury.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[5] provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[6] In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment the Act, under section 8107(a), compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.[7]

As a claimant seeking compensation under the Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, it is thus the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.[8] The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized

[5] 5 U.S.C. §§ 8101-8193.

[6] *Lyle E. Dayberry*, 49 ECAB 369 (1998).

[7] *Renee M. Straubinger*, 51 ECAB 667 (2000).

[8] *See Veronica Williams*, 56 ECAB 367 (2005); *Annette M. Dent*, 44 ECAB 403 (1993).

medical opinion that supports a causal connection between his current condition and the employment injury.[9] The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.[10]

ANALYSIS

The Office accepted that appellant sustained a right ankle sprain on November 1, 2002 in the performance of duty. Appellant had a history of preexisting right ankle instability with loose bodies and anterior tibiotalar impingement due to a prior military injury. On August 13, 2008 she filed a claim for a schedule award.

Appellant has not submitted sufficient evidence to establish that, as a result of his employment injury, he sustained any permanent impairment to a scheduled member such that he would be entitled to a schedule award. In a report dated July 23, 2008, Dr. Wirebaugh discussed his history of walking and standing eight hours per day in performing his work duties and his complaints of increased pain, instability and weakness. He indicated that appellant's problems did not result from a traumatic injury but instead developed over time. Dr. Wirebaugh reviewed his history of a right ankle injury while in the military. He opined that appellant had an 11 percent right lower extremity impairment due to loss of range of motion according to the A.M.A., *Guides*. Dr. Wirebaugh, however, did not address the causal relationship between the impairment rating and the accepted employment injury; consequently, his opinion is of diminished probative value.[11] Further, he found that appellant's condition arose over time rather than from the accepted traumatic injury of right ankle sprain and thus his opinion is based on an inaccurate history of injury.[12]

On January 26, 2009 the Office informed Dr. Wirebaugh that it had accepted that appellant sustained a right ankle sprain due to a traumatic injury rather than an injury occurring over time. It requested that he explain whether appellant's 11 percent permanent impairment of the right ankle resulted from his accepted work injury. On February 5, 2009 Dr. Wirebaugh related that he could not determine what portion, if any, of the right ankle impairment was related to the work injury and what resulted from preexisting conditions. As he did not provide a finding regarding whether appellant had a permanent impairment due to his accepted employment injury, his opinion is insufficient to meet appellant's burden of proof to establish that he sustained a permanent impairment of a scheduled member.[13]

[9] *Manuel Gill*, 52 ECAB 282 (2001).

[10] *Yvonne R. McGinnis*, 50 ECAB 272 (1999).

[11] Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *A.D.*, 58 ECAB 149 (2006); *Conrad Hightower*, 54 ECAB 796 (2003).

[12] Medical opinions based on an incomplete or inaccurate factual history are of little probative value. *See M.W.*, 57 ECAB 710 (2006); *John W. Montoya*, 54 ECAB 306 (2003).

[13] *See Thomas P. Lavin*, 57 ECAB 353 (2006).

There is no probative medical evidence establishing that appellant has any permanent impairment causally related to his November 1, 2002 right ankle sprain. Appellant has the burden of proof to submit medical evidence supporting that he has a permanent impairment of a scheduled member of the body due to his work injury.[14] He has not met his burden of proof and thus the Office properly denied his schedule award claim.[15]

CONCLUSION

The Board finds that appellant has not established that he sustained a permanent impairment of the right lower extremity causally related to his November 1, 2002 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 19, 2009 is affirmed.

Issued: May 19, 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

[14] *Annette M. Dent, supra* note 8.

[15] As appellant has not established any permanent impairment caused by the accepted work injury, the claim is not ripe for consideration of any preexisting impairment. *Thomas P. Lavin, supra* note 13.