United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
	)	
and	)	**Docket No. 09-833**
	)	**Issued: November 9, 2009**
DEPARTMENT OF THE NAVY, NAVAL SUBMARINE BASE, Groton, CT, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 9, 2009 appellant, through his attorney, filed a timely appeal of the October 29, 2008 decision of the Office of Workers' Compensation Programs' hearing representative finding permanent impairment for schedule award purposes. Pursuant to 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 three percent impairment of his left lower extremity for which he has received a schedule award.

FACTUAL HISTORY

This is the second appeal in this case. On May 14, 1992 appellant, then a 44-year-old hazardous waste handler, injured his neck, shoulder and arm while moving 55-gallon drums in the performance of his federal duties. The Office accepted his claim for cervical radiculopathy and granted him a schedule award for 12 percent impairment of the left upper extremity on May 18, 1993. Appellant filed a second claim for traumatic injury on September 27, 2003 when he slipped on cable and injured his left ankle. The Office accepted this claim for left ankle strain. Appellant filed a third claim on January 20, 1998 alleging on January 17, 1998 he injured his right and left thumbs and left heel when he slipped off the ladder of a railroad car. The Office later accepted left ankle strain and authorized arthroscopy of the left ankle. Appellant underwent an arthroscopy of the left ankle with debridement synovium and scar tissue on September 15, 2000. The Office accepted lumbar sprain and strain as a result of the January 17, 1998 employment injury on March 15, 2002. By decision dated December 8, 2003, the Office granted appellant schedule awards for 10 percent impairment of each of his upper extremities and 1 percent impairment of his left lower extremity. By decision dated April 8, 2005, it granted appellant a schedule award for an additional two percent impairment of his left lower extremity.

The Office relied on reports from Dr. Ian B. Fries, a Board-certified orthopedic surgeon, selected to serve as the impartial medical adviser to reach appellant's impairment ratings. In a March 23, 2006 report, Dr. Fries stated that there was no specific table in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* that provided a rating for ankle synovitis. He found one percent impairment of the whole person due to this condition. The district medical adviser noted that appellant had three percent impairment of the left lower extremity due to pain based on Chapter 18 of the A.M.A., *Guides*. By decision dated April 12, 2006, the Office granted appellant additional schedule awards of one percent for his upper extremities. The Board reviewed appellant's claim on July 11, 2007[1] and found that the case was not in posture for a decision on the percentage of his permanent impairment as Dr. Fries' reports were not sufficiently detailed or rationalized to constitute the weight of the medical opinion evidence. The Board remanded the case for the Office to refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician to resolve the conflict of medical opinion evidence. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

The Office referred appellant, a statement of accepted facts and a list of questions to Dr. Robert Dennis, a Board-certified orthopedic surgeon, on January 2, 2008. In a report dated January 15, 2008, Dr. Dennis described appellant's history of injury and medical treatment. He provided a detailed analysis of the statement of accepted facts and the medical records and treatment. Dr. Dennis noted appellant's concerns of constant left ankle weakness and giving way as well as swelling and pain in the left calf. Appellant also reported low back pain on the left with radiation into the left buttock. Dr. Dennis performed a physical examination and listed his findings. He examined appellant's lumbar spine and found normal range of motion with no evidence of radiculopathy, sciatica or spasm. Dr. Dennis concluded that appellant had no impairment of the lumbar spine. As to appellant's right lower extremity, he found normal strength, motion and neurological examination with no evidence of radiculopathy. Dr. Dennis examined appellant's left ankle and found normal gait and ability to support appellant's weight with a loss of range of motion consisting of 20 degrees of dorsiflexion and 40 degrees of plantar flexion. He measured appellant's calves and thighs, and found no evidence of weakness or muscle loss. Dr. Dennis stated, "There is absolutely no other positive finding." He examined appellant's upper extremities and concluded that appellant had 24 percent impairment to each of

[1] Docket No. 07-699 (issued July 11, 2007).

his arms.[2] Dr. Dennis found no impairment of appellant's lower extremities due to radiculopathy or functional impairment of the left ankle.

The district medical adviser reviewed Dr. Dennis' report on February 7, 2008 and agreed with his assessment awarding appellant 24 percent for each upper extremity and no impairment for the left ankle. He stated that the left ankle exhibited dorsiflexion of 20 degrees and plantar flexion of 40 degrees, which were not ratable impairments.[3]

By decision dated March 20, 2008, the Office granted appellant a schedule award for an additional 13 percent impairment of each upper extremity. Appellant, through his attorney, requested an oral hearing on March 25, 2008. Counsel appeared at the oral hearing on July 16, 2008 and withdrew appellant's objection to the schedule awards for his upper extremities but challenged the existing three percent impairment rating for the left lower extremity. He contended that Dr. Dennis did not adequately evaluate appellant's motor strength or sensory deficits. Counsel requested additional medical evaluation regarding appellant's left lower extremity.

By decision dated October 29, 2008, the hearing representative found that Dr. Dennis performed a thorough evaluation of appellant's left lower extremity and found no objective evidence to support an impairment. She affirmed the Office's March 20, 2008 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] 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, the Act 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.[6] Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[7]

---

[2] On appeal, appellant's attorney specifically stated that appellant did not contest the impairment ratings of his upper extremities and the Board will not address this issue on appeal.

[3] A.M.A., *Guides* 537, Table 17-11.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id.*

[7] Federal (FECA) Procedure Manual, Part 2 – Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.[8]

ANALYSIS

The Board remanded the case for the Office to refer appellant to a second impartial medical examiner to resolve the conflict of medical opinion regarding the extent of appellant's permanent impairment for schedule award purposes. The Office properly referred appellant, a statement of accepted facts and a list of questions, to Dr. Dennis on January 2, 2008. In a January 15, 2008 report, Dr. Dennis provided a detailed analysis of the statement of accepted facts as well as the medical records and treatment. He noted that appellant reported that he experienced constant left ankle weakness and giving way as well as swelling and pain in the left calf. Appellant also reported low back pain on the left with radiation into the left buttock. Dr. Dennis performed a physical examination of appellant and provided the results. He examined appellant's lumbar spine and found normal range of motion with no evidence of radiculopathy, sciatica or spasm. Dr. Dennis concluded that appellant had no impairments of the lumbar spine. In regard to appellant's right lower extremity, he found normal strength, motion and neurological examination with no evidence of radiculopathy. Dr. Dennis examined appellant's left ankle and found normal gait and ability to support his weight with a loss of range of motion of 20 degrees of dorsiflexion and 40 degrees of plantar flexion. He measured appellant's calves and thighs and found no evidence of weakness or muscle loss. Dr. Dennis stated, "There is absolutely no other positive finding." He found no impairment of appellant's lower extremities due to radiculopathy or functional impairment of the left ankle.

The Board finds that Dr. Dennis' report is sufficiently detailed and well rationalized to constitute the weight of the medical opinion evidence. Dr. Dennis provided comprehensive findings on physical examination noting that, although, appellant reported constant left ankle weakness and giving way as well as swelling, his gait was normal and the ability of his ankle to support his weight was normal. He found no atrophy of the lower extremity. Appellant's attorney argued before the hearing representative and on appeal, that Dr. Dennis should have utilized manual muscle testing. Manual muscle testing assesses an individual's ability to move a joint through a full range of motion against gravity or move it against additional resistance applied by the examiner or to hold the joint position against resistance. Manual muscle testing is subject to the individual's conscious or unconscious control.[9] To be valid, the results should agree with other observable pathologic signs and medical evidence.[10] Dr. Dennis specifically noted that there were no other objective findings in regard to appellant's lower extremity. The Board notes that because Dr. Dennis found no other observable deficits suggesting that manual muscle testing was appropriate, under the A.M.A., *Guides* he was not required to perform these tests. The Board further notes that, without findings on examination to suggest a sensory or pain deficit, Dr. Dennis was not required to provide an impairment rating for these conditions.

---

[8] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[9] A.M.A., *Guides* 531, 17.2e.

[10] *Id.*

The district medical adviser reviewed Dr. Dennis' report on February 7, 2008 and agreed with his assessment awarding appellant 24 percent for each upper extremity and no impairment for the left ankle. He stated that the left ankle exhibited dorsiflexion 20 degrees and plantar flexion of 40 degrees, which were not ratable impairments.

CONCLUSION

The Board finds that the weight of the medical evidence as represented by the well-reasoned report of Dr. Dennis the impartial medical examiner establishes that appellant has no more than three percent impairment of his left lower extremity for which he has received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 29, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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