United States Department of Labor
Employees' Compensation Appeals Board

M.F., Appellant	)	
and	)	**Docket No. 11-1690**
	)	**Issued: April 3, 2012**
DEPARTMENT OF HOMELAND SECURITY, U.S. SECRET SERVICE, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 15, 2011 appellant filed a timely appeal from a June 22, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for a schedule award. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant established that he has permanent bilateral toe impairment entitling him to a schedule award.

FACTUAL HISTORY

On January 27, 2009 appellant, then a 42-year-old federal police officer, filed a claim for traumatic injury alleging that he sustained injury to his toes on January 20, 2009 when he was

[1] 5 U.S.C. § 8101 *et seq.*

required to stand at his duty station, during the Presidential inauguration, for 13 hours in 15-degree temperature.

In a February 19, 2009 medical report, Dr. Robert Vandenbosche, Board-certified in family medicine, diagnosed appellant with neuropathy secondary to frostbite.

Dr. Richard T. Leschek, Board-certified in osteopathic neurology, noted in a November 18, 2009 report that appellant's symptoms had improved with warm weather but were worsening again as the weather grew colder. He noted that appellant had tingling in his feet. Dr. Leschek opined that appellant's symptoms were suggestive of mild frostbite and neuropathic pain involving the digital nerves of the great toes, with possible mild sensory neuropathy. In an attending physician's report dated March 3, 2010, he noted that appellant's electromyogram findings were normal. Dr. Leschek diagnosed neuropathy due to frostbite.

On March 9, 2010 OWCP accepted appellant's claim for temporary bilateral frostbite of the feet.

In a report dated May 17, 2010, Dr. Shan Haider, a Board-certified specialist in vascular surgery, diagnosed Raynaud's syndrome. He recommended that appellant's employment duties be modified so that he could use heat packs on his feet and take frequent breaks when working in cold weather. On August 13, 2010 OWCP accepted appellant's claim for Raynaud's syndrome.

Appellant submitted a claim for schedule award on July 16, 2010. On July 20, 2010 OWCP informed him that further medical evidence was necessary to establish his entitlement to a schedule award. Appellant was advised that a physician's assessment of his permanent impairment, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* was necessary.

Appellant responded to OWCP's request for further evidence on July 27, 2010; he stated that none of his physicians would rate his toe impairment.

On August 13, 2010 OWCP informed appellant that an appointment was scheduled with Dr. David Katz, a Board-certified neurologist and a second opinion physician, to determine whether he had sustained a permanent impairment of the toes.

In an August 31, 2010 medical report, Dr. Katz detailed the findings of the examination as follows:

> "On neurologic examination, mental status was intact. Cranial nerves were nonfocal. Motor examination revealed normal bulk, tone and strength throughout. Dorsalis pedis and posterior tibial pulses were diminished bilaterally. All the toes were slightly cold to touch and there was slight erythematous discoloration of all the toes. There was no skin ulcers or loss of toenails. Pinprick was diminished below the mid calf in both legs, in the proprioception. Temperature was diminished below both ankles and to the wrist bilaterally. Proprioception and light touch were normal. Reflexes were 2+ including the ankles with flexor plantar responses. Straight leg raise was negative. Heel and toe walking were normal and Romberg was negative."

Dr. Katz concluded that, based on the results of the examination, appellant had sustained one percent permanent impairment to his lower extremity. He made this determination according to Chapter 16 of the A.M.A., *Guides*. Dr. Katz stated the following in the addendum dated November 17, 2010:

> "Table 16-1 on page 495 lists [c]lass 1 as 'mild lower extremity impairment with 1 percent to 13 percent.' Table 16-2 on page 498 sensory deficit was 1, motor deficit 0, assigned class sensory is 1, motor 0. Table 16-2 on page 501 diagnostic criteria is class 1, class definition 'mild problem,' impairment range is 1 percent to 13 percent. Under Table 16-5 functional history was grade 1 which is 'mild problem,' physical examination was grade 0 no problem. Clinical studies grade 0 no problem. Table 16-6 class definition grade 1 modifier 'mild problem,' gait derangement none, AAOS lower limb instruments normal. Table 16-7 on page 517 shows grade 21 modified class definition. Table 16-8 page 519 showed class definition no problem, never conduction testing normal. Table 16-9 impairment ranges 1 to 13 percent which was class 1, grade A. Using the net adjustment formula on page 521 there is net adjustment -2 to grade A. I determined that within class 1 of 1 percent to 13 percent that he was on the low end of class 1 which is 1 percent."

Appellant underwent a nerve conduction study on November 8, 2010. Dr. Willie Yu, Board-certified in physical medicine and rehabilitation, interpreted the results as a normal study of the right and left feet sensory and motor nerves.

OWCP forwarded Dr. Katz's medical report to the district medical adviser (DMA) for review. In a December 22, 2010 report, the DMA opined that Dr. Katz's rating was not compliant with the rating process discussed in the A.M.A., *Guides.* The DMA opined that appellant's impairment should be rated as zero percent. He explained that there were two methodologies that could be utilized to rate impairment under the A.M.A., *Guides*: the diagnosis-based impairment (DBI) methodology and the range of motion (ROM) methodology. The DMA stated that there are no motion measurements of the great toes, therefore, the ROM method could not be used to evaluation appellant's condition. Furthermore, he stated that Dr. Katz's reference to Chapter 16 in evaluation of appellant's impairment was in error:

> Typically, Table 16-2, Foot and Ankle Regional Grid -- Lower Extremity Impairments, would be used to rate impairment for the foot. However, there are no diagnoses listed in this grid that apply to this case. The patient has an accepted diagnosis of frostbite. The process of assessing impairment for this is discussed in Chapter 4, The Cardiovascular System (6th ed. 47-73), with specific reference to [s]ection 4.8, Vascular Disease Affecting the Extremities (6th ed. 68-71) and Table 4-12, Criteria for Rating Permanent Impairment due to Peripheral Vascular Disease -- Lower Extremity (6th ed. 69).

The DMA instead referred to Table 4-12 of the A.M.A., *Guides*, which provided ratings for permanent impairment to the lower extremities due to peripheral vascular disease according to three factors: history, physical findings and objective test results -- as evidenced by ankle-brachial indices (ABIs), with objective test results being the key factor in the analysis. He went

on to conclude that, because there was no evidence of abnormal ABIs, no residual physical findings at maximum medical improvement, and that appellant's condition had resolved without permanency, the rating should be determined to be zero percent lower extremity impairment. The DMA also determined appellant's date of maximum medical improvement to be March 9, 2009, when appellant was released to regular duty.

In a June 22, 2011 decision, OWCP denied appellant's claim for schedule award on the grounds that the medical evidence was insufficient to establish that appellant had sustained a compensable permanent impairment.

LEGAL PRECEDENT

The schedule award provision of FECA,[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, FECA 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, OWCP 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]

Not all medical conditions accepted by OWCP result in permanent impairment to a scheduled member.[6] It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[7]

ANALYSIS

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

OWCP found that appellant was not entitled to a schedule award for permanent impairment for his toes. In reaching that decision, it relied on the DMA's December 22, 2010 medical report, which stated that Chapter 4 of the A.M.A., *Guides*, specifically section 4.8, Vascular Disease Affecting the Extremities (6th ed. 68-71), and Table 4-12, Criteria for Rating Permanent Impairment due to Peripheral Vascular Disease -- Lower Extremity (6th ed. 69), pertained to the rating of Raynaud's syndrome, appellant's primary diagnosis. The Board finds that Table 4-12 does provide the criteria for rating appellant's accepted bilateral Raynaud's

[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] *H.P.*, Docket No. 11-894 (issued November 9, 2011); *Thomas P. Lavin*, 57 ECAB 353 (2006).

[7] *H.P.*, *supra* note 6; *Tammy L. Meehan*, 53 ECAB 229 (2001).

syndrome. To apply this table of the A.M.A., *Guides*, however, ABI must be obtained. As the A.M.A., *Guides* explain: "obstructive physiology is evaluated by objective testing including arterial pressure ratios between the digits and the brachial pressure." This record does not document that such testing has been performed. Because there was no evidence of abnormal ankle-brachial indices, a key factor in determining permanent impairment rating, the DMA concluded that appellant's permanent impairment should be rated as zero percent. The DMA reached this conclusion based on Dr. Katz's August 31 and November 17, 2010 reports, which erroneously evaluated appellant's condition using the criteria set out in Chapter 16 of the A.M.A., *Guides* and thus did not provide the ABI.[8]

The Board has long held that OWCP is not a disinterested arbiter but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation to see that its administrative processes are impartially and fairly conducted.[9] Although the employee has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence.[10] Once OWCP starts to procure medical opinion, it must do a complete job.[11] It has the responsibility to obtain an evaluation that will resolve the issue involved in the case.[12] OWCP selected Dr. Katz to perform a second opinion evaluation to assess appellant's permanent impairment. As Dr. Katz's evaluation was incomplete, OWCP was responsible for obtaining an evaluation that complied with the A.M.A., *Guides*. The case will therefore be remanded for further development on the issue of whether appellant has a permanent impairment of the toes which will entitle him to a schedule award. After this and such further development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant is entitled to a schedule award for permanent impairment of the toes.

[8] It is also worth noting that Dr. Katz's medical reports did not mention whether appellant had reached maximum medical improvement.

[9] *Richard F. Williams*, 55 ECAB 343, 346 (2004); *Thomas M. Lee*, 10 ECAB 175, 177 (1958).

[10] *D.N.*, 59 ECAB 576 (2008); *Mary A. Barnett*, 17 ECAB 187, 189-90 (1965).

[11] *Richard F. Williams*, 55 ECAB 343, 346 (2004); *William N. Saathoff*, 8 ECAB 769, 770-71 (1956).

[12] *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983).

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2011 decision of the Office of Workers' Compensation Programs be set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: April 3, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board