United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 15-663**
	)	**Issued: June 5, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 11, 2015 appellant, through counsel, filed a timely appeal from a December 24, 2014 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 has more than a one percent impairment of his left lower extremity for which he has received a schedule award.

FACTUAL HISTORY

This is the second appeal before the Board.[2] Appellant, a 55-year-old letter carrier, injured his left ankle on November 6, 2009 when he stepped out of his vehicle onto unlevel

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 13-2132 (issued July 23, 2014).

ground. He filed a claim for benefits, which OWCP accepted for left distal fibular fracture, based upon a November 6, 2009 report from Dr. Paul H. Steinfield, a Board-certified orthopedic surgeon, who reviewed x-ray evidence.

In a May 3, 2011 report, Dr. David Weiss, an osteopath, found that appellant had an eight percent impairment of his left leg pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) sixth edition. He based his rating on an ankle distal fibular fracture (malleolar), which yielded a six percent impairment under the Foot and Ankle Regional Grid at Table 16-2, page 503;[3] and a class 1 sensory deficit of the left tibial nerve of two percent under Table 16-12, page 536.[4]

On November 3, 2012 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his left lower extremity.

By decision dated December 6, 2012, OWCP denied appellant's claim for a schedule award, finding that Dr. Weiss' May 3, 2011 report was not based on a current medical examination. In a January 2, 2013 nonmerit decision, it denied appellant's request for reconsideration as insufficient to warrant reopening his case for further review of the merits under 5 U.S.C. § 8128(a).

By letter dated April 12, 2013, appellant's counsel requested reconsideration.

In a report dated March 14, 2013, based on an updated physical examination, Dr. Weiss found that appellant had a 16 percent left lower extremity impairment. He reviewed x-ray and magnetic resonance imaging (MRI) scans of the left ankle from January 31, 2013. Dr. Weiss stated that, on physical examination, appellant had a noticeable left lower extremity limp. He found mild effusion over the lateral malleolus and that the lateral impingement sign was positive producing pain. Dr. Weiss also stated that appellant had tenderness over the tibotalar joint, the anterior talofibular ligament, and the common peroneal tendon. He advised that his left ankle range of motion was restricted on dorsiflexion, that circumduction produced crepitus, and the Tinel's tap was positive over the tarsal tunnel. Appellant related complaints of daily and constant left ankle pain, stiffness, and swelling in addition to numbness in his left foot. He also experienced episodes of instability involving the left ankle.

Using the Foot and Ankle Regional Grid at Table 16-2, page 503 of the A.M.A., *Guides*, Dr. Weiss found that appellant had a class 1 left ankle distal fibular fracture (malleolar) with mild motion deficit, which yielded a 10 percent impairment. He found that he had a functional history grade modifier 2, a physical examination grade modifier 2, and that the grade modifiers for clinical studies were not applicable. Applying the adjustment formula at page 521 of the A.M.A., *Guides*,[5] Dr. Weiss determined that appellant had a net adjustment of two, which resulted in a 13 percent impairment of the left leg. He also found that appellant had a class 1 moderate sensory deficit of the left medial plantar nerve, a two percent impairment pursuant to

[3] A.M.A., *Guides* 503.

[4] *Id*. at 536.

[5] *Id*. at 521.

Table 16-12, page 536 of the A.M.A., *Guides*, which produced an adjusted three percent left lower extremity impairment. This amounted to a combined 16 percent left lower extremity impairment.

In a May 2, 2013 report, Dr. Morley Slutsky, Board-certified in occupational medicine and an OWCP medical adviser, found that Dr. Weiss had rated appellant's impairment based on a diagnosis of left distal fibular fracture without documenting the objective tests which demonstrated this condition; he therefore found that this diagnosis was incorrect. He further found that, even if the diagnosis was correct, appellant's fracture had healed and resolved with no residuals. Dr. Slutsky found that a left distal fibular fracture would not be the most impairing diagnosis in the left ankle region once appellant had reached maximum medical improvement. He stated that if there was an x-ray in the record which demonstrated a distal fibular fracture it should be forwarded for review. Dr. Slutsky concluded that the left medial plantar condition had not been accepted and that prior examinations of appellant did not support an impairment rating for this condition.

Dr. Slutsky rated appellant's impairment using the diagnosis of symptomatic soft tissue based on an MRI scan which documented small ankle joint effusion. Relying on Table 16-2 at pages 501 to 508 of the A.M.A., *Guides*,[6] he rated a class 1 impairment. Applying the grade modifiers, Dr. Slutsky found a net adjustment of zero, which yielded a one percent left lower extremity impairment.

By decision dated July 11, 2013, OWCP granted appellant a schedule award for a one percent permanent impairment of the left lower extremity for the period August 27 to September 16, 2012, for a total of 2.88 weeks of compensation.

In a July 23, 2014 decision,[7] the Board set aside the July 11, 2013 decision, finding that Dr. Slutsky's May 2, 2013 report was insufficient to represent the weight of medical evidence. The Board stated that he incorrectly found that Dr. Weiss' impairment rating was improper because it was based on a diagnosis of a left distal fibular fracture, but there were no x-rays to review to confirm the diagnosis. In fact, the record contained references to several x-rays of appellant's left ankle. The Board noted that OWCP had accepted his claim for a distal fibular fracture based on x-ray reports in evidence, including those of Dr. Steinfield, which diagnosed a fracture of the distal portion of the fibula based on x-rays. As Dr. Slutsky did not base his opinion on the statement of accepted facts, which included an accepted left fibular fracture, the Board found that his impairment rating was of diminished value. The Board therefore remanded for further development of the medical evidence and instructed OWCP to refer appellant for a second opinion examination on whether the accepted fracture caused left lower extremity permanent impairment under the A.M.A., *Guides*.[8] The Board instructed OWCP to obtain copies of the 2009 and 2013 x-rays and have them reviewed by a second opinion examiner. The

[6] *Id*. at 501-08.

[7] Docket No. 13-2132 (issued July 23, 2014).

[8] The Board disallowed the three percent left lower extremity impairment Dr. Weiss accorded for the condition of moderate sensory deficit left medial plantar, finding that this rating was not based on an accepted condition.

complete facts of this case are set forth in the Board's July 23, 2014 decision and are herein incorporated by reference.

In order to determine the degree of impairment stemming from appellant's accepted left fibular fracture, OWCP referred him to Dr. Robert A. Smith, Board-certified in orthopedic surgery, for a second opinion examination. In an October 17, 2014 report, Dr. Smith found that appellant had a one percent left lower extremity impairment under the A.M.A., *Guides* based on a diagnosis of left distal fibular fracture, which had healed anatomically with mild soft tissue residuals. He stated that, on physical examination, appellant walked with a slight limp on the left side but did not require assistance or an ankle brace; and there was no evidence of any extra-articular swelling, palpable effusion, instability, or deformity. Dr. Smith advised that appellant had some limited range of motion in the ankle but showed no atrophy or crepitation in the ankle or in the subtalar joints with motion. He found that, under Table 16-2, page 501, a mild soft tissue injury yielded a class 1 rating, for a one percent default lower extremity impairment."[9] Dr. Smith determined that appellant had a functional history grade modifier 1, a mild problem, and a physical examination grade modifier 1, a mild problem. He assigned no grade for clinical studies. Using the net adjustment formula at page 521,[10] Dr. Smith subtracted the grade 1 from functional history and physical examination for a net adjustment of zero, which produced an adjusted class 1, grade C impairment of one percent for the left lower extremity.

In a December 2, 2014 report, Dr. Slutsky found that Dr. Smith's October 17, 2014 report, which rated a one percent left lower extremity based on mild soft tissue residuals from appellant's left distal fibular fracture, represented the weight of the medical evidence. He stated that Dr. Weiss had rated a 13 percent impairment for an ankle fracture, the residuals of which did not exist at maximum medical improvement. Dr. Slutsky advised that appellant's clinical findings and condition had improved significantly since Dr. Weiss examined appellant in March 2013; he, therefore, used Dr. Smith's October 17, 2014 findings as the date of maximum medical improvement. He asserted that appellant's left ankle condition had stabilized at this time, that there was no further treatment planned and that Dr. Smith's October 17, 2014 evaluation represented appellant's final impairment.

By decision dated December 24, 2014, OWCP found that appellant was not entitled to an additional schedule award for the left lower extremity greater than the one percent already awarded.

LEGAL PRECEDENT

The schedule award provision of FECA[11] and its implementing regulations[12] 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

[9] A.M.A., *Guides* 501.

[10] *Id*. at 521.

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

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 as the appropriate standard for evaluating schedule losses.[13] The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[14]

ANALYSIS

In the instant case, OWCP accepted the condition of left distal fibular fracture. In his March 14, 2013 report, Dr. Weiss, appellant's treating physician, found that he had a 13 percent left lower extremity impairment stemming from this condition. He reviewed January 31, 2013 x-ray and MRI scans of the left ankle and based on physical examination made findings of residual pain, tenderness, numbness, and limited range of motion in the left ankle and left foot. Dr. Weiss related that appellant had some residual instability in the left ankle. In his October 17, 2014 report, Dr. Smith found that appellant's left distal fibular fracture had healed anatomically with mild soft tissue residuals. He advised that appellant walked with a slight limp on the left side, but did not require assistance and did not have an ankle brace. Appellant showed no evidence of extra-articular swelling, palpable effusion, instability, or deformity. Dr. Smith noted that appellant had some limited range of motion in the ankle but showed no atrophy or crepitation in the subtalar joints with motion. He found that his impairment rated a class 1 impairment rating, which yielded a one percent default lower extremity impairment at Table 16-2, page 501, for a mild soft tissue injury. Using the net adjustment formula at page 521,[15] Dr. Smith found that appellant had an adjusted class 1, grade C impairment of one percent for the left lower extremity.

Dr. Slutsky, OWCP's medical adviser, reviewed Dr. Smith's October 17, 2014 impairment rating on December 2, 2014 and found that it showed that appellant's clinical findings and condition had improved significantly since Dr. Weiss' March 14, 2013 examination. He found that appellant's left ankle condition had stabilized, that there was no further treatment planned, and that Dr. Smith's October 17, 2014 evaluation represented his final impairment. Dr. Slutsky therefore found that the date of Dr. Smith's October 17, 2014 report was the appropriate date of maximum medical improvement. He stated that, although Dr. Weiss had rated a 13 percent impairment for an ankle fracture, this rating was based on residuals which did not exist at the time of maximum medical improvement, a year and a half later. Dr. Slutsky determined that Dr. Smith's October 17, 2014 report, which rated a one percent left lower extremity based on mild soft tissue residuals from his left fibular fracture, represented the weight of the medical evidence.

[13] *Id.*

[14] *Veronica Williams*, 56 ECAB 367, 370 (2005).

[15] A.M.A., *Guides* at 521.

The Board finds that Dr. Smith and Dr. Slutsky followed the guidelines set forth at Table 16-2, page 501 to correctly rate appellant's left leg impairment. Based on these reports OWCP properly determined in its July 31, 2012 decision that appellant was not entitled to an increase in his left lower extremity impairment. Drs. Smith and Slutsky correctly calculated a one percent impairment ratings based on the applicable protocols and tables of the sixth edition of the A.M.A., *Guides*.

On appeal, appellant's counsel contends that there is a conflict in the medical evidence between the opinions of Drs. Smith and Slutsky, and Dr. Weiss regarding the impairment from appellant's accepted left distal fibular fracture, which requires referral to an impartial medical examiner to resolve the conflict. The Board does not accept counsel's contention. OWCP properly denied an additional schedule award based on Dr. Smith's October 17, 2014 report which established, based on the most recent examination, that appellant's condition had stabilized and that he only had mild soft tissue residuals. The Board affirms OWCP's December 24, 2014 decision denying an additional schedule award for the left lower extremity.

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.

CONCLUSION

The Board finds that appellant has no more than a one percent impairment to his left leg.

ORDER

IT IS HEREBY ORDERED THAT the December 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 5, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board