

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

D.H., Appellant)
and) Docket No. 10-284
U.S. POSTAL SERVICE, POST OFFICE,) Issued: September 10, 2010
Southeastern, PA, Employer)
)

Appearances:

Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 9, 2009 appellant, through her representative, filed a timely appeal from the August 6, 2009 decision of the Office of Workers' Compensation Programs denying her 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 this case.

ISSUE

The issue is whether appellant established that she is entitled to a schedule award.

On appeal appellant, through her attorney, contends that, as there was an unresolved conflict between appellant's physician and the Office medical adviser, the Office should have referred appellant to an impartial medical examiner.

FACTUAL HISTORY

On August 13, 2007 appellant, then a 49-year-old mail processing clerk, filed a traumatic injury claim alleging that she sustained a left ankle fracture that day when she fell during her

federal employment. On November 15, 2007 the Office accepted appellant's claim for nondisplaced fracture left ankle (lateral malleolus).

Appellant filed a claim for a schedule award. In a medical report dated November 20, 2008, Dr. David Weiss, an osteopath, diagnosed appellant with status post lateral malleola fracture to the left ankle joint, post-traumatic osteoarthritis of the left ankle by clinical impression and functional instability to the left ankle joint. He listed subjective disability factors as intermittent left foot/ankle pain and stiffness, occasional swelling, occasional episodes of left foot instability, increased symptoms with weather changes and restrictions in daily living. Dr. Weiss noted objective disability factors of inversion on the range of motion that does produce crepitus. He noted that appellant experienced pain when performing her duties as a mail processing clerk and that based on the "Visual Analogue Scale" for appellant's pain ranged from 0 to 10. Dr. Weiss also noted that the August 13, 2007 employment injury was the competent producing factor for appellant's disability. Applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th edition 2001) (A.M.A., *Guides*) 574, Figure 18-1, he noted that appellant had three percent impairment to her left lower extremity based on pain.

On February 13, 2009 the Office referred appellant's case to an Office medical adviser for determination of an impairment rating. In a memorandum of the same date, the Office medical adviser opined that appellant had "a typical full recovery as would be expected with this type of fracture of the lateral malleolus" and accordingly any pain award would not be justified under the fifth edition of the A.M.A., *Guides* as appellant did not fall into one of the three categories found in Chapter 18, section 18.3a when assessing impairment resulting from pain. He listed them as follows: when there is excess pain in the context of verifiable medical conditions that cause pain; when there are well-established pain syndromes without significant, identifiable organ dysfunction to explain the pain and when there are other associated pain syndromes. The Office medical adviser noted that, pursuant to the examination of Dr. Weiss, the range of motion and strength were normal and, accordingly, appellant had a zero percent impairment to the left lower extremity.

By decision dated February 24, 2009, the Office denied appellant's claim for a schedule award.

By letter dated February 27, 2009, appellant filed a request for an oral hearing. At the hearing held on June 10, 2009, her attorney argued that the opinion of Dr. Weiss was well reasoned and controlling, or in the alternative, that the Office medical adviser's report created a conflict requiring an impartial medical examination.

Appellant submitted a statement dated June 11, 2009 wherein she indicated that her ankle still bothers her and that she treats the pain with over-the-counter medication.

By decision dated August 6, 2009, the hearing representative affirmed the Office's February 24, 2009 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of schedule 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.³

Section 8123(a), in pertinent part, provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁴

ANALYSIS

The Board finds that this case is not in posture for decision due to a conflict in medical opinion between Dr. Weiss and the Office medical adviser as to whether appellant has any ratable impairment to her left lower extremity.

In his November 20, 2008 report, Dr. Weiss opined that, pursuant to the fifth edition of the A.M.A., *Guides*, appellant was entitled to three percent impairment of the left lower extremity based on subjective and objective factors of pain. He reported intermittent left foot and ankle pain and stiffness, left foot instability, increased symptoms with weather changes, inversion or range of motion, which produces crepitus and pain when working. The Office medical adviser found that appellant was not entitled to an impairment rating under the A.M.A., *Guides* as any pain award in this case would not be justified as appellant did not fall within any of the three categories for assessing impairment based on pain. The Office improperly found that the opinion of the Office medical adviser constituted the weight of the evidence. Pain is subjective but may serve as a basis for determining impairment.⁵ An Office medical adviser may review a report to verify the correct application of the A.M.A., *Guides* and confirm the percentage of impairment,⁶ but it is an impartial medical specialist who must resolve a conflict in medical opinion.⁷

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ *Id.* at § 10.404.

⁴ 5 U.S.C. § 8123(a).

⁵ L.H., 60 ECAB ____ (Docket No. 08-1352, issued December 24, 2008).

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (March 1994).

⁷ L.H., *supra* note 5; Richard R. LeMay, 56 ECAB 341, 348 (2005).

The Board will set aside the Office's August 6, 2009 decision and remand the case to the Office for referral to an impartial medical examiner for an opinion regarding whether appellant has any permanent impairment to her left lower extremity causally related to the accepted condition. Following this and any such further development as may be deemed necessary, the Office shall issue an appropriate final decision on appellant's entitlement to a schedule award.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 6, 2009 is set aside and the case remanded for further action consistent with this decision.

Issued: September 10, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board