United States Department of Labor
Employees' Compensation Appeals Board

W.M., Appellant	)	
and	)	**Docket No. 11-1486**
	)	**Issued: February 8, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, 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:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 8, 2011 appellant filed a timely appeal from a February 23, 2011 schedule award decision of the Office of Workers' Compensation Programs (OWCP). 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 schedule award decision.

ISSUE

The issue is whether appellant has more than an 18 percent impairment of the right leg for which he received a schedule award.

On appeal, appellant's attorney asserts that the weight of the medical evidence rests with the opinion of appellant's attending physician or there is a conflict in medical evidence.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On April 18, 2003 appellant, then a 41-year-old letter carrier, filed an occupational disease claim, alleging that his employment duties caused a torn tendon in his right foot. Dr. Harold Schoenhaus, a podiatrist, performed a right posterior tendon repair on April 23, 2003. On September 17, 2003 he removed an implant in the right foot. In a March 30, 2004 treatment note, Dr. Schoenhaus reported that appellant was pleased with the results of his surgery and would be seen on an as needed basis.

On July 26, 2010 appellant filed a schedule award claim. In a May 4, 2010 report, Dr. David Weiss, an osteopath, reviewed the medical records, appellant's medical history and noted his complaint of daily right foot pain with stiffness. He noted that appellant was employed full time as a letter carrier and had difficulties in activities of daily living including climbing stairs, going from a seated to a standing position and difficulty with prolonged driving. Appellant had a lower extremity activity scale (LEAS) score of 11/18 or a 39 percent lower extremity disability. Dr. Weiss provided findings on Physical Examination (GMPE) of the right foot, noting tenderness over the posterior tibial tendon. Range of motion testing was performed three times and dorsal and plantar flexion were diminished. Appellant had a pes planus deformity and a "too many toe" sign. He was unable to perform a single heel raise, consistent with a posterior tibial dysfunction. Dr. Weiss diagnosed: cumulative and repetitive trauma disorder; posterior tibial tendon dysfunction with longitudinal tear to the right ankle; acquired pes planus deformity to the right foot; status post right posterior tibial tendon and subtalar joint implant to the right ankle joint in April 2003; retained painful implant to the right foot; status post removal of implant to the right foot in September 2003; and degenerative joint disease of the right ankle joint, by clinical impression. He rated appellant's impairment under the sixth edition of the A.M.A., *Guides*[2] which was based on the history provided by appellant, GMPE, employment duties and a review of medical records, under Table 16-2, Ankle Regional Grid, appellant had a class 3 impairment due to a posterior tibial tendon tear with a fixed deformity or a 34 percent impairment. Dr. Weiss stated that appellant had a net adjustment score of one percent for Functional History (GMFH) and net adjustment scores of two each for GMPE and Clinical Studies (GMCS). He applied the net adjustment formula, finding a net adjustment of minus 4, which yielded a final right lower extremity impairment rating of 28 percent, with a date of maximum medical improvement of May 4, 2010.

By report dated August 4, 2010, Dr. Arthur Berman, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical record. He found that the rating of Dr. Weiss under Table 16-2, of a class 3 impairment, was not be appropriate because on examination appellant had flexibility. Dr. Berman maintained that a class 2 impairment would be more appropriate, with a flexible deformity and loss of specific tendon function, for a grade C, or a default value of 16 percent. He offered an alternative option, under Table 16-2, of a class 1 impairment for a subtalar fusion, which he rated as class C or a 10 percent impairment. Dr. Berman stated that appellant had net adjustment scores of 1 for GMFH, grade modifier of 2 for GMPE and grade modifier of 2 for GMCS. He applied the net adjustment formula, finding that appellant had an adjustment of plus 2, which would increase his total right lower extremity

[2] A.M.A., *Guides* (6th ed. 2008).

impairment to 18 percent and agreed that the date of maximum medical improvement was May 4, 2010.

In an August 18, 2010 decision, appellant was granted a schedule award for an 18 percent impairment of the right lower extremity, for a total of 51.84 weeks, to run from May 4, 2010 to May 1, 2011. His attorney requested a hearing on August 23, 2010. At the hearing, held by video conference on December 17, 2010, appellant testified that he was still a letter carrier. He stated that he now delivered mail using a truck and did not do as much walking. Appellant still had sharp pains on a daily basis, difficulty coming down stairs and had deformed toes. Counsel argued that the opinion of Dr. Weiss should be given weight or a conflict in medical evidence had been created.

In a February 23, 2011 decision, OWCP's hearing representative affirmed the August 18, 2010 decision.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing federal regulations[4] 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.[5] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* was used to calculate schedule awards.[6] For decisions issued after May 1, 2009, the sixth edition is to be used.[7]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[8] Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] Under Chapter 2.3, evaluators are directed to

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. at § 10.404(a).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[7] FECA Bulletin No. 09-03 (issued March 15, 2009).

[8] A.M.A., *Guides*, *supra* note 2 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[9] *Id*. at 494-531.

[10] *Id*. at 521.

provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[11]

Section 8123(a) of FECA provides that, if there is 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.[12] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

ANALYSIS

The Board finds that a conflict in medical evidence arose regarding the degree of impairment to appellant's right leg. The accepted condition is right tibial tendon dysfunction with surgical repair. In a May 4, 2010 report, Dr. Weiss advised that on GMPE appellant had decreased dorsal and plantar flexion, a pes planus deformity, and "too many toe" sign. Under Table 16-2, Ankle Regional Grid, appellant had a class 3 impairment due to a posterior tibial tendon tear with a fixed deformity for a 34 percent impairment. Dr. Weiss described modifiers and applied the net adjustment formula, finding a net adjustment of minus 4, which yielded total impairment of 28 percent, with a date of maximum medical improvement of May 4, 2010.

Dr. Berman, OWCP's medical adviser, disagreed with the impairment of Dr. Weiss. impairment evaluation, because he indicated that appellant had ankle flexibility. He stated class 2 impairment would be more appropriate, with a grade C and a default value of 16 percent. Dr. Berman also offered an alternative option, under Table 16-2, a class 1 impairment for a subtalar fusion, which he rated as class C for a 10 percent impairment. He also applied the net adjustment formula, indicating that appellant had an adjustment of plus 2, which would increase his total right lower extremity impairment to 18 percent, and agreed that the date of maximum medical improvement was May 4, 2010.

Table 16-2 provides that for a muscle/tendon impairment, a fixed deformity and loss of specific tendon function is rated as class 3 with a C default rating of 34 percent. The table indicates that a flexible deformity and loss of specific function is rated as class 2 with a C default

[11] *Id*. at 23-28.

[12] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[13] 20 C.F.R. § 10.321.

[14] *V.G.*, 59 ECAB 635 (2008).

rating of 16 percent.[15] Dr. Weiss found a fixed deformity and Dr. Berman found a flexible deformity.

If there is disagreement between OWCP's medical adviser and the employee's physician, OWCP will appoint a third physician who shall make an examination.[16] For a conflict to arise, the opposing physician's viewpoints must be of virtually equal weight and rationale.[17] The Board finds the opinions of Dr. Weiss and Dr. Berman to be of equal weight. As to the extent of permanent impairment.[18] The Board will set aside the February 23, 2011 schedule award decision and remand the case for OWCP to refer appellant to an impartial medical specialist to resolve the conflict. After such further development as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds this case is not in posture for decision due to a conflict in medical evidence.

[15] A.M.A., *Guides*, *supra* note 2 at 501.

[16] *Supra* note 12.

[17] *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[18] The Board also notes that Dr. Berman's application of the net adjustment formula contained an error. Using Dr. Weiss modifier, (GMFH of 1 minus CDX of 2 yields -1) + (GMPE of 2 -- CDX of 2 yields 0) + (GMCS of 2 -- CDX of 2 yields 0) for a net adjustment of minus , not the plus 2 found by Dr. Berman.

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2011 decision of the Office of Workers' Compensation Programs be set aside and the case remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: February 8, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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