United States Department of Labor
Employees' Compensation Appeals Board

W.C., Appellant	)	
and	)	**Docket No. 15-1212**
	)	**Issued: October 27, 2015**
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:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 6, 2015 appellant, through counsel, filed a timely appeal from a March 11, 2015 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 that he has more than four percent permanent impairment of his right leg and four percent permanent impairment of his left leg, for which he received schedule awards.

FACTUAL HISTORY

In 1976, OWCP accepted that appellant, then a 31-year-old part-time flexible letter carrier, sustained bilateral aggravation of pes valgo planus due to the extensive walking and standing required by his job. On May 5, 2009 he underwent right foot surgery, including triple

[1] 5 U.S.C. §§ 8101-8193.

arthrodesis and percutaneous Achilles tendon lengthening. This surgery was not accepted as being related to an accepted condition.

Appellant filed a claim for a schedule award (Form CA-7) due to his accepted work injury. OWCP determined that there was a conflict in the medical opinion between Dr. Nicolas Diamond, an attending osteopath, and an OWCP medical adviser regarding the extent of the permanent impairment to his legs. To resolve the conflict, OWCP referred appellant in February 2010 to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the extent of appellant's leg impairment 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).

In an April 6, 2010 report, Dr. Glenn determined that appellant had one percent permanent impairment of his right leg and zero percent permanent impairment of his left leg under the standards of the sixth edition of the A.M.A., *Guides*.

In a January 24, 2012 decision, OWCP granted appellant a schedule award for one percent permanent impairment of his right leg and determined that he had zero percent permanent impairment of his left leg. The award ran for 2.88 weeks from April 6 to 26, 2010. The award was based on a determination that the opinion of Dr. Glenn represented the weight of the medical evidence with respect to appellant's leg impairment.

In a June 26, 2012 decision, an OWCP hearing representative affirmed OWCP's January 24, 2012 schedule award decision. She found that the special weight of the medical evidence regarding appellant's lower extremity impairment continued to rest with the opinion of Dr. Glenn.

In an October 28, 2013 decision,[2] the Board set aside OWCP's June 26, 2012 decision. The Board found that OWCP had not properly selected Dr. Glenn under the Physicians Directory System (PDS). The Board remanded the case to OWCP for selection of another impartial medical specialist and, after carrying out this development, the issuance of an appropriate decision regarding appellant's schedule award claim.

On remand, OWCP referred appellant, the case record, and a statement of accepted facts to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination and impairment evaluation regarding the permanent impairment of appellant's legs.

In a June 19, 2014 report, Dr. Fries discussed appellant's factual and medical history, including his history of treatment and diagnostic testing and the accepted work-related conditions. He reported his physical examination findings noting that appellant had bilateral pes valgo planus with limited dorsiflexion. Appellant also had bilateral fasciitis and myositis of the feet. Dr. Fries provided a calculation indicating that appellant had four percent permanent impairment of his right leg and four percent permanent impairment of his left leg. He noted that, under Table 16-2 of the sixth edition of the A.M.A., *Guides*, there was no diagnosis-based category for pes planus and/or heel valgus, but that the closest diagnosis-based category was the bilateral deformity of the midfoot called "rocker bottom" as described in Table 16-2 on page

[2] Docket No. 13-368 (issued October 28, 2013).

505. Under this diagnosis, appellant fell under class 1 (mild) for a default value of five percent in each leg. Dr. Fries determined that, for both legs, appellant fell under grade modifier 1 for functional history, grade modifier 1 for physical examination, and grade modifier 0 for clinical studies.[3] Application of the Net Adjustment Formula meant that appellant's impairment in each leg moved one space to the left on Table 16-2 such that the impairment rating moved from five to four percent in each leg.[4]

In a report dated July 18, 2014, Dr. Harvey L. Seigel, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, noted that he had evaluated the evidence of record including the impairment evaluation of Dr. Fries. He concluded that appellant had four percent permanent impairment of his right leg and four percent permanent impairment of his left leg.[5]

By decision dated August 5, 2014, OWCP granted appellant a schedule award for three percent permanent impairment of his right leg and four percent permanent impairment of his left leg. The award ran for 20.16 weeks from April 27 to September 15, 2010. As appellant had already received a schedule award for one percent permanent impairment of his right leg, he now had received schedule awards for a total right leg permanent impairment of four percent and a total left leg permanent impairment of four percent.[6]

Appellant, through counsel, requested a video hearing with an OWCP hearing representative. During the hearing, counsel argued that appellant's May 5, 2009 right foot surgery should have been included in the impairment calculations.

In a March 11, 2015 decision, the hearing representative affirmed OWCP's August 5, 2014 decision noting that appellant had not shown that he has more than four percent permanent impairment of his right leg and four percent permanent impairment of his left leg, for which he received schedule awards.[7]

LEGAL PRECEDENT

The schedule award provision of FECA[8] and its implementing regulations[9] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

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[3] Dr. Fries indicated that there were no relevant clinical studies for this condition.

[4] Dr. Fries also provided a calculation rating for appellant's right leg of 12 percent which included his May 5, 2009 right foot surgery.

[5] Dr. Seigel agreed that it was correct to not include appellant's May 5, 2009 right foot surgery in the impairment rating calculation.

[6] OWCP stated, "You have an outstanding overpayment balance in the amount of $9,395.67. Therefore, this amount was deducted from your schedule award."

[7] The hearing representative further indicated that the question of whether appellant's schedule award monies should be deducted from an overpayment of compensation still had to be determined by OWCP. As this matter is in an interlocutory posture, it is not before the Board. *See* 20 C.F.R. § 501.2(c)(2) (providing that there will be no appeal with respect to any interlocutory matter decided (or not decided) during the pendency of a case).

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404 (1999).

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 as the appropriate standard for evaluating schedule losses.[10] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[11]

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, 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.[12] After the Class of Diagnosis (CDX) is determined from the Knee 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).[13]

It is well established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[14] There is no basis for including subsequently acquired conditions.[15]

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."[16] 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.[17] In situations where 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

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[10] *Id*.

[11] *W.B.,* Docket No. 14-1982 (issued August 26, 2015). For OWCP decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. *B.M.,* Docket No. 09-2231 (issued May 14, 2010). *See also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Ex. 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

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

[13] *Id.* at 515-22.

[14] *D.F.,* 59 ECAB 288 (2007); *Kenneth E. Leone,* 46 ECAB 133 (1994).

[15] *R.G.,* Docket No. 13-220 (issued May 9, 2013).

[16] 5 U.S.C. § 8123(a).

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

conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[18]

ANALYSIS

In 1976, OWCP accepted that appellant sustained bilateral aggravation of pes valgo planus due to the extensive walking and standing required by his job. Appellant received schedule awards for a total right leg permanent impairment of four percent and a total left leg permanent impairment of four percent under the standards of the sixth edition of the A.M.A., *Guides*.

The Board finds that appellant has not shown that he has more than four percent permanent impairment of his right leg and four percent permanent impairment of his left leg.

After development of the evidence, OWCP properly referred appellant to Dr. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination and evaluation to resolve the conflict in the medical opinion evidence regarding his leg impairment.[19]

In a June 19, 2014 report, Dr. Fries discussed the factual and medical history of appellant's claim and reported his physical examination findings. He provided a calculation concluding that appellant had four percent permanent impairment of his right leg and four percent permanent impairment of his left leg. The Board finds that this calculation provides a proper assessment of appellant's leg impairment. Dr. Fries noted that, under Table 16-2 of the sixth edition of the A.M.A., *Guides*, the closest diagnosis-based category was the bilateral deformity of the midfoot called "rocker bottom" as described in Table 16-2 on page 505. Under this diagnosis, appellant fell under class 1 (mild) for a default value of five percent in each leg. Dr. Fries determined that, for each leg, appellant fell under grade modifier 1 for functional history, grade modifier 1 for physical examination, and grade modifier 0 for clinical studies. Application of the Net Adjustment Formula meant that appellant's impairment in each leg moved one space to the left on Table 16-2 such that the impairment rating moved from five to four percent in each leg.

On July 18, 2014 Dr. Seigel, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, noted that he agreed with the assessment that appellant had four percent permanent impairment of his right leg and four percent permanent impairment of his left leg.

Dr. Fries also presented a calculation rating for appellant's right leg of 12 percent which included his May 5, 2009 right foot surgery, triple arthrodesis, and percutaneous Achilles tendon lengthening. On appeal, counsel argued that Dr. Fries should have been asked whether appellant's right triple arthrodesis surgery was work related.[20] The Board notes that there was no

[18] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[19] In an October 28, 2013 decision (Docket No. 13-368), the Board found that there was a conflict in the medical opinion evidence regarding this matter between Dr. Diamond, an attending osteopath, and an OWCP medical adviser. As noted previously, the Board found that a prior impartial medical specialist, Dr. Glenn, a Board-certified orthopedic surgeon, had not been properly selected under the PDS. The case was remanded to OWCP for referral of appellant to a new impartial medical specialist. OWCP correctly used the PDS in selecting Dr. Fries.

[20] Counsel argued that it was improper for Dr. Fries to rely on the statement of accepted facts with respect to this matter.

conflict in the medical opinion evidence on this matter. The Board finds that it was proper for Dr. Seigel to exclude the May 5, 2009 surgery from the impairment calculation as there is no evidence that the condition necessitating this surgery was work related or that it preexisted the work injuries accepted in the 1970s.[21]

Appellant has not submitted any medical evidence showing that he has more than four percent permanent impairment of his right leg and four percent permanent impairment of his left leg, for which he received schedule awards.[22]

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 not met his burden of proof to establish that he has more than four percent permanent impairment of his right leg and four percent permanent impairment of his left leg, for which he received schedule awards.

[21] *See supra* notes 14 and 15.

[22] The Board notes that there is no evidence of record which would overcome the weight of the medical evidence regarding appellant's leg impairment as represented by the opinion of Dr. Fries as interpreted by Dr. Seigel. *See supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 27, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board