United States Department of Labor
Employees' Compensation Appeals Board

OSCAR McCOY, Appellant	)	
and	)	**Docket No. 04-688**
	)	**Issued: July 29, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Willingboro, 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, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On January 20, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated October 1, 2003, finding appellant entitled to a schedule award for no greater than a nine percent permanent impairment of his right lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this schedule award decision.

ISSUE

The issue is whether appellant is entitled to a schedule award greater than nine percent for the permanent impairment of his right lower extremity.

FACTUAL HISTORY

On March 28, 1998 appellant, then a 28-year-old letter carrier, filed a traumatic injury claim alleging that he stepped in a hole while in the performance of his federal duties. The claim was accepted for a sprained ankle. Appellant returned to light duty until November 24, 1998 when an arthroscopic procedure was performed on his ankle. Appellant returned to light duty

wearing an ankle brace until he terminated his relationship with the employing establishment in January 2000, due to his injury. Appellant stated that he subsequently tried work as a mechanic, but had to stop due to ankle pain and currently works as a truck driver.

On August 4, 2000 appellant requested a schedule award. In support of his request, appellant submitted a January 19, 2000 report from Dr. John Potash, an orthopedist, who stated that on examination of appellant's right ankle he found two punctate scars at the medial malleolus and anterior joint area. He noted no medial malleolus, anterior tenderness or lateral malleolus tenderness, but there was medial ligament tenderness. Dr. Potash stated that he found no effusion, deformities or instability but an anterior draw sign was positive. He stated that appellant's range of motion revealed dorsiflexion of 10/15 degrees, plantar flexion of 45/55 degrees, inversion of 30/55 degrees, eversion of 10/20 degrees. Motor strength testing was reported as 45/5 involving dorsiflexion. Applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (4th ed. 1999) Dr. Potash found that appellant had 7 percent impairment of the range of motion deficit for right ankle extension, 2 percent impairment of the range of motion deficit for right ankle eversion and 12 percent impairment for motor strength deficit. He combined the two ratings to arrive at a total permanent impairment of 20 percent with a date of maximum medical improvement of January 13, 2000.

On March 27, 2001 the Office referred appellant's records to the district medical adviser.[1] In a May 15, 2001 report, the district medical adviser reviewed Dr. Potash's report, applied the fifth edition of the A.M.A., *Guides*. The district medical adviser opined that appellant had reached maximum medical improvement on November 24, 2000 which date was one year postsurgery. He also found that appellant had nine percent impairment based on a range of motion deficits of seven percent for extension and two percent for eversion. The district medical adviser further noted that, according to Table 17-2, page 526 of the fifth edition of the A.M.A., *Guides*, range of motion and loss of strength cannot be combined. In a June 4, 2001 decision, the Office awarded appellant a schedule award based on a nine percent permanent impairment, with a date of maximum medical improvement of November 24, 2000.

In a June 8, 2001 letter, appellant requested a hearing. At the hearing appellant's representative argued that the A.M.A., *Guides* allow combining strength and range of motion, that there was a conflict in the medical evidence and that appellant should at least receive the greater of the two impairments ratings which was 12 percent for loss of strength. In a March 19, 2002 letter, the hearing representative referred appellant's records to Dr. Neven Popovic, acting as a district medical adviser. In a March 28, 2002 report, Dr. Popovic wrote that he applied the fifth edition of the A.M.A., *Guides* to Dr. Potash's report and found appellant entitled to a nine percent permanent impairment of the right lower extremity, noting that Table 17-2, page 526 of the A.M.A., *Guides* prohibits combining a partial permanent impairment based on range of motion with a partial permanent impairment based on loss of strength. He further added that he found no clear, objective anatomic evidence for the perceived weakness of ankle extensors or neurological deficits that would effect the ankle extensor strength.

[1] The district medical adviser's report was handwritten and his or her name is illegible.

In an October 1, 2003 decision, the Office found appellant entitled to a schedule award for no greater than a nine percent permanent impairment of the right lower extremity.[2]

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[3] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[4] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[5]

The schedule award provision of the Act[6] and its implementing regulation[7] 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 regulation as the appropriate standard for evaluating schedule losses.[8]

ANALYSIS

In the present case, the weight of the medical evidence rests with reports of the district medical adviser's who both found appellant entitled to a schedule award based on a nine percent permanent impairment of the right lower extremity. Dr. Popovic applied the A.M.A., *Guides* correctly, noting that according to Table 17-11, page 537 a loss of between 10 and 20 degrees flexion equated to a 7 percent permanent impairment and pursuant to Table 17-12, page 537 a loss of between 0 and 10 degrees of eversion equated to 2 percent permanent impairment for a combined 9 permanent impairment due to loss of motion. The Board also notes that plantar flexion of 45/55 degrees does not provide an additional impairment pursuant to Table 17-11 and inversion of 30/55 degrees also does not provide a rateable impairment under Table 17-12. The first district medical adviser who reviewed the case record and appellant's treating physician, Dr. Potash, also found that appellant's impairment due to loss of motion was nine percent, even though Dr. Potash applied the fourth edition of the A.M.A., *Guides*.

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[2] Appellant had previously appealed the Office decision to the Board but the Office forwarded a partial record to the Board. Consequently, in an April 29, 2003 order, the Board remanded the case to the Office for reconstruction of the record and a *de novo* decision that protected appellant's rights of appeal.

[3] 5 U.S.C. §§ 8101-8193.

[4] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[5] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404 (1999).

[8] *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

The district medical adviser's DMA's noted correctly that Table 17-2 page 526 of the fifth edition of the A.M.A., *Guides* prohibits combining a disability award based on a range of motion percent permanent impairment with a percent permanent impairment based on loss of strength. Although on appeal appellant has argued that he is at least entitled to the method of calculation which would grant the greater award, this argument is not substantiated by the A.M.A., *Guides*. The text of page 526 of the A.M.A., *Guides* in describing the usage of the cross-usage chart provides that: "When uncertain about which method to choose, the evaluator should calculate the impairment using different alternatives and choose the method or combination of methods that gives the most clinically accurate impairment rating."

Dr. Popovic explained that there was no objective basis to find a permanent partial impairment based on loss of strength stating that he found no clear, objective anatomic evidence for the perceived weakness of ankle extensors or neurological deficits that would affect the ankle extensor strength. Dr. Potash offered no explanation as why both rating methods should be used to obtain the most accurate clinical assessment.

Finally, the Board notes that while Dr. Potash found that appellant had reached maximum medical improvement on January 13, 2000 the district medical adviser found that appellant had not reached maximum medical improvement until November 24, 2000. By the latter date the district medical adviser could not identify any objective deficit which would substantiate clinical finding causing loss of strength. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The Board has noted a reluctance to find a date of maximum medical improvement that is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board therefore requires persuasive proof of maximum medical improvement for selection of a retroactive date of maximum medical improvement.[9]

CONCLUSION

Appellant has not met his burden of proof to establish entitlement to a schedule award greater than nine percent for the permanent impairment of his right lower extremity.

[9] *James E. Earle*, 51 ECAB 567 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 1, 2003 is affirmed.

Issued: July 29, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member