United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
	)	**Docket No. 13-1475**
and	)	**Issued: December 18, 2013**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, 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
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On June 10, 2013 appellant, through his attorney, filed a timely appeal from the February 19, 2013 merit 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 this case.

ISSUE

The issue is whether appellant met his burden of proof to establish more than seven percent permanent impairment of his right leg, for which he received a schedule award.

FACTUAL HISTORY

OWCP accepted that on April 20, 2010 appellant, then a 44-year-old letter carrier, sustained partial rupture of his right Achilles tendon, right tarsal tunnel syndrome and temporary contraction of his right tendon sheath due to stepping down from a truck at work.

[1] 5 U.S.C. §§ 8101-8193.

The findings of the May 10, 2010 magnetic resonance imaging (MRI) scan testing of appellant's right ankle showed small interstitial partial thickness tear of the distal Achilles tendon and retrocalcaneal bursitis with a Haglund's deformity of the calcaneous. MRI scan testing of his right ankle on September 29, 2010 demonstrated focal tenosynovitis of the flexor hallucis longus tendon, (just below the level of the subtalar joint) and focal collection contiguous with the flexor hallucis longus tendon sheaths extending to the adjacent soft tissues close to the tibial neurovascular bundle (possibly associated with tarsal tunnel syndrome). The findings also showed distal Achilles tendinopathy, mild partial intrasubstance tear at the Achilles insertion and partial tearing of the deep fibers of the deltoid ligament with remote appearing evulsion fragment in the region.

On November 2, 2010 Dr. William Newcomb, an attending Board-certified orthopedic surgeon, performed a right foot tenolysis of the flexor hallucis longus tendon and right ankle release of the tarsal tunnel. The procedure was authorized by OWCP.

In a January 13, 2012 report, Dr. Arthur F. Becan, an attending Board-certified orthopedic surgeon, determined that appellant sustained 15 percent permanent impairment of his right leg under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). He indicated that physical examination of appellant's right foot and ankle revealed tenderness of the medial malleolus, subtalar joint, posterior tibial tendon, distal Achilles tendon, retrocalcaneal bursae right tarsal tunnel. Dr. Becan observed that appellant had a mild limp due to right hind foot pain and reported range of motion findings for his right ankle. Appellant exhibited dorsiflexion of 0 to 5 out of 15 degrees, plantar flexion of 0 to 50 out of 50 degrees, inversion of 0 to 30 out of 30 degrees and eversion of 0-30 out of 30 degrees with manual muscle strength dorsiflexion of 5/5, plantar flexion of 4/5, inversion of 4/5 and eversion of 5/5. There was decreased sensation along his instep and involving his right great toe. Dr. Becan indicated that Semmes-Weinstein Monofilaments revealed a decreased sensation along the instep area of the right foot and involving the right great toe with a minimum of 6.6 milligrams using Semmes-Weinstein Monofilaments on the right and 3.3 milligrams on the left.

Dr. Becan explained how he calculated appellant's right leg impairment under the A.M.A., *Guides*. He stated that, using Table 16-2 (Foot and Ankle Regional Grid) on page 501, the diagnosed-based impairment of partial Achilles tendon rupture fell under class 1 with a default value (mild motion deficit) of five percent impairment. Dr. Becan determined that, per Table 16-6 on page 516, the functional history modifier fell under grade modifier 1 (mild problem); per Table 16-7 on page 517, the physical examination modifier was grade modifier 2 (moderate problem); per Table 16-8 on page 519, the clinical studies modifier fell under grade modifier 1 (mild problem). Dr. Arnold T. Berman, a Board-certified orthopedic surgeon, applied the net adjustment formula on page 521 to find that there was a +1 net adjustment from the default rating of five percent, which meant that moving one space to the right under Table 16-2 yielded a six percent impairment of the right leg due to the Achilles tendon rupture. Dr. Becan noted that appellant had severe sensory deficits of the right tibial nerve and therefore his condition, under Table 16-12 (Peripheral Nerve Impairment -- Lower Extremity Impairments) on page 536, fell under class 1 with a default value of 10 percent. He indicated that appellant's functional history modifier, physical examination modifier and clinical studies modifiers all fell under grade modifier 1 and therefore, after application of the net adjustment formula, there was

no adjustment from the default value of 10 percent. Therefore, appellant had 10 percent impairment due to his tibial nerve condition. Using the Combined Values Chart on page 604, the 6 percent impairment combined with the 10 percent impairment equaled a total right leg impairment of 15 percent.[2]

On April 13, 2012 appellant claimed a schedule award.

In a July 10, 2012 report, Dr. Berman, serving as an OWCP medical adviser, found that appellant sustained a seven percent permanent impairment of his right leg under the standards of the sixth edition of the A.M.A., *Guides.* Dr. Berman stated that, using Table 16-2 (Foot and Ankle Regional Grid) on page 501, the diagnosed-based impairment of partial Achilles rupture fell under class 1 with a default value (mild motion deficit) of five percent impairment. He determined that, per Table 16-6 on page 516, the functional history modifier fell under grade modifier 1 (mild problem); per Table 16-7 on page 517, the physical examination modifier was grade modifier 1 (mild problem); and per Table 16-8 on page 519, the clinical studies modifier fell under grade modifier 1 (mild problem). Dr. Berman applied the net adjustment formula on page 521 to find that there was zero net adjustment from the default rating of five percent.

Dr. Berman indicated that appellant's tarsal tunnel syndrome involved a branch of the tibial nerve. He stated that Dr. Becan improperly found that appellant's tibial nerve condition was "severe" with a class 1 default value of 10 percent under Table 16-12 on page 536. Dr. Berman felt that the findings of Dr. Becan's January 13, 2012 examination fell under the category of mild motor and moderate sensory tarsal deficits per Table 16-12 and therefore appellant's tarsal condition fell under the Class 1 default value of two percent. He noted that the grade modifiers did not warrant an adjustment modification and concluded that appellant's tarsal condition equaled two percent impairment of his right leg. Dr. Berman indicated that, using the Combined Values Chart on page 604, the five percent impairment due to the Achilles tear combined with the two percent impairment due to the tibial nerve condition equaled a total right leg impairment of seven percent.

In a July 19, 2012 decision, OWCP granted appellant a schedule award for seven percent permanent impairment of his right leg. The award ran for 20.16 weeks from January 13 to June 2, 2012. The award was based on the July 10, 2012 report of Dr. Berman, the medical adviser.

Appellant requested a video hearing before an OWCP hearing representative. During the November 29, 2012 hearing, counsel argued that there was a conflict in the medical opinion evidence regarding the extent of his right leg impairment between Dr. Becan and Dr. Berman.

In a February 19, 2013 decision, the hearing representative affirmed OWCP's July 19, 2012 schedule award decision. She found that the weight of the medical evidence regarding appellant's right leg impairment rested with the opinion of Dr. Berman.

[2] Dr. Becan found a date of maximum medical improvement of January 13, 2012.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations the appropriate standard for evaluating schedule losses.[5] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[6]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the foot and ankle, the relevant portion of the leg for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.[7] After the Class of Diagnosis (CDX) is determined from the Foot and Ankle Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE) and grade modifier for Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[8] Table 16-12 (Peripheral Nerve Impairment -- Lower Extremity Impairments) is used to evaluate peripheral nerve impairments of the legs.[9]

Section 8123(a) of FECA provides in pertinent part: "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."[10] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[11]

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id*.

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

[7] *See* A.M.A., *Guides* (6th ed. 2009) 501-08.

[8] *Id.* at 515-21.

[9] *Id.* at 536.

[10] 5 U.S.C. § 8123(a).

[11] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

ANALYSIS

OWCP accepted that appellant sustained partial rupture of his right Achilles tendon, right tarsal tunnel syndrome and temporary contraction of his right tendon sheath on April 20, 2010. On November 2, 2010 appellant underwent OWCP-authorized surgery, including a right foot tenolysis of the flexor hallucis longus tendon and right ankle release of the tarsal tunnel. In a July 19, 2012 decision, OWCP granted him a schedule award for a seven percent permanent impairment of his right leg. The award was based on the July 10, 2012 impairment rating calculation of Dr. Berman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. He had evaluated the medical evidence of record, including the January 13, 2012 examination findings of Dr. Becan, an attending Board-certified orthopedic surgeon. On February 19, 2013 an OWCP hearing representative affirmed OWCP's July 19, 2012 decision.

The Board finds that there is a conflict in the medical opinion evidence regarding the extent of appellant's right leg impairment between Dr. Berman and Dr. Becan.[12] In the July 10, 2012 report, Dr. Berman found that appellant sustained seven percent permanent impairment of his right leg under the standards of the sixth edition of the A.M.A., *Guides.* In contrast, Dr. Becan found, in his January 13, 2012 report, that appellant had 15 percent permanent impairment of his right leg under the standards of the sixth edition of the A.M.A., *Guides.*

Both physicians used Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501, with associated Table 16-6 through Table 16-8 and Table 16-12 (Peripheral Nerve Impairment -- Lower Extremity Impairments) on page 536 to evaluate appellant's right leg impairment.[13] However, the physicians disagreed about how to apply the medical findings of record to the standards of the tables. For example, Dr. Becan felt that appellant's condition warranted a grade modifier 2 for physical examination per Table 16-7 on page 517, whereas Dr. Berman believed it warranted a grade modifier 1. In addition, he found that appellant's tibial nerve condition represented a severe sensory deficit with a class 1 default value of 10 percent under Table 16-12 on page 536. However, Dr. Berman felt that the medical findings of record showed that appellant's tibial nerve condition fell under the category of mild motor and moderate sensory deficits per Table 16-12 and therefore appellant's tibial nerve condition fell under the class 1 default value of two percent.

Due to the outstanding conflict in the medical opinion evidence regarding appellant's right leg impairment between Dr. Becan and Dr. Berman, the case must be referred to an impartial medical specialist to resolve the conflict.[14] On remand, OWCP should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter. After such further development as it deems necessary, it should issue an appropriate decision regarding appellant's schedule award claim.

[12] *See supra* note 10.

[13] *See supra* notes 7 through 9.

[14] *See supra* note 11.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant he has more than seven percent impairment of his right leg. The case is remanded to OWCP for further development.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision.

Issued: December 18, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board