United States Department of Labor
Employees' Compensation Appeals Board

V.C., Appellant	)	
and	)	**Docket No. 06-952**
	)	**Issued: September 18, 2006**
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:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 20, 2006 appellant, through her attorney, filed a timely appeal from a November 3, 2005 merit decision of a hearing representative of the Office of Workers' Compensation Programs affirming the denial of a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has a permanent impairment of the left lower extremity causally related to her accepted employment injury.

FACTUAL HISTORY

On March 3, 1998 appellant, then a 51-year-old clerk, filed a claim for an injury occurring on that date in the performance of duty. The Office accepted her claim for a left ankle fracture. Appellant stopped work and did not return. On March 5, 1998 Dr. David A. Bundens, a Board-certified orthopedic surgeon, performed an open reduction and internal fixation of the medial and lateral malleolus of the left ankle to repair a trimalleolar fracture of the left ankle.

By decision dated March 14, 1999, the Office terminated appellant's compensation and authorization for medical treatment on the grounds that she had no further disability or residuals of her employment injury. In a decision dated January 13, 2000, a hearing representative affirmed the termination of compensation. By decision dated March 22, 2001, the Board adopted the hearing representative's findings and affirmed the termination decisions.[1]

Appellant, through her attorney, requested a schedule award on July 10, 2001. In support of her claim, appellant submitted an impairment evaluation dated June 13, 2001 from Dr. Nicholas Diamond, an osteopath, who noted that appellant was unable to return to her regular employment because of her need for a walker. Dr. Diamond discussed her history of a March 3, 1998 employment injury and noted that appellant had a diagnosis "questionable for multiple sclerosis." On examination of the left ankle, he found tenderness over the medial and lateral malleolus with medial and lateral effusion. Dr. Diamond measured range of motion for the left ankle as 0 to 15/15 degrees of dorsiflexion, 0 to 55/55 degrees of plantar flexion, 0 to 20/30 degrees of inversion and 1 to 15/20 degrees of eversion. He indicated that "inversion and eversion were carried through with pain at the extremes" and noted ankle circumference as 28 centimeters on the left and 29 centimeters on the right and motor strength of 3+/5. Dr. Diamond diagnosed post-traumatic trimalleolar displaced fracture of the left ankle, status post open reduction internal fixation of the medial and lateral malleolus and chronic tenosynovitis. He concluded that appellant had a 2 percent impairment of the left ankle due to loss of inversion and a 25 percent impairment of the left ankle due to a motor strength deficit, for a combined lower extremity impairment of 27 percent. Dr. Diamond opined that the work-related injury of March 3, 1998 was the competent producing factor for appellant's subjective and objective findings. He found that she reached maximum medical improvement on June 7, 2001.

By letter dated February 27, 2002, the Office referred appellant for a second opinion evaluation regarding the cause and extent of any impairment to the lower extremity. In a report dated March 20, 2002, Dr. Richard J. Mandel, a Board-certified orthopedic surgeon, noted that she underwent rehabilitation for her employment injury but was unable to resume work as she needed a walker for a preexisting condition. He noted that a neurologist had diagnosed multiple sclerosis based on magnetic resonance imaging scans of the brain and spine. On physical examination, Dr. Mandel found "obvious bilateral lower extremity weakness affecting multiple major muscle groups" and "also obvious upper extremity weakness." He found that appellant had a healed surgical scar on her left ankle with intact sensation, no crepitus or instability and unrestricted range of motion without tenderness over the fracture or scar. Dr. Mandel interpreted x-rays as showing completely healed fractures with no evidence of post-traumatic arthritis. He related:

> "I have been asked to address the issue of whether there was any permanent impairment of the left ankle as a result of the 1998 work injury. Following examination of [appellant] today, review of medical records and review of imaging studies, including new radiographs taken today, it is my opinion that there is no evidence of any residuals from the 1998 work injury. The ankle fracture has fully healed in an anatomic position. There is no evidence of any

[1] *Valerie E. Croston*, Docket No. 00-1630 (issued March 22, 2001).

post[-]traumatic arthritis change, avascularity, instability or any other trauma-related abnormality pertaining to the left ankle. [Appellant] has fully recovered from the work injury.

"There were significant findings on today's examination that were most consistent with demyelinating disease, that is, multiple sclerosis. [Appellant] has significant weakness, mainly affecting the lower extremities, which significantly affects her ability to ambulate. Essentially, she is not an independent ambulatory at this point and is dependent upon the walker for limited ambulation. [Appellant's] ambulatory dysfunction is unrelated to the ankle fracture of March 1998 and is secondary to significant lower extremity weakness related to multiple sclerosis. There is no functional loss of use of the left ankle as a result of the work injury."

By decision dated March 26, 2002, the Office denied appellant's claim for a schedule award on the grounds that she had no impairment due to her employment injury.

Appellant, through her attorney, requested an oral hearing which was held on July 27, 2005. At the hearing, she argued that the diagnosis of multiple sclerosis was not definite. Counsel contended that a conflict in medical opinion existed and noted that Dr. Mandel did not reference the American Medical Association, *Guides to the Evaluation of Permanent Impairment* in reaching his findings.

By decision dated November 3, 2005, a hearing representative affirmed the Office's March 26, 2002 decision.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[2] provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[3] In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment the Act, under section 8107(a), compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.[4]

As a claimant seeking compensation under the Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, it is thus the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.[5] The evidence generally required to establish causal

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.5(f); *Lyle E. Dayberry*, 49 ECAB 369 (1998).

[4] 5 U.S.C. § 8107(a); *Renee M. Straubinger*, 51 ECAB 667 (2000).

[5] *See Raymond E. Gwynn*, 35 ECAB 247 (1983).

relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between his current condition and the employment injury.[6] The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.[7]

Section 8123(a) provides that, 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.[8] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[9]

ANALYSIS

The Office accepted that appellant sustained a fracture of her left ankle due to a March 3, 1998 employment injury and authorized a March 5, 1998 open reduction and internal fixation to repair a trimalleolar fracture. On July 10, 2001 appellant requested a schedule award. She submitted a report dated June 13, 2001 from Dr. Diamond, who evaluated her left ankle and found that she had a 27 percent impairment of the left lower extremity. Dr. Diamond discussed appellant's employment history and noted possible multiple sclerosis. He concluded that her March 3, 1998 employment injury was the competent producing factor for her subjective and objective findings."

The Office referred appellant to Dr. Mandel for a second opinion evaluation on the issue of whether she had an impairment of the left ankle due to her accepted employment injury. In a report dated March 20, 2002, Dr. Mandel noted that she required a walker due to her multiple sclerosis. On physical examination, he found bilateral upper and lower extremity weakness. Dr. Mandel determined that appellant had full range of motion with no instability or tenderness of the left ankle. He interpreted x-rays as showing no evidence of post-traumatic arthritis and concluded that she had no impairment of the left ankle due to her employment injury. Dr. Mandel attributed appellant's lower extremity weakness and difficulty walking to her multiple sclerosis.

The record contains a conflict in medical opinion between appellant's physician, Dr. Diamond and the Office referral physician, Dr. Mandel on the issue of whether she has any impairment of her left lower extremity due to her March 3, 1998 employment injury. Section 8123 of the Act provides that, if there is a disagreement between the physician making the

[6] *Manuel Gill*, 52 ECAB 282 (2001).

[7] *Yvonne R. McGinnis*, 50 ECAB 272 (1999).

[8] 5 U.S.C. § 8123(a); *Barry Neutuch*, 54 ECAB 313 (2003).

[9] 20 C.F.R. § 10.321.

examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[10] On remand the Office should refer appellant, a statement of accepted facts and the case record to an appropriate medical specialist for a reasoned medical opinion on the issue of whether she has any impairment of the left ankle due to her accepted injury. The Office should then issue an appropriate decision on appellant's entitlement to a schedule award for any permanent impairment of the left leg.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 3, 2005 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 18, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[10] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002).