United States Department of Labor
Employees' Compensation Appeals Board

M.E., Appellant	)	
and	)	**Docket No. 10-902**
	)	**Issued: January 7, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Glendale, WI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 18, 2010 appellant timely appealed the January 12, 2010 merit decision of the Office of Workers' Compensation Programs, which affirmed her schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award claim.

ISSUE

The issue is whether appellant has greater than 10 percent impairment of the left lower extremity.

FACTUAL HISTORY

Appellant, a 33-year-old letter carrier, sustained a left foot sprain on January 27, 2000 (xxxxxx469). She ultimately returned to work and sustained another left lower extremity injury on December 11, 2000. The Office accepted a left foot strain (xxxxxx718). The two claims were subsequently combined, and the December 11, 2000 traumatic injury claim was designated

the master file. Appellant received compensation for intermittent lost wages. In January 2009, she requested a schedule award.

In a report dated January 8, 2009, Frank P. Silver, M.D., found 30 percent impairment of the left lower extremity. The overall rating included five percent impairment for loss of motion of the left great toe. According to Dr. Silver, appellant did not have any motion deficits with respect to her left ankle. He also found impairment due to dysesthesia (2.5 percent), motor deficit (21 percent) and sensory deficit (2.5 percent) involving the peroneal nerve.[1]

The Office referred appellant's file to a medical adviser, Dr. Amon Ferry. In a report dated February 18, 2009, Dr. Ferry found 13 percent impairment of left lower extremity. He attributed 10 percent impairment for ankylosis of the great toe in full extension. Dr. Ferry also found three percent impairment for pain in the distribution of the superficial peroneal nerve. In explaining the difference between his impairment rating and that of Dr. Silver, he noted that under the A.M.A., *Guides* (5th ed. 2001) decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximal force in the region being evaluated.[2] As such, Dr. Silver's rating for weakness (21 percent) of the peroneal nerve in the presence of pain and decreased motion was inappropriate.

In June 2009, the Office referred the record back to Dr. Ferry to rate appellant's left lower extremity impairment under the sixth edition of the A.M.A., *Guides* (2008).[3]

In a report dated June 10, 2009, Dr. Ferry found a combined 10 percent impairment of the left lower extremity. He found seven percent impairment for ankylosis of the great toe in full extension, citing Table 16-19, A.M.A., *Guides* 549. Dr. Ferry found an additional three percent impairment for a Class 1, Grade C sensory deficit in the distribution of the superficial peroneal nerve. He referenced Table 16-12, A.M.A., *Guides* 534 in support of the three percent peripheral nerve impairment. Dr. Ferry again found no impairment for weakness.[4]

In a decision dated July 1, 2009, the Office granted a schedule award for 10 percent impairment of the left lower extremity. The award covered a period of 28.8 weeks beginning January 8, 2009.

Appellant requested a hearing, which was held on November 13, 2009.

---

[1] While Dr. Silver stated that his rating was based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001), he did not identify the particular tables he relied upon in calculating appellant's 30 percent impairment.

[2] Dr. Ferry referenced "Paragraph 1, pg. 508," which is part of section 16.8, "Strength Evaluation," pertaining to impairments of the upper extremity particularly with respect to grip and pinch strength. A.M.A., *Guides* 507-08 (5th ed. 2001).

[3] The latest edition of the A.M.A., *Guides* is applicable to all schedule awards issued on or after May 1, 2009.

[4] As in his previous report, the district medical adviser noted that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximal force in the region being evaluated.

By decision dated January 12, 2010, an Office hearing representative affirmed the July 1, 2009 schedule award for 10 percent impairment of the left leg.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[6] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).[7]

ANALYSIS

The Board finds that the case is not in posture for decision. Dr. Ferry's June 10, 2009 impairment rating does not provide a clear rationale for the percentage of impairment specified. The procedure manual provides that, after obtaining all necessary medical evidence, the Office shall refer the case record to its medical adviser for an opinion concerning the nature and percentage of impairment.[8] The procedure manual further provides that the percentage should be computed in accordance with the A.M.A., *Guides* (6th ed. 2008).[9] In this instance, the Office properly forwarded the medical record, including Dr. Silver's January 8, 2009 impairment rating, to the Office medical adviser for review. Dr. Silver rated appellant under the fifth edition of the A.M.A., *Guides*; however, his January 8, 2009 report did not include any specific reference to the tables of the A.M.A., *Guides* that supported his rating of 30 percent impairment of the left lower extremity. Dr. Ferry found 13 percent impairment of the left lower extremity under the fifth edition of the A.M.A., *Guides*.

The Board notes that as of May 1, 2009 implementation of the sixth edition of the A.M.A., *Guides* became applicable to evaluation of all schedule award claims. Appellant suggests that the Office intentionally delayed processing her January 22, 2009 schedule award. The Board finds nothing in the record that substantiates her allegation. The Office received appellant's claim, including Dr. Silver's report, on January 30, 2009. It referred the record to Dr. Ferry who submitted an impairment rating that the Office received on March 2, 2009. Why

[5] For total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2006).

[6] 20 C.F.R. § 10.404 (2010).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Example 1 (January 2010).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6d (January 2010).

[9] *Id.* at Chapter 2.808.6d(1).

the Office was unable to process the claim before May 1, 2009 is unclear; however, a two-month delay in processing a schedule award is not evidence of malfeasance on the part of the Office. The Board notes that it was characterized as an "oversight" to appellant during a June 11, 2009 telephone contact.

The Office was obtained another report from Dr. Ferry based on review of the sixth edition of the A.M.A., *Guides*.[10] This latter report did not adequately explain Dr. Ferry's application of the sixth edition of the A.M.A., *Guides* (2008). As noted, he found 10 percent impairment of the left lower extremity due to loss of motion in the great toe (7 percent) and sensory deficit (3 percent) involving the superficial peroneal nerve. In addition to sensory deficit, Dr. Silver found a significant motor deficit/weakness (21 percent) involving the peroneal nerve. Dr. Ferry did not award impairment for motor deficit/weakness. In the June 10, 2009 report, the Office medical adviser explained that decreased strength cannot be rated in the presence of decreased motion, painful conditions, citing to "Paragraph 1, pg. 508." However, the sixth edition of the A.M.A., *Guides* does not include such information at page 508. That particular page is one of several pages pertaining to the "Foot and Ankle Regional Grid (LEI)," Table 16-2. While the above-quoted passage appears at page 508 of the fifth edition of the A.M.A., *Guides*, the Office specifically instructed Dr. Ferry to apply the sixth edition of the A.M.A., *Guides*. The updated report of the Office medical adviser did not provide appropriate references to the current edition of the A.M.A., *Guides.*[11]

Further, Dr. Ferry did not offer any explanation for his left great toe loss of motion rating. He simply stated that appellant was awarded seven percent impairment for ankylosis of the great toe in full extension (Table 16-19, pg 549). Under the sixth edition of the A.M.A., *Guides*, diagnosis-based impairment is the primary method of evaluation for the lower limb.[12] Alternative approaches are also provided for calculating impairment for peripheral nerve deficits and range of motion.[13] However, range of motion is primarily used as a physical examination adjustment factor under the diagnosis-based approach and is "only used to determine actual impairment values when it is not possible to otherwise define impairment."[14] Dr. Ferry did not explain why the diagnosis-based impairment method for evaluating the lower limb was not utilized in this instance. Moreover, the Board notes that Dr. Ferry's reference to Table 16-19, "Great Toe Impairments," appears not to support his finding of seven percent left lower extremity impairment. The identified table provides for two percent lower extremity impairment

[10] *Id.* at Chapter 2.808.6a.

[11] One of the fundamental principles of the 6th edition of the A.M.A., *Guides* is that range of motion and strength measurement techniques should be assessed carefully in the presence of apparent self-inhibition secondary to pain or fear. *See* Table 2-1, A.M.A., *Guides* 20. Additionally, with respect to measuring motor deficits and loss of power, section 16.4a provides: "Individuals whose performance is inhibited by pain or the fear of pain are not good candidates for manual muscle testing." A.M.A., *Guides* 532-33.

[12] Section 16.2, A.M.A., *Guides* 497.

[13] *Id.*

[14] *Id.* Section 16.7, "[r]ange of [m]otion [i]mpairment," provides that "[t]his section is to be used as a stand-alone rating when other grids refer ... to this section or no other diagnosis-based sections of [Chapter 16] are applicable for impairment rating of a condition." A.M.A., *Guides* 543.

for extension of 15 degrees to 30 degrees, and five percent impairment for extension of 0 degrees to 9 degrees.[15] Dr. Silver's January 8, 2009 examination revealed 0 degrees extension, which would appear to represent only five percent impairment under Table 16-19. It is not readily apparent from either the A.M.A., *Guides* or Dr. Ferry's June 10, 2009 report how appellant's ankylosis of the great toe in full extension represents seven percent impairment under Table 16-19.

Dr. Ferry also failed to explain his rating of three percent impairment for a Class 1, Grade C sensory deficit of the superficial peroneal nerve. He cited Table 16-12, A.M.A., *Guides* 534. Section 16.4b, "Neurological Grading and Severity Determination," outlines the process for classifying the severity of sensory and/or motor deficit under Table 16-11, A.M.A., *Guides* 533. Dr. Ferry did not reference Table 16-11. Once the severity of the sensory and/or motor deficit is determined under Table 16-11, the findings are applied to Table 16-12, "Peripheral Nerve Impairment," to determine the percentage impairment of the lower extremity. Dr. Ferry's June 10, 2009 report provided insufficient discussion as to how the three percent impairment was derived. There was no reference to any physical examination findings that might otherwise support his finding of a Class 1, Grade C sensory deficit. Under Table 16-12, the range of impairment for the superficial peroneal nerve is 0 to 5 percent. Dr. Ferry merely concluded without adequate explanation that appellant had three percent impairment.

The procedure manual provides that the Office medical adviser should provide rationale for the percentage of impairment specified.[16] Providing such medical reasoning is especially important when more than one impairment evaluation method is present.[17] Accordingly, the January 12, 2010 decision will be set aside and the case remanded to the Office to obtain a supplemental report from the medical adviser. After such further development as the Office deems necessary, it should issue an appropriate decision regarding appellant's entitlement to a schedule award for impairment of the left lower extremity.

CONCLUSION

The case is not in posture for decision on the extent of permanent impairment to appellant's left leg.

[15] A.M.A., *Guides* 549, Table 16-19.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6d(1).

[17] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: January 7, 2011
Washington, DC

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

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

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