

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

S.B., Appellant)
and) Docket No. 11-1265
U.S. POSTAL SERVICE, POST OFFICE,) Issued: February 10, 2012
Johnson City, TN, Employer)

)

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

Case Submitted on the Record

DECISION & ORDER

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

JURISDICTION

On April 28, 2011 appellant timely appealed the November 29, 2010 decision of the Office of Workers' Compensation Programs (OWCP), which granted a schedule award. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 has greater than 19 percent impairment of the left lower extremity.

FACTUAL HISTORY

Appellant, a 54-year-old rural carrier associate, was involved in an employment-related motor vehicle accident on March 15, 2008. She was ejected from the vehicle and sustained multiple injuries to her left lower extremity. Appellant underwent surgery on March 15 and 24,

¹ 5 U.S.C. §§ 8101-8193.

2008 to repair the damage to her left foot and ankle. OWCP initially accepted her claim for open fracture of the tibia with fibula, upper end. It later expanded appellant's claim to include closed fracture of left metatarsal bone, closed fracture of left lateral malleolus, open wound of the left ankle and left foot wound with complications. Appellant received appropriate wage-loss compensation.

On January 27, 2009 OWCP granted a schedule award for 19 percent impairment of the left lower extremity (leg) based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001).² The award covered a period of 54.72 weeks, beginning October 28, 2008.

On November 16, 2009 appellant underwent a left first (great toe) metatarsophalangeal (MTP) joint fusion, which OWCP authorized. She subsequently filed a claim for an additional schedule award.

In a report dated June 29, 2010, appellant's surgeon, Dr. Karen J. McRae, found 10 percent impairment based on arthrodesis of the first MTP joint.³ She referenced Table 16-2, Foot & Ankle Regional Grid -- Lower Extremity Impairments, A.M.A., *Guides* 508 (6th ed. 2008). The district medical adviser (DMA) reviewed Dr. McRae's latest rating and initially believed that the 10 percent left lower extremity impairment (LLE) was duplicative of the previous award for 19 percent. In a supplemental report dated September 21, 2010, Dr. McRae noted her disagreement with the DMA's finding. She explained that appellant's current rating represented an increased impairment from the prior rating, which included only two percent impairment attributable to loss of motion in the left first MTP joint. According to Dr. McRae, the outcome of the November 2009 great toe surgical fusion represented additional impairment. Upon further review, the DMA issued a November 4, 2010 report noting that appellant was entitled to an additional 10 percent impairment of the left lower extremity.

On November 29, 2010 OWCP granted a schedule award for ten (10) percent "loss of use of left great toe." The award covered a period of 3.8 weeks. The claims examiner indicated that the award was based on Dr. McRae's June 29, 2010 report and the DMA's November 4, 2010 report.

LEGAL PRECEDENT

Section 8107 of FECA 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.⁴ FECA, 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

² Appellant's overall rating of 19 percent was based on a combination of impairments, including loss of ankle motion (15 percent), loss of motion in the first MTP joint (2 percent), and loss of motion in the lesser toes (2 to 5 MTP joints -- 2 percent). See Table 17-11 and Table 17-14, A.M.A., *Guides* 537 (5th ed. 2001).

³ Dr. McRae is a Board-certified orthopedic surgeon. She also provided the October 28, 2008 impairment rating that formed the basis of appellant's January 27, 2009 schedule award. *See supra* note 2.

⁴ For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

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.⁵ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).⁶

FECA and its implementing regulations provide for the reduction of compensation for subsequent injury to the same scheduled member.⁷ Benefits payable under 5 U.S.C. § 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.⁸

ANALYSIS

The Board finds that the case is not in posture for decision. OWCP's latest schedule award was for the left great toe, rather than the LLE as previously awarded. Under FECA, a total loss of use of the great toe warrants 38 weeks' compensation.⁹ Therefore, 10 percent impairment of the great toe represents 3.8 weeks' compensation. But for a total loss of use of a leg, an employee shall receive 288 weeks' compensation.¹⁰ A 10 percent impairment of the lower extremity would, therefore, entitle appellant to 28.8 weeks' compensation.

The claims examiner indicated that the November 29, 2010 schedule award was based on the reports of Dr. McRae and the DMA, both of whom referenced Table 16-2, A.M.A., *Guides* 508 (6th ed. 2008), which provides a default impairment of 10 percent of the lower extremity for great toe arthrodesis. Although the identified impairment involved a fusion of the great toe, the 10 percent rating under Table 16-2 pertained to the LLE, not the great toe.

In his November 4, 2010 report, the DMA clearly referenced Table 16-2 and indicated that "final additional impairment LLE equals 10 percent." It seems the claims examiner misinterpreted this finding to mean impairment of the great toe rather than the lower extremity. At this juncture, there appears to be no other plausible explanation.¹¹ Under FECA, a 10 percent loss of use of the great toe versus a 10 percent loss of use of the lower extremity (leg) represents

⁵ 20 C.F.R. § 10.404 (2011).

⁶ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

⁷ 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

⁸ 20 C.F.R. § 10.404(c)(1), (2).

⁹ 5 U.S.C. § 8107(c)(8).

¹⁰ *Id.* at § 8107(c)(2).

¹¹ Decisions issued by OWCP "shall contain findings of fact and a statement of reasons." 20 C.F.R. § 10.126.

a difference of 25 weeks' compensation. As such, the claims examiner's misinterpretation represents a significant discrepancy. The case shall be remanded for clarification.

The Board further notes that the claims examiner neglected to discuss what, if any, part of the latest 10 percent LLE impairment rating was duplicative of the prior schedule award. Dr. McRae explained that the prior 19 percent LLE award included 2 percent LLE impairment for loss of motion involving the first MTP joint. Arguably, the latest impairment rating for great toe arthrodesis (loss of motion) overlaps at least part of the prior award, which included impairment for loss of motion in the first MTP joint (2 percent). But neither the claims examiner nor the DMA adequately addressed this particular point. Consequently, the case is to be remanded to OWCP to clarify the basis for the November 29, 2010 schedule award. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: February 10, 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