United States Department of Labor
Employees' Compensation Appeals Board

T.C., Appellant	)	
and	)	**Docket No. 16-0269**
	)	**Issued: April 1, 2016**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer	)	

Appearances:
Paul Kalker, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 30, 2015 appellant, through counsel, filed a timely appeal from an October 27, 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 has more than 17 percent permanent impairment of the left leg for which he has received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board on prior appeals regarding issues other than permanent impairment. OWCP accepted that appellant, then a 36-year-old mail handler, sustained injuries to his left foot on May 19, 2004 while loading a trailer. The accepted

[1] 5 U.S.C. § 8101 *et seq.*

conditions of record are: left foot contusion, left ankle strain, left tarsal tunnel syndrome, and lesion of the left plantar nerve. Appellant underwent left foot surgery on May 14, 2007. He received wage-loss compensation through November 5, 2008, when OWCP terminated wage-loss compensation and medical benefits effective November 6, 2008. In a decision dated June 28, 2010, the Board found that OWCP properly terminated compensation based on the medical evidence.[2]

OWCP issued a December 7, 2011 decision denying modification of the termination decisions. The Board reviewed and affirmed the December 7, 2011 OWCP decision on August 1, 2012.[3] The Board noted in its decision that appellant had submitted an October 20, 2010 report from Dr. Carol De Costa, a Board-certified physiatrist, opining that he had 57 percent left leg permanent impairment. The Board noted, however, that she had diagnosed peripheral neuropathy and post-traumatic arthritis without explaining how those conditions were employment related.

With respect to left leg permanent impairment, OWCP referred the October 20, 2010 report from Dr. De Costa to an OWCP medical adviser. In a September 8, 2011 report, Dr. Henry Magliato, an OWCP medical adviser and Board-certified orthopedic surgeon, opined that the report from Dr. De Costa was of little probative value. He recommended referral for a second opinion evaluation.

Appellant submitted a May 31, 2012 report from Dr. De Costa providing a history and results on examination. Dr. De Costa opined that appellant had 70 percent left leg permanent impairment. She also opined that he had a consequential knee strain with tendon damage.

OWCP issued a July 30, 2013 decision denying merit review of the claim with respect to the termination of compensation. In a March 6, 2014 decision, the Board set aside the July 30, 2013 OWCP decision.[4]

Appellant was referred to Dr. Hormozan Aprin, a Board-certified orthopedic surgeon, for a second opinion examination regarding permanent impairment. In a report dated June 3, 2013, Dr. Aprin opined that appellant had 22 percent left leg impairment. The impairment included 13 percent for a left ankle sprain, 2 percent left foot crush injury, 3 percent left great toe crush injury, 3 percent for peripheral nerve impairment to the posterior tibial nerve, and 1 percent for the medial plantar nerve impairment.

The medical adviser, Dr. Magliato, opined in a June 18, 2013 report that the impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) was 17 percent. He found that the impairments for crush injuries should be combined, as should the nerve impairments to the tibial and medial plantar nerves. The medical adviser found that the combined impairment for the left leg was 17 percent.

[2] Docket No. 09-1911 (issued June 28, 2010).

[3] Docket No. 12-0444 (issued August 1, 2012).

[4] Docket No. 13-2008 (issued March 6, 2014).

By decision dated August 29, 2013, OWCP issued a schedule award for 17 percent permanent impairment to the left leg. The period of the award was 48.96 weeks for the period June 3 to August 24, 2013.

On February 20, 2015 appellant submitted an October 20, 2014 report from Dr. De Costa, who reviewed his history and results on diagnostic testing. Dr. De Costa opined that he had 72 percent left leg permanent impairment. She referred to 45 percent impairment from the diagnosis-based Table 16-2 at page 508 sixth edition of the A.M.A., *Guides* for "range of motion." Dr. De Costa found an additional 15 percent impairment also under Table 16-2 for ankle arthritis, indicating cystic changes in the sub chondral area. In addition, she reported an eight percent impairment under the same table for metacarpophalangeal (MP) joint arthritis. Dr. De Costa then found an additional seven percent for a mild sensory deficit. She noted that under the A.M.A., *Guides* that while generally only the most impairing diagnosis is used, "in rare cases" the examiner may combine multiple impairments within a single region.

In a May 20, 2015 report, Dr. Magliato reviewed Dr. De Costa's October 20, 2014 report. The medical adviser opined that her report was of diminished probative value. He found that Dr. De Costa had not properly applied Table 16-2 or the A.M.A., *Guides*, and recommended referral to a second opinion physician.

OWCP referred appellant to Dr. Donald Heitman, a Board-certified orthopedic surgeon. In a report dated July 28, 2015, Dr. Heitman provided a history and results on examination. He reported range of motion for the left ankle: 10 degrees extension, 35 to 40 degrees of plantar flexion, 15 degrees inversion and 15 degrees eversion. For the MP joint, 20 degrees extension and 45 degrees flexion. Dr. Heitman opined that appellant had three percent left leg impairment for loss of range of motion under Table 16-22.

In a report dated August 25, 2015, Dr. Magliato found that appellant had nine percent left leg permanent impairment due to loss of range of motion, according to the findings from Dr. Heitman. He requested clarification from the second opinion physician.

In a report dated October 6, 2015, Dr. Heitman opined that appellant had nine percent left leg impairment for loss of range of motion. The impairment was calculated as seven percent for 10 degrees of extension (dorsiflexion) and two percent for 15 degrees of inversion. By report dated October 9, 2015, Dr. Magliato opined that appellant's left leg permanent impairment was nine percent.

By decision dated October 27, 2015, OWCP found that appellant was not entitled to an additional schedule award. It found that the weight of the evidence was represented by Dr. Heitman and the medical adviser.

LEGAL PRECEDENT

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the

permanent impairment of the scheduled member or function.[5] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[7]

ANALYSIS

In the present case, OWCP accepted that appellant sustained left foot contusion, left ankle strain, left tarsal tunnel syndrome, and lesion of the left plantar nerve, as a result of a May 19, 2004 employment incident. On August 29, 2013 it issued a schedule award for 17 percent left leg permanent impairment. The issue presented is whether appellant has established an increased schedule award.

Before addressing the reports of the second opinion physician, Dr. Heitman, and the OWCP medical adviser, Dr. Magliato, the Board will first consider the October 20, 2014 report from Dr. De Costa. Appellant has argued on appeal that OWCP did not properly consider this report, but a review of the October 20, 2014 report indicates that it is of diminished probative value.

The October 20, 2014 report provides a medical history, but does not provide results on examination. It is not clear what physical examination results Dr. De Costa was basing her opinion as to a permanent impairment. In calculating a 72 percent left leg impairment, Dr. De Costa finds 45 percent impairment under Table 16-2 for "range of motion." She refers to a grade 3, grade D impairment, without further explanation. It is unclear how Table 16-2 was applied in this case. Table 16-2 is a diagnosis-based regional grid for the foot and ankle. Dr. De Costa does not identify the diagnosis, or in any way explain how she determined a class 3 (severe problem), grade D impairment. A proper application of Table 16-2 must identify the diagnosis, explain the class of impairment, and how the net adjustment formula was applied to determine the proper grade.[8] Under Table 16-2, there does not appear to be any class 3, grade D impairment that results in 45 percent leg impairment.

In addition, Dr. De Costa then applies Table 16-2 for additional impairments based on diagnoses of arthritis and MP joint arthritis. There is a brief reference to "cystic changes" as to ankle arthritis, without further explanation as to the proper application of Table 16-2. Dr. De Costa notes that the A.M.A., *Guides* indicate that generally a single diagnosis is used within a specific region, but "in rare cases" the examiner may combine multiple impairments.[9]

[5] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[6] *A. George Lampo*, 45 ECAB 441 (1994).

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

[8] A.M.A., *Guides* 501-21.

[9] *Id*. at 529.

There is no explanation of why this would be a rare case that would include three different diagnosed applications of Table 16-2. The brief finding of a seven percent peripheral nerve impairment is similarly lacking in adequate explanation under the A.M.A., *Guides.* For these reasons, the Board finds the opinion that appellant had 72 percent left leg permanent impairment is of diminished probative value.

OWCP relied on the findings of Dr. Heitman and the medical adviser that appellant's current left leg permanent impairment was nine percent, but this evidence is also of diminished probative value and does not resolve the issue. The problem is that the impairment rating provided was based solely on loss of range of motion under Tables 16-22 (ankle) and 16-20 (hindfoot).[10] It is well established that diagnosis-based impairment (DBI) is the primary method of evaluation under the A.M.A., *Guides*.[11] There was no explanation in this case as to why a range of motion evaluation is the appropriate method in this case.[12] Since OWCP undertook additional development and referred appellant to Dr. Heitman, it is OWCP's responsibility to resolve the issue.[13] The case will be remanded to OWCP to properly secure a report which determines the current employment-related permanent impairment to the left leg. After such further development as is necessary, OWCP should issue a *de nova* decision.

CONCLUSION

The Board finds that the case is not in posture for decision and is remanded to OWCP for further development.

[10] *Id.* at 549.

[11] A.M.A., *Guides* 497. *See W.D.*, Docket No. 15-1469 (issued October 7, 2015); *see also S. J.*, Docket No. 15-1500 (issued November 3, 2015) (OWCP requested clarification from the impartial medical examiner as to why he had not used a DBI method of rating as this was the primary method under the A.M.A., *Guides*).

[12] *Cf. B.W.*, Docket No. 14-1834 (issued September 18, 2015) (OWCP medical adviser did explain why range of motion, rather than DBI, was the appropriate method of evaluation. The Board remanded the case, finding that it was not clear the second opinion examiner had followed the A.M.A., *Guides* procedure for measuring range of motion).

[13] *See Robert Kirby*, 51 ECAB 474, 476 (2000); *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 27, 2015 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: April 1, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy 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