United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 13-2132**
	)	**Issued: July 23, 2014**
U.S. POSTAL SERVICE, TACONY STATION, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 19, 2013 appellant, through his attorney, filed a timely appeal from a July 11, 2013 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 one percent permanent impairment of his left leg, for which he received a schedule award.

On appeal appellant, through counsel, requested that the Board modify the schedule award decision to reflect the impairment rating set forth by his attending physician. In the alternative, counsel contends that there is a conflict in medical opinion.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 6, 2009 appellant, then a 55-year-old letter carrier, sustained an injury when he exited from a truck and stepped on unlevel ground covered with leaves and broke his ankle. In a November 6, 2009 report, Dr. Paul H. Steinfield, a Board-certified orthopedic surgeon, stated that an x-ray of appellant's ankle obtained on that date showed a fracture of the distal portion of the fibula, involving a segment 1.5 x 1.5 centimeters. He diagnosed distal fibular fracture and placed appellant in a cast for three weeks. OWCP accepted appellant's claim for distal fibular fracture and paid compensation benefits.

On October 17, 2012 appellant filed a claim for a schedule award. In a May 3, 2011 report, Dr. David Weiss, an osteopath, applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). He determined that appellant had a combined eight percent impairment of his left leg based on an ankle distal fibular fracture (malleolar) which represented six percent impairment and a class 1 sensory deficit of the left tibial nerve of two percent.

By decision dated December 6, 2012, OWCP denied appellant's claim for a schedule award, finding that the report of Dr. Weiss was stale and did not reference a current medical examination.

On December 17, 2012 appellant, through counsel, requested reconsideration. He submitted a December 12, 2012 addendum to a November 1, 2012 report by Dr. John Pron, a treating podiatrist, who agreed with Dr. Weiss that based on the sixth edition of the A.M.A., *Guides* appellant had eight percent impairment of the left leg.

By decision dated January 2, 2013, OWCP denied appellant's request for reconsideration, as it found that Dr. Pron's report was repetitious of evidence submitted by Dr. Weiss.

On April 12, 2013 appellant, through counsel, requested reconsideration. In a March 14, 2013 report, Dr. Weiss diagnosed a postdistal fibular fracture of the left ankle; chronic post-traumatic left ankle strain and sprain with involvement of the anterior talofibular ligament; post-traumatic arthrofibrosis of the left ankle joint; post-traumatic intra-articular synovitis of the left ankle with anteromedial and lateral impingement lesions; post-traumatic osteoarthritis of the left ankle joint; status post arthroscopic surgery with debridement of extensive arthrofibrosis and hypertrophic synovitis of the left ankle, 11/5/10; post-traumatic tarsal tunnel syndrome involving the medial plantar nerve of the left foot; and mechanical instability to the left ankle. Dr. Weiss reviewed x-ray and magnetic resonance imaging (MRI) scans of the left ankle of January 31, 2013. On physical examination appellant had a noticeable left lower extremity limp, and that calcaneal and equinus gait were carried through with a modicum of difficulty. There was a mild effusion over the lateral malleolus, and that the lateral impingement sign was positive producing pain. Dr. Weiss also noted a tenderness over the tibotalar joint, a tenderness over the anterior talofibular ligament and tenderness over the common peroneal tendon. He noted that the range of motion of left ankle was restricted on dorsiflexion and that circumduction produced crepitus. Dr. Weiss also noted Tinel's tap was positive over the tarsal tunnel. He further noted that subjectively, appellant complained of left ankle pain and stiffness which was daily and

constant, swelling of the left ankle, episodes of instability involving the left ankle, numbness in his left foot and that changes in the weather increased his pain.

Dr. Weiss used the sixth edition of the A.M.A., *Guides* to note that pursuant to Table 16-2, page 503, appellant had a class 1 left ankle distal fibular fracture (malleolar) with mild motion deficit which equaled a 10 percent impairment. He applied the grade modifiers for functional history of two, for physical examination of two, and found that the grade modifiers for clinical studies were not applicable. Applying the adjustment formulae, he determined that appellant had a net adjustment of two which resulted in a 13 percent impairment of the left leg. Dr. Weiss also found that appellant had a class 1 moderate sensory deficit of the left medial plantar nerve which was a two percent impairment pursuant to Table 16-12, page 536 of the A.M.A., *Guides*. Applying the adjustment formula, he noted that appellant had a functional history adjustment of two and a clinical studies adjustment of two which yielded a net adjustment of two, and a left lower extremity impairment after net adjustment of three percent. The total combined left lower extremity impairment was 16 percent.

On May 1, 2013 OWCP referred the record to Dr. Morley Slutsky, an OWCP medical adviser, for an opinion on appellant's impairment. It noted that appellant's claim was accepted for left distal fibula fracture, as reflected in the December 22, 2009 statement of accepted facts.

In a May 2, 2013 report, Dr. Slutsky stated that Dr. Weiss rated appellant for left distal fibular fracture without documenting the objective tests which demonstrated this condition. He concluded that the rating by Dr. Weiss was not justified as the diagnosis was incorrect. Dr. Slutsky stated that, even if the diagnosis was correct, the fracture had gone on to heal and resolved with no residual. Therefore, it would not be the most impairing diagnosis in the left ankle region at maximum medical improvement. Dr. Slutsky stated that if there was an x-ray which demonstrated a distal fibular fracture it should be forwarded for review. He also noted that the left medial plantar conditions had not been accepted and prior examination of appellant did not support the diagnosis or impairment rating by Dr. Weiss. Dr. Slutsky rated appellant's impairment using the diagnosis of symptomatic soft tissue based on an MRI scan documenting small ankle joint effusion. Based on Table 16-2 at pages 501 to 508, Dr. Slutsky rated a class 1 impairment. Applying the grade modifiers, he found a net adjustment of zero which represented one percent impairment.

By decision dated July 11, 2013, OWCP issued a schedule award for a one percent left lower extremity impairment. It determined that the weight of the medical evidence rested with Dr. Slutsky. OWCP noted that Dr. Weiss did not properly apply the A.M.A., *Guides.*

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations[2] 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. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in

[2] 20 C.F.R. § 10.404.

making such a determination is a matter that rests within the sound discretion of OWCP.[3] 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.[4] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[5]

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[6] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[7] The sixth edition of the A.M.A., *Guides* also provides that range of motion may be selected as an alternative approach in rating impairment under certain circumstances. A rating that is calculated using range of motion may not be combined with a diagnosis-based impairment and stands alone as a rating.[8]

ANALYSIS

OWCP accepted appellant's claim for distal fibular fracture of November 6, 2009. An x-ray obtained by Dr. Steinfield revealed a fracture of the lateral malleolus, nondisplaced (closed). Copies of this x-ray were provided to appellant but the x-ray is not of record.

On October 17, 2012 appellant filed a claim for a schedule award. In a March 14, 2013 report, Dr. Weiss stated that he reviewed an x-ray report and MRI scan of the left ankle performed on January 31, 2013 as well as the medical reports with regard to the films. He used the sixth edition of the A.M.A., *Guides* to determine that appellant had a 16 percent impairment of his left lower extremity. He found 13 percent impairment of the left leg based on a class 1 left ankle distal fibula fracture (malleolar) with minimum motion deficit and grade modifiers of two for physical examination and two for clinical studies. Dr. Weiss also rated three percent impairment based on a class 1 moderate sensory deficit of the left medial plantar nerve, with adjustments of two for functional history and two for clinical studies.

Dr. Slutsky disagreed with the impairment rating of Dr. Weiss. He stated that a left fibular fracture was not supported in the medical record and disagreed with the grade modifiers of Dr. Weiss. Dr. Slutsky noted that, if appellant had a left distal fibular fracture, it had healed with no residuals. He rated a left lower extremity impairment of one percent based on Table

[3] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

[4] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[6] A.M.A., *Guides* 494-531.

[7] *Id.* at 521.

[8] *L.B.*, Docket No. 12-910 (issued October 5, 2012).

16-2 for a class 1 soft tissue injury. Dr. Slutsky noted that Dr. Weiss rated appellant for left medial plantar problems which were not accepted conditions. Based on the opinion Dr. Slutsky, OWCP issued a schedule award for a one percent impairment of the left leg.

The Board finds that Dr. Slutsky's report is insufficient to represent the weight of medical evidence. The Board notes that he based his disagreement with the impairment rating by Dr. Weiss as to the diagnosis of a left distal fibular fracture. Dr. Slutsky noted specifically that he had no x-rays to review to confirm the diagnosis. The Board notes that the record makes reference to several x-rays obtained of appellant's left ankle. OWCP has accepted appellant's claim for a distal fibular fracture based on the reports in evidence, including the reports of Dr. Steinfield, who diagnosed a fracture of the distal portion of the fibula. OWCP procedures provide that when the medical adviser renders a medical opinion and does not use the statement of accepted facts as the framework for forming his or her opinion, the probative value of the opinion is diminished.[9] Dr. Slutsky's rating is of diminished value as it was not based on the accepted left fibular fracture. The case will be remanded for further development of the medical evidence.

The Board also notes that Dr. Weiss based his rating of 13 percent impairment to the left lower extremity based on the left ankle distal fibular fracture and a 3 percent impairment based on moderate sensory deficit left medial plantar. However, OWCP never accepted appellant's claim for a left medial plantar condition. A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[10] Therefore, Dr. Weiss' rating is also deficient in that it is based, in part, on an unaccepted condition.

On remand, OWCP should obtain copies of the 2009 and 2013 x-rays for the record and refer appellant for a second opinion examination and opinion on whether the accepted fracture caused permanent impairment under the sixth edition of the A.M.A., *Guides.* After such further development as deemed necessary, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that the case requires development of the medical evidence as to appellant's left lower extremity impairment.

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (August 2, 2011); *see also T.M.*, Docket No. 12-1654 (issued April 4, 2013).

[10] *Veronica Williams*, 56 ECAB 367 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 11, 2013 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 23, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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