United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 13-190**
	)	**Issued: April 3, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Alexandria, LA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 5, 2012 appellant, through counsel, timely appealed from the August 15, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied 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 schedule award claim.

ISSUE

The issue is whether appellant has greater than two percent impairment of the left leg.

FACTUAL HISTORY

Appellant, a 31-year-old temporary letter carrier, has an accepted claim for left knee contusion, left elbow contusion and left ankle sprain involving the deltoid, calcaneofibular and distal tibofibular ligaments. The injury occurred on March 6, 2009 when he missed a step, twisted his left ankle and fell down several steps. On September 14, 2010 appellant filed a claim

[1] 5 U.S.C. §§ 8101-8193.

for a schedule award. Dr. Robert E. Holladay IV, a Board-certified orthopedic surgeon and OWCP-referral physician, examined appellant on February 14, 2011 and rated two percent impairment of the left leg due to left ankle strain with mild motion deficits.[2] In a March 9, 2011 report, Dr. Ronald Blum, an OWCP district medical adviser, concurred with Dr. Holladay's left lower extremity impairment rating. Appellant achieved maximum medical improvement (MMI) as of August 19, 2010.

By decision dated March 16, 2011, OWCP granted a schedule award for two percent impairment of the left lower extremity. The award covered a period of 5.76 weeks from August 19 to September 28, 2010.

Appellant's counsel requested a telephone hearing which was held on July 6, 2011. In a March 11, 2011 report, Dr. Phillip Osborne, a specialist in occupation medicine, found no basis for a lower extremity impairment rating due to complex regional pain syndrome (CRPS).[3] He stated that appellant's left lower extremity impairment represented a five percent whole person impairment under the A.M.A., *Guides* (6th ed. 2008).

Dr. M. Stephen Wilson examined appellant on June 24, 2011. Regarding the left lower extremity, Dr. Wilson rated seven percent impairment under Table 16-2, A.M.A., *Guides* 501 (6th ed. 2008). He explained that appellant's left ankle ligament strain with mild motion deficits represented a class 1 or mild problem with a default (grade C) lower extremity impairment of 5 percent. Dr. Wilson then calculated a net adjustment of +2, which corresponded to a grade E rating of seven percent under Table 16-2.

In a September 22, 2011 decision, the Branch of Hearings & Review set aside the March 16, 2011 schedule award and remanded the case for further medical development. The hearing representative found a conflict in medical opinion between appellant's physician, Dr. Wilson, and the referral physician, Dr. Holladay. The case was remanded for referral to an impartial medical examiner.

On December 2, 2011 OWCP referred appellant to Dr. Grant R. McKeever, a Board-certified orthopedic surgeon, selected as the medical referee. He examined appellant on January 6, 2012 and found that the accepted left elbow, left knee and left ankle conditions had each resolved without evidence of permanent impairment. Appellant confirmed that his left elbow and left knee were fine; however, he continued to complain of left ankle pain. On physical examination there was no loss of motion in the left elbow, left knee or left ankle. Dr. McKeever reported slight swelling and slight tenderness in the left ankle, but no decrease in strength, no atrophy or ankylosis and no sensory changes. He found that appellant's marked severe subjective complaints were inconsistent with the objective physical findings, x-ray findings or magnetic resonance imaging (MRI) scan findings. Dr. McKeever found no impairment of the left lower extremity under Table 16-2, A.M.A., *Guides* 501 (6th ed. 2008). He

[2] Dr. Holladay rated appellant under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008).

[3] Although his discussion of CRPS focused on appellant's left lower extremity, Dr. Osborne appears to have mistakenly referenced various tables in Chapter 15, The Upper Extremities, A.M.A., *Guides* 383-492 (6th ed. 2008).

estimated that appellant's left ankle would have reached maximum medium improvement within six months of his injury, September 6, 2009. While appellant's accepted orthopedic conditions had resolved, Dr. McKeever provided an additional diagnosis of psychophysiologic ankle pain (ICD-9 Code 719.47).

On March 14, 2012 Dr. Blum reviewed the case record, including the impartial medical examiner's January 6, 2012 report. He noted that Dr. McKeever found no impairment of the left leg.

By decision dated March 21, 2012, OWCP denied appellant's claim for an additional schedule award. It found that the medical evidence, as represented by the impartial medical examiner's January 6, 2012 report, did not support an increase in the two percent left lower extremity impairment previously awarded.

Appellant's counsel requested a hearing which was held on June 25, 2012. He contended that the claim should be expanded to include the impartial medical examiner's diagnosed left ankle pain disorder. OWCP did not receive additional medical evidence or posthearing comments.

In an August 15, 2012 decision, the hearing representative accepted the condition of psychophysiologic ankle pain but otherwise affirmed OWCP's March 21, 2012 schedule award decision based on the impartial medical examiner's findings.

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 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]

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or the implementing regulations.[7] Neither FECA nor the regulations provide

[4] For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

[5] 20 C.F.R. § 10.404.

[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] *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[8]

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[9] For a conflict to arise the opposing physicians' opinions must be of "virtually equal weight and rationale."[10] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS

OWCP granted a schedule award for two percent impairment of the left leg based on Dr. Holladay's February 14, 2011 impairment rating. At the time, the district medical adviser concurred with the two percent left lower extremity rating under Table 16-2, A.M.A., *Guides* 501 (6th ed. 2008).

Appellant later submitted two impairment ratings. Dr. Osborne found five percent whole person impairment while Dr. Wilson found seven percent left lower extremity impairment under Table 16-2, A.M.A., *Guides* 501 (6th ed. 2008). His impairment rating was insufficient for purposes of determining appellant's entitlement to an additional schedule award. Dr. Osborne failed to identify the appropriate tables and/or figures he relied on in calculating appellant's left lower extremity impairment under the A.M.A., *Guides* (6th ed. 2008). He also did not explain how he converted appellant's lower extremity impairment to five percent whole person impairment. Accordingly, Dr. Osborne's March 11, 2011 impairment rating did not comply with the A.M.A., *Guides* (6th ed. 2008). FECA does not provide for the payment of a schedule award for whole person impairment.[12]

Dr. Wilson rated seven percent left lower extremity impairment under Table 16-2, A.M.A., *Guides* 501 (6th ed. 2008). Because Dr. Wilson's June 24, 2011 impairment rating differed from Dr. Holladay's February 14, 2011 rating, the hearing representative found a conflict in medical opinion.

Dr. McKeever, the impartial medical specialist, examined appellant on January 6, 2012 and found no left leg impairment under Table 16-2. The impartial medical examiner explained that appellant's subjective complaints were inconsistent with the objective physical examination and diagnostic findings. He determined that all of appellant's accepted conditions had resolved

[8] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[9] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[10] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[11] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[12] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, *supra* note 8.

without permanent impairment. The district medical adviser agreed with Dr. McKeever that appellant had no left lower extremity impairment under the A.M.A., *Guides* (6th ed. 2008).[13]

When a case is referred to an impartial medical examiner to resolve a conflict, the resulting medical opinion, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14] The Board finds that OWCP properly deferred to Dr. McKeever's January 6, 2012 findings. The impartial medical examiner provided a well-reasoned report based on a proper factual and medical history. He accurately summarized the relevant medical evidence. Dr. McKeever also examined appellant and provided a thorough review of his relevant medical records. His January 6, 2012 report included detailed findings and medical rationale supporting his opinion. As the impartial medical examiner, Dr. McKeever's opinion was entitled to determinative weight.[15] Accordingly, the Board finds that OWCP properly relied on the impartial medical examiner's January 6, 2012 findings in determining that appellant did not have left lower extremity impairment in excess of the two percent previously awarded.

CONCLUSION

Appellant failed to establish that he has greater than two percent impairment of the left lower extremity.[16]

[13] The district medical adviser, Dr. Ronald Blum, had previously agreed with Dr. Holladay that appellant had two percent left lower extremity impairment.

[14] *Gary R. Sieber*, *supra* note 11.

[15] *Id.*

[16] Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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