United States Department of Labor
Employees' Compensation Appeals Board

MICHAEL REED, Appellant	)	
and	)	**Docket No. 04-734**
	)	**Issued: October 5, 2004**
DEPARTMENT OF THE ARMY,	)	
Fort Lewis, WA, Employer	)	

Appearances:
Michael Reed, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On January 26, 2004 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated May 20, 2003, finding that an overpayment of $9,205.20 occurred when the Office issued an October 31, 2002 schedule award for a five percent impairment to the right leg. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the overpayment in this case.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of compensation was created when the Office issued a schedule award for a five percent permanent impairment to the right leg; (2) whether the Office properly determined that the amount of the overpayment was $9,205.20; and (3) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On September 23, 1983 appellant, then a 36-year-old inspector, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right ankle injury in the performance of duty. The Office accepted the claim for a right ankle sprain; appellant underwent right ankle surgery on June 29, 1984 and returned to light duty on September 4, 1984.

By decision dated July 11, 1985, the Office issued a schedule award for a 10 percent impairment to the right leg. The period of the award was 28.80 weeks commencing June 4, 1985.

Appellant returned to regular duty and the Office accepted that he developed a right talus cyst requiring surgery on October 24, 1989. In a report dated February 5, 1991, Dr. W. Brandt Bede, an attending orthopedic surgeon, opined that appellant had a 12 percent impairment to his right leg. In a report dated March 8, 1991, an Office medical adviser opined that appellant had a 10 percent impairment for loss of range of motion and sensory deficit/pain.

In a decision dated April 4, 1991, the Office determined that appellant did not have any additional impairment to the right leg. By decision dated April 17, 1991, the Office denied a request for reconsideration without merit review of the claim.

On January 15, 1992 appellant underwent additional right ankle surgery. He stopped working and received compensation for temporary total disability. By decision dated March 2, 1993, the Office terminated compensation on the grounds that appellant refused an offer of suitable work. In a decision dated November 20, 1994, the Office denied appellant's request for a hearing as untimely. On appeal to the Board, the November 20, 1994 decision was set aside as the Board found that the Office had applied an improper standard in denying the untimely hearing request.[1] In a decision dated January 15, 1998, an Office hearing representative vacated the March 2, 1993 suitable work termination on procedural grounds.

On July 10, 2001 appellant filed a claim for compensation (Form CA-7) indicating that he was claiming a schedule award. Appellant resubmitted a May 11, 1994 report from Dr. Bede opining that appellant had an 18 percent impairment to his right leg. The Office referred the medical records to an Office medical adviser, who indicated in a September 30, 2001 report that additional medical evidence was required to evaluate the degree of permanent impairment.[2]

In a report dated August 7, 2002, Dr. Bede provided results on examination, reporting 10 degrees of ankle dorsiflexion, 40 degrees of plantar flexion, 20 degrees of inversion and 10 degrees of eversion. According to Dr. Bede, appellant had one centimeter decreased circumference of the right calf compared to the left, and slight weakness with plantar flexion.

[1] Docket No. 95-1045 (issued November 20, 1994).

[2] Based on this report, the Office accepted degenerative arthritis of the right ankle.

Dr. Bede opined that appellant had a four percent impairment for loss of dorsiflexion, two percent for loss of inversion and two percent for loss of eversion. He also stated that appellant had an additional 5 percent impairment for weakness and 5 percent for osteoarthritic changes, totaling an 18 percent permanent impairment to the right leg.

On October 1, 2002 an Office medical adviser requested that Dr. Bede provide a more complete examination and explanation of his impairment rating. By report dated October 11, 2002, Dr. Bede cited to specific tables under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* to explain his impairment rating. Dr. Bede stated that, under Table 17-11, appellant had a 4 percent impairment for loss of dorsiflexion, under Table 17-2 a 2 percent impairment for loss of inversion and 2 percent for loss of eversion, 2 percent for atrophy according to Table 17-6 and 10 percent under Table 17-31 for degenerative osteophytic change.

By decision dated October 31, 2002, the Office issued a schedule award for a five percent permanent impairment to the right leg. The Office stated that the claim was currently with an Office medical adviser for review but five percent was the minimum appellant was due at that time. The Office issued a payment dated November 8, 2002 for $9,205.20 representing 14.4 weeks of compensation from July 24 to November 1, 2002.

In a report dated February 3, 2003, an Office medical adviser reviewed the medical evidence of record.[3] The medical adviser opined that appellant had a six percent loss of ankle motion and four percent for loss of dorsiflexion under Table 17-11, one percent for loss of eversion and one percent for loss of inversion according to Table 17-12. With respect to atrophy, the medical adviser found a 3 percent impairment under Table 17-6 and, with respect to Table 17-31, concurred with a 10 percent impairment for 2 to 3 centimeters of cartilage interval. The medical adviser stated that the impairments for range of motion, atrophy and arthritis could not be combined; one of the methods alone must be used. Since the greatest value for 1 of the impairment methods was 10 percent, this represented the degree of permanent impairment.

In a letter dated March 10, 2003, the Office advised appellant of a preliminary determination that an overpayment of $9,205.20 was created when the Office issued its October 31, 2002 schedule award. The Office also made a preliminary determination that appellant was not at fault in creating the overpayment. Appellant was advised of the actions he could take and the information necessary for a determination as to waiver of the overpayment. The record does not contain any evidence with respect to waiver of the overpayment.

By decision dated May 20, 2003, the Office finalized its determination that an overpayment of $9,205.20 was created. The Office also found that circumstances of the case did not warrant waiver of the overpayment and that appellant should forward a payment of $9,205.20 to the Office within 30 days.

[3] The medical adviser referred to Dr. Bede's August 7, 2002 report, but did not discuss the October 11, 2002 report.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[4] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5]

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.[6]

ANALYSIS -- ISSUE 1

The record establishes that the Office issued a schedule award on July 11, 1985 for a 10 percent permanent impairment to the right leg, and on October 31, 2002 issued an award for an additional 5 percent. There is no probative medical evidence establishing a 15 percent permanent impairment to the right leg. Dr. Bede opined in an August 7, 2002 report that appellant had an 18 percent leg impairment, but his impairment rating was not based on a proper application of the A.M.A., *Guides.* Dr. Bede combined eight percent for loss of range of motion, five percent for weakness and five percent for advanced osteoarthritic changes, without providing any reference to the specific tables in support of his opinion. In an October 11, 2002 report, Dr. Bede did identify specific tables with respect to ankle range of motion, atrophy and degenerative arthritis. The Board notes that the medical adviser correctly stated that each of these impairments represent separate evaluation methods for lower extremity impairments. Table 17-2 clearly indicates range of motion, muscle atrophy and arthritis are not to be combined, but only one of the methods should be chosen by the evaluator.[7] Dr. Bede improperly combined evaluation methods. Therefore his opinion that appellant had an 18 percent permanent impairment to the right leg is of little probative value.

Since the record does not contain probative medical evidence of a 15 percent impairment to the right leg, an overpayment of compensation has been created. The Board will now consider whether the Office properly determined the amount of the overpayment.

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[4] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[5] *A. George Lampo*, 45 ECAB 441 (1994).

[6] *See Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue was not in posture because the Office had not properly resolved the schedule award issue).

[7] A.M.A., *Guides* 526, Table 17-2.

LEGAL PRECEDENT -- ISSUE 2

When the Office makes a determination that an overpayment of compensation has occurred because the claimant received a schedule award, the Office must properly resolve the schedule award issue. Before the amount of the overpayment of compensation can be determined, the evidence must properly establish the appropriate degree of permanent impairment.[8]

ANALYSIS -- ISSUE 2

The Office determined that the entire amount paid pursuant to the October 31, 2002 decision represented an overpayment of compensation, because the medical evidence established that appellant had only a 10 percent permanent impairment to the right leg. In determining that appellant had a 10 percent impairment, the Office relied on the March 3, 2003 report from the Office medical adviser, who reviewed the findings of the attending physician, Dr. Bede.[9] With respect to atrophy, Dr. Bede reported a one centimeter calf atrophy, and he found that to be a two percent impairment. Table 17-6 provides an impairment range of 3 to 8 percent for 1 to 1.9 centimeters of calf atrophy.[10] As Dr. Bede reported one centimeter, the three percent impairment found by the medical adviser is in accordance with Table 17-6.

With respect to degenerative arthritic changes, both Dr. Bede and the medical adviser refer to Table 17-31, which provides arthritis impairment based on cartilage intervals.[11] For the ankle a 3 millimeter interval is a 5 percent impairment, while a 2 millimeter impairment is a 15 percent leg impairment. Dr. Bede reported between 2 and 3 millimeters, and both physicians found a 10 percent impairment under Table 17-31.

As noted above, only one method of evaluation is appropriate when arthritis, atrophy and loss of range of motion are considered. The Office medical adviser found that appellant had a 10 percent leg impairment based on Table 17-31, as this represented the greatest amount of impairment among the three methods of evaluation. The problem with this conclusion is that the loss of ankle range of motion was not properly resolved. Dr. Bede indicated that appellant had 10 degrees of extension, 20 degrees of inversion and 10 degrees of eversion. On October 11, 2002 he referred to a "loss of 10 degrees of dorsiflexion [extension]" and finds a 4 percent impairment, as does the medical adviser. Table 17-11 does not provide for an impairment of four percent to the leg for loss of extension.[12] If appellant had 10 degrees of extension, that is a 7 percent leg impairment. If appellant has more than 10 degrees of extension, there is no

[8] *Richard Saldibar, supra* note 6.

[9] The Board notes that the record contains a report from another Office medical adviser dated October 28, 2002. The copy of this report in the record, however, is marked as received by the Office on July 18, 2003. Since it is not clear whether the report was before the Office at the time of the final decision on appeal, the Board will not review the contents of that report.

[10] A.M.A., *Guides* 530, Table 17-6.

[11] *Id.* at 545, Table 17-31.

[12] *Id.* at 537, Table 17-11.

impairment under Table 17-11. With respect to 20 degrees of inversion and 10 degrees of eversion, Table 17-12 provides a 2 percent impairment for each, rather than the 1 percent found by the medical adviser.[13]

Accordingly, if Dr. Bede's reported ranges of motion for the ankle in the August 7, 2002 report are used, the A.M.A., *Guides* indicate that the impairment would be 7 percent for extension, 2 percent for inversion and 2 percent for eversion, totaling 11 percent for loss of range of motion. It is not clear whether the actual physical findings were 10 degrees of extension or a "loss" of 10 degrees of extension. Since appellant may be entitled to 11 percent for loss of range of motion, the case is not in posture for decision as to the amount of the overpayment. The case will be remanded to the Office for further development on this issue. After such further development as the Office deems necessary, it should issue an appropriate decision. As the amount of the overpayment has not been determined, the Board will not address the waiver of the overpayment issue.

CONCLUSION

The Board finds that the October 31, 2002 Office decision issuing a schedule award created an overpayment of compensation. The case requires further development as to the amount of the overpayment and the case is remanded to the Office for appropriate action.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 20, 2003 is affirmed with respect to fact of overpayment. The May 20, 2003 decision is set aside on the issues of amount of overpayment and waiver, and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: October 5, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[13] *Id.* at 537, Table 17-12.