United States Department of Labor
Employees' Compensation Appeals Board

D.P., Appellant	)	
and	)	**Docket No. 09-1348**
	)	**Issued: February 19, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Des Moines, IA, Employer	)	

Appearances:
Appellant, pro se
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 April 30, 2009 appellant filed a timely appeal from a March 5, 2009 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

The issue is whether appellant has established that he has more than a one percent permanent impairment of his left foot, for which he received a schedule award.

FACTUAL HISTORY

On March 22, 2008 appellant, then a 51-year-old mail handler, filed a traumatic injury claim alleging that, on March 21, 2008, his left foot was crushed by the front wheel of a forklift at work. He stopped work on March 21, 2008. The Office accepted the claim for closed metatarsal fractures of the left foot. Appellant received compensation benefits and was released to regular duty on May 19, 2008.

In a July 11, 2008 report, Dr. Michael S. Lee, a podiatrist and treating physician, noted that appellant was seen for metatarsal fractures of toes two, three and four of the left foot. He advised that appellant was doing well despite some mild pain or swelling from time to time. Dr. Lee indicated that the neurovascular status was intact and unchanged and that appellant had no swelling, erythema or deformity. He also noted that x-rays revealed that the metatarsal fractures were completely healed with no deformity or malalignment. Dr. Lee indicated that appellant could progress in his activities and had no work restrictions. He opined that appellant had reached maximum medical improvement and should have normal range of motion.

On September 2, 2008 appellant requested a schedule award. On September 9, 2008 the Office requested that he submit a report from his physician which contained a detailed description of any impairment utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (A.M.A., *Guides*). No response was received.

On February 4, 2009 the Office referred appellant for a second opinion examination of impairment, with a statement of accepted facts and the medical record, to Dr. Charles Denhart, a Board-certified physiatrist.

In a February 23, 2009 report, Dr. Denhart examined appellant and reviewed his medical history. He advised that appellant had a normal gait and would favor the left foot if he had to walk for an extended period. Appellant could heel walk and toe walk without difficulty and the deep tendon reflexes to lower extremities in the knee jerk and ankle jerk were "2+" and equal. Sensory examination of the feet was normal. Dr. Denhart indicated that strength on manual muscle testing in toe dorsiflexion, foot dorsiflexion and plantar flexion and knee extension was normal. He examined the foot and determined that appellant had no tenderness over the metatarsals. Dr. Denhart stated, "the foot was perhaps slightly pinker than on the right side. I am not really able to appreciate any swelling," and that the left foot was somewhat cooler than the right on touching. Appellant related that he had occasional crepitus in the left foot and reported "an episode of popping when he was walking when he was demonstrating his gait for me. However, I did not hear it at that time." Range of motion testing for the ankle and toes did not reveal any loss of motion of the foot and no varus or valgus deformity. Dr. Denhart explained that appellant was status postfractures of the left second, third and fourth metatarsals. He opined that appellant could generally "do everything he would normally do, although he reports that he is somewhat nervous about going back to an athletic activity and does not run." Dr. Denhart noted that appellant reported that he had "some discomfort, especially when standing on his metatarsal heads, that is, up on his toe or pushing off when climbing stairs or running." He referred to Chapter 18 and noted that it allowed a rating for a pain-related impairment that increased the burden of appellant's condition which "was not accounted for by other measurements. I would assign this a one percent impairment of the lower extremity based on his discomfort and difficulty standing on his toes or pushing off." Dr. Denhart added that this finding was supported by his observation that the left foot was redder and cooler than the right. He noted that appellant reached maximum medical improvement on June 11, 2008.

In a February 27, 2009 report, the Office medical adviser reviewed Dr. Denhart's findings. He explained that Dr. Denhart discussed range of motion, chronic pain, sensory change and chronic weakness and did not find any range of motion limitations or weakness. Regarding

appellant's pain, the Office medical adviser noted that Dr. Denhart referred to Chapter 18 to find that appellant had one percent impairment to the left lower extremity based on pain. He determined that this rating was "perhaps" supported by the "reported 'pain' in conjunction with the observation that the left foot is redder and cooler than the right." However, the Office medical adviser explained that the rating could not be expressed as a lower extremity rating when the condition involved a metatarsal fracture. He opined that the impairment rating for a metatarsal fracture could only be expressed as foot rating. The Office medical adviser further explained that neither the fourth[1] or fifth editions of the A.M.A., *Guides* contained a table which converted a lower extremity rating to a foot rating. He advised that the third edition[2] of the A.M.A., *Guides* contained a table on page 58 which revealed that a one percent rating of the lower extremity could be processed as a one or two percent rating to the foot. The Office medical adviser explained that in appellant's case, because "the only basis for the rating was the very mild pain which technically should not have been rated using Chapter 18."[3] He advised that appellant would be entitled to an impairment of one percent to the left foot. The Office medical adviser opined that appellant reached maximum medical improvement on June 11, 2008.

On March 5, 2009 the Office granted appellant a schedule award for one percent permanent impairment of the left foot. The award covered the period June 11 to 25, 2008.

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]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[7] However, all factors that prevent a limb from functioning

[1] A.M.A., *Guides* (4th ed. 1993).

[2] *Id*. at (3d ed. 1988).

[3] *Id*. at 20, *see* section 2.5e 'Pain.'

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] A.M.A., *Guides* (5th ed. 2001).

[7] *See William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.[8]

Section 8107(c) of the Act provides 288 weeks of compensation for total loss of a leg and 205 weeks for total loss of a foot.[9] While appellant would not be entitled to receive two awards for injury to the same body part, he should be given the benefit of the more favorable allowance, as prescribed for the hands and feet in FECA Program Memorandum No. 134.[10]

ANALYSIS

The Board finds that this case is not in posture for decision. Proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[11]

In a February 23, 2009 report, Dr. Denhart, the second opinion physician described appellant's history of injury and treatment and examined appellant. He determined that appellant had a normal gait and that appellant would favor the foot if he had to walk for an extended period. Dr. Denhart found that appellant had a normal sensory examination and normal strength on manual muscle testing in toe dorsiflexion, foot dorsiflexion, plantar flexion, knee extension and no tenderness over the metatarsals. He stated, "the foot was perhaps slightly pinker than on the right side. I am not really able to appreciate any swelling." Dr. Denhart indicated that the left foot was somewhat cooler than the right on touch. He also noted that appellant had occasional crepitus in the left foot and reported "an episode of popping when he was walking and demonstrating his gait." Dr. Denhart advised that appellant had a normal gait and he did not have any loss of motion of the foot and no varus or valgus deformity. He explained that appellant was status postfractures of the left second, third and fourth metatarsals. Dr. Denhart explained that appellant could generally engage in his normal activities although he was hesitant about athletic activities. He added that appellant had "some discomfort, especially when standing on his metatarsal heads, that is, up on his toe or pushing off when climbing stairs or running." Dr. Denhart referred to Chapter 18 and noted that it allowed a pain-related impairment that increased the burden of appellant's condition which was not accounted for by other measurements. He assigned one percent impairment of the lower extremity based on appellant's discomfort and difficulty standing on his toes or pushing off. Dr. Denhart added that this finding was supported by his observation that the left foot was redder and cooler than the right.

The Board notes that Dr. Denhart utilized Chapter 18 and explained that appellant did not have any loss in range of motion. However, Dr. Denhart did not explain why provisions for rating pain in Chapter 17 were not applicable.[12] The Board has noted the restrictions on the use

[8] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000); *see also Paul A. Toms*, 28 ECAB 403 (1987).

[9] *See supra* note 4 at sections 8107(c)(2) and 8107(c)(4).

[10] *Issued* February 3, 1971.

[11] *Horace L. Fuller*, 53 ECAB 775, 777 (2002).

[12] *See e.g.*, A.M.A., *Guides* at 550, Chapter 17.2l, 553, Chapter 17.2m.

of Chapter 18 for rating pain.[13] He did not explain why appellant's impairment due to his accepted metatarsal fractures could not be adequately calculated using Table 17-33, addressing lower extremity impairments involving forefoot deformity.[14] The Board notes that this table allows a method for rating impairment to certain metatarsal fractures which result in a loss of weight transfer. While appellant would not be entitled to receive two awards for injury to the same body part, he should be given the benefit of the more favorable allowance.[15] Dr. Denhart's impairment rating is insufficient to establish the extent of appellant's permanent impairment of the left foot or leg.

The Office medical adviser reviewed Dr. Denhart's report on February 27, 2009 and explained that the one percent rating to the left lower extremity was perhaps supported by the reported pain in conjunction with the observation that the left foot was redder and cooler than the right. However, he did not address why Table 17-33 was not applicable. It is unclear why the Office medical adviser noted that the rating could not be expressed as a lower extremity rating when the condition involved multiple metatarsal fractures or why the impairment rating could only be expressed as foot rating.

The Board has held that where the residuals of an injury to a member of the body specified in the schedule award provisions of the Act extend into an adjoining area of a member also enumerated in the schedule, such as an injury of a finger into the hand, of a hand into the arm, or of a foot into the leg, the schedule award should be made on the basis of the percentage loss of use of the larger member.[16] The medical adviser did not explain why residuals of the accepted metatarsal fractures did not also extend into the leg. Consequently, the medical adviser's report is also insufficient to establish the extent of appellant's permanent impairment.

The Board notes that Table 17-33 addresses forefoot deformities, including metatarsal fractures. The Board notes that it addresses loss of weight transfer that would appear to be the case in this instance as Dr. Denhart noted that appellant had pain when standing on the metatarsal heads when on his toes or pushing off when climbing stairs or running. All of these activities would appear to involve weight transfer.

The case will be remanded for further medical development.[17] On remand, the Office should obtain a medical opinion regarding the extent of any permanent impairment of the left foot or lower extremity, whichever is greater, causally related to the March 22, 2008 employment injury. Following any other development deemed necessary, the Office shall issue a merit decision on appellant's schedule award claim.

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[13] *See Frantz Ghassan*, 57 ECAB 349 (2006) (physicians should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*).

[14] A.M.A., *Guides* 546.

[15] *See supra* note 9.

[16] *Charles B. Carey*, 49 ECAB 528 (1998). *See also supra* note 8.

[17] *See P.K.*, 60 ECAB ___ (Docket No. 08-2551, issued June 2, 2009) (once the Office undertakes development of the record, it has the responsibility to do so in a proper manner).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 5, 2009 is set aside and remanded for further action consistent with this decision.

Issued: February 19, 2010
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