United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 10-1805**
	)	**Issued: May 10, 2011**
DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Barstow, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 29, 2010 appellant filed a timely appeal of a January 21, 2010 Office of Workers' Compensation Programs' merit decision denying his claim for an additional schedule award. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant has more than 10 percent impairment of his left leg for which he has received schedule awards; and (2) whether appellant has reached maximum medical improvement and can be considered for an additional schedule award.

On appeal appellant contends that the second opinion report should be removed from the record as the physician's license was revoked in West Virginia within the last five years.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On October 7, 2000 appellant, then a 57-year-old boiler plant operator, alleged that he developed hallux valgus deformity and a bunion on the toe of his left foot due to wearing steel-toed boots as required by his employer. On December 21, 2000 the Office accepted his claim for bunion on the first toe of his left foot. Dr. Nicholas C. Crismali, a podiatrist, performed an offset-V bunionectomy with Akin osteotomy and K-wire stabilization on appellant's left foot on May 2, 2001. He performed additional surgery on May 30, 2001 consisting of an excision of deep implant left foot and open reduction and internal fixation of the first metatarsal fracture in appellant's left foot. By decision dated July 19, 2004, the Office granted appellant a schedule award for nine percent impairment of the left lower extremity, or 25.92 weeks of compensation. In a December 22, 2004 decision, an Office hearing representative affirmed the July 19, 2004 decision.

Appellant requested an additional schedule award on February 18, 2006. The Office medical adviser reviewed the medical evidence and accepted appellant's claim for the additional condition of post-traumatic degenerative joint disease of the left first metatarsal phalangeal joint. He found appellant had 8 percent impairment of his left leg as a result of developing moderate to severe post-traumatic degenerative joint disease in his first metatarsal phalangeal joint and 2 percent impairment for loss of range of motion of the great toe or a combined impairment of 10 percent to his left lower extremity. The Office medical adviser stated, "It should be noted that the claimant's impairment has increased as compared to July 19, 2004 as he now has increasing problems as a result of post-traumatic arthritis in his left metatarsal phalangeal joint." By decision dated May 19, 2006, the Office granted appellant a schedule award for an additional 10 percent impairment of his left lower "extremity/foot." It awarded him 20.5 weeks of compensation. The Office then found that appellant had received an overpayment of compensation based on his dual schedule awards totaling 19 percent impairment as he was only entitled to an additional one percent of the left lower extremity. The Branch of Hearings and Review affirmed this decision on March 21, 2007. By decision dated August 10, 2007, the Office found that appellant had no more than 10 percent total impairment of his left lower extremity. Appellant appealed these decisions to the Board. The Board remanded the case, finding that the medical evidence was not correlated with the A.M.A., *Guides* and that the Office medical consultant did not explain why the additional conditions diagnosed by appellant's physician were not considered.[2] The facts and circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

Dr. Arthur S. Harris, the Office's orthopedic consultant, reviewed the medical evidence on July 16, 2008. He found that appellant had two percent impairment of his left lower extremity due to loss of ankle dorsiflexion citing to the A.M.A., *Guides*.[3] Dr. Harris further found that appellant had post-traumatic arthritis in the first metatarsophalangeal joint resulting in eight percent impairment.[4] He found that appellant had 10 percent total impairment of the left

[2] Docket No. 08-365 (issued June 11, 2008).

[3] A.M.A., *Guides* 537, Table 17-14 (5th ed. 2001).

[4] *Id*. at 544, Table 17-31.

lower extremity. Dr. Harris also stated that appellant's neurologic deficits with increasing weakness of his tibialis anterior, extensor hallucis longus and flexor hallucis longus, toe flexors and gastrocsoleus muscles with increased diminished sensation diagnosed by Dr. Crismali were not related to his accepted employment injury.

By decision dated September 25, 2008, the Office denied appellant's claim for an additional schedule award.[5]

Appellant's attending physician, Dr. Crismali, a podiatrist, completed a note on October 13, 2008 and diagnosed drop foot, left and hallux valgus. He found dysesthesia associated with the metatarsal heads, two, three and four on the left foot and limited dorsiflexion range of motion for the first metatarsal to 30 degrees as well marked deficit for the tibialis anterior and extensors of the foot and metatarsophalangeal joint. Dr. Crismali examined appellant on January 7, 2009. He found dysesthesia associated with the fourth and fifth toes of the left foot. Dr. Crismali noted dislocation of the second metatarsal with slight dorsiflexion and limited range of motion. He found that appellant's first metatarsal was limited to 20 degrees of dorsiflexion and was developing a dorsomedial bump. Dr. Crismali found that appellant had mild drop foot on the left side and deficit in motor function with the tibialis aneroid tendon at 4/5.

On June 1, 2009 Dr. Crismali found a neuroma in the second and third interspace of the left foot and numbness in the second web space. Appellant had increase in the size of the first metatarsophalangel joint of the left foot where he had a developing bone spur.

On September 25, 2009 appellant requested reconsideration on the September 25, 2008 Office decision. He alleged that the Office had accepted that he had an additional 10 percent impairment of his left lower extremity and that therefore he was entitled to additional compensation for 28.8 weeks rather than the 20.5 weeks of compensation that he received. Appellant requested the additional 8.3 weeks of compensation plus interest.

The Office referred appellant for a second opinion evaluation with Dr. Bunsri T. Sophon, a Board-certified orthopedic surgeon, on October 16, 2009. In a report dated November 10, 2009, Dr. Sophon reviewed appellant's history of injury and medical history. He found that appellant had a normal gait but was unable to stand on his heels or toes. In regard to appellant's feet, Dr. Sophon found enlargement deformity at the dorsal head of the left first metatarsal, with no motion of the metatarsophalangeal joint or the IP joint of the left great toe. He found tenderness in the second webspace of the left foot and nontender clawing deformity of the left second and third toes. Dr. Sophon stated that appellant's motor strength was within normal limits. He found that appellant was not at maximum medical improvement as he required removal of the pin fixation and neurectomy of the Morton's neuroma.

The Office referred this report to Dr. Crismali on November 30, 2009.

By decision dated January 21, 2010, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. It found that Dr. Sophon found that appellant

[5] At the time of the appeal to the Board, the Office has not again developed the issue of overpayment.

required additional treatment including fixation of the proximal phalanx of the left great toe and neurectomy of the Morton's neuroma. The Office noted that Dr. Crismali had not responded to the request to review Dr. Sophon's report, but that his reports were consistent with a worsening of appellant's condition. It found that as appellant had not reached maximum medical improvement and required additional medical treatment of his accepted condition, an additional schedule award was not currently appropriate.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[6] and its implementing regulations[7] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of loss of use, of scheduled members or functions of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*. As of May 1, 2009, any decision regarding a schedule award must be based on the sixth edition.[8] For decisions issued prior to May 1, 2009, the fifth edition of the A.M.A., *Guides* was appropriate.

ANALYSIS -- ISSUE 1

The Office's September 25, 2008 decision found that appellant had no more than 10 percent impairment of his left lower extremity for which he had received schedule awards. The record establishes that he received a schedule award on July 19, 2004 for nine percent impairment of the left lower extremity or 25.92 weeks of compensation. On May 19, 2006 the Office granted appellant a schedule award for an additional 10 percent impairment of his left foot and 20.5 weeks of compensation. Appellant requested reconsideration and argued that his May 19, 2006 schedule award should have been for an additional 10 percent impairment of his left lower extremity or 28.8 weeks of compensation and requested that the Office provide him with the additional 8.3 weeks of compensation.

The Board previously remanded the case because the medical evidence did not clearly establish the percent of appellant's permanent impairment for schedule award purposes as the Office's orthopedic consultant, Dr. Harris, did not correlate appellant's physical findings with the A.M.A., *Guides* and did not explain why he excluded additional left lower extremity conditions diagnosed by Dr. Crismali. Following the Board's decision, the Office requested a supplemental report from Dr. Harris who correlated his findings with the fifth edition of the A.M.A., *Guides* reaching an impairment rating of 10 percent impairment of the left lower

[6] 5 U.S.C. §§ 8101-8193, 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id*. at § 10.404. For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

extremity and again stated that appellant's neurologic deficit with increasing weakness of his tibialis anterior, extensor hallucis longus and flexor hallucis longus, toe flexors and gastrocsoleus muscles with increased diminished sensation were not related to his accepted employment injury. Dr. Harris provided citations to the A.M.A., *Guides* to support his conclusion that appellant had no more than 10 percent impairment of his left lower extremity entitling him to a schedule award.

The Board finds that there is no medical evidence correlated with the A.M.A., *Guides* which establishes that appellant has more than 10 percent impairment of his left lower extremity. Dr. Harris' most recent report provided citation to the A.M.A., *Guides* in rating impairment of 10 percent of the left leg due to loss of range of motion of the ankle for two percent impairment and eight percent impairment due to arthritis. Appellant previously received schedule awards totaling 46.42 weeks of compensation, while the medical evidence does not currently establish that he is entitled to more than 28.8 weeks of compensation, or 10 percent impairment of the left lower extremity. The Board finds that the medical evidence in the record does not establish that he is entitled to additional compensation.

LEGAL PRECEDENT -- ISSUE 2

In the case of *James Kennedy, Jr.*,[9] the Board found that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of her employment injury. Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of maximum medical improvement is not to be based on surmise or prediction of what may happen in the future. A schedule award is appropriate where the physical condition of an injured member has stabilized, despite the possibility of an eventual change in the degree of functional impairment in the member.[10] The question of when maximum medical improvement has been reached is a factual one which depends on the medical findings in the record and the determination of such date is made in each case upon the basis of submitted medical evidence.[11]

ANALYSIS -- ISSUE 2

Appellant claims a worsening of his left lower extremity condition. The Office developed the medical evidence by referring the claim to Dr. Sophon, who found on November 10, 2009 that appellant required additional treatment due to his accepted employment injury and had not reached maximum medical improvement. Dr. Sophon recommended additional medical treatment including the required removal of the pin fixation and neurectomy of the Morton's neuroma.

Appellant's attending physician, Dr. Crismali submitted additional medical reports, diagnosing drop foot, left and hallux valgus. He indicated that appellant's range of motion of the

[9] 40 ECAB 620, 626 (1989).

[10] *Id.*

[11] *Eugenia L. Smith*, 41 ECAB 409, 413 (1990).

first metatarsal was decreasing finding 30 degrees on October 13, 2008 and 20 degrees on January 7, 2009. On June 1, 2009 Dr. Crismali diagnosed a neuroma in the second and third interspace of the left foot as well as an increase in the size of the first metatarsophalangel joint of the left foot where he had a developing bone spur.

Both physicians who examined appellant in 2008 reported increasing symptoms and a worsening of his condition. Dr. Sophon recommended additional medical treatment. As appellant is not at maximum medical improvement and has not specifically informed the Office that he does not desire the additional medical treatment, the case is not in posture for an additional permanent impairment rating.

On appeal appellant alleged that Dr. Sophon's report should be excluded from the record due to sanctions and submitted a document from an internet site alleging that Dr. Sophon surrendered his medical license in West Virginia. Office procedures provide an exclusion of a medical report is required if the physician selected for the referee examination regularly performs fitness-for-duty examinations, a second referee is selected before the Office has attempted to clarify the original referee's report, a report is obtained through telephone contact or leading questions have been posed to the physician.[12] The facts of this case, do not require the medical report to be excluded. Furthermore, appellant did not submit a copy of any official decision that Dr. Sophon's medical license had been revoked with the reasons for the revocation. He did not discuss whether any alleged incompetence by Dr. Sophon would make his report in this case unreliable and not entitled to any weight as a second opinion report.[13] Appellant, therefore, has not submitted any evidence and argument to support his request to strike Dr. Sophon's report from the record.

CONCLUSION

The Board finds that the medical evidence does not currently establish that appellant has more than 10 percent impairment of his left lower extremity for which he has received schedule awards. The Board further finds that the current medical evidence establishes that he has not reached maximum medical improvement and that his claim is not in posture for an additional schedule award.

[12] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6 (September 1995)

[13] *Roger D. Girouard*, Docket No. 04-1220 (issued November 18, 2004).

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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