

**United States Department of Labor
Employees' Compensation Appeals Board**

GINA CUCCO, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Whippany, NJ, Employer**

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**Docket No. 04-1877
Issued: January 7, 2005**

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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 20, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' schedule award decision dated March 31, 2004 finding no more than a 40 percent impairment of her left lower extremity. 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 a 40 percent permanent impairment of her left lower extremity for which she has received schedule awards.

FACTUAL HISTORY

On March 7, 1993 appellant, then a 26-year-old mail handler sustained a fracture of her left ankle in the performance of duty. The Office authorized two surgeries.

Dr. Mark Rieger, an attending Board-certified orthopedic surgeon, completed a report on March 24, 1997 and found that appellant had a 35 percent permanent impairment of her left lower extremity. He found that appellant had 0 degrees of dorsiflexion, 30 degrees of plantar

flexion, 15 degrees of inversion and 15 degrees of eversion. Appellant requested a schedule award.

The Office medical adviser reviewed this report on February 13, 1998 and found that appellant had a nine percent impairment to her left lower extremity due to loss of range of motion. By decision dated May 8, 1998, the Office granted appellant a schedule award for a nine percent permanent impairment of her left leg.

Appellant, through her attorney, requested an oral hearing and submitted additional medical evidence from Dr. David Weiss, an osteopath. In a July 12, 1998 report, Dr. Weiss found that appellant had 3 degrees of dorsiflexion, 0 degrees of inversion, 15 degrees of plantar flexion and 0 degrees of eversion for 24 percent impairment due to loss of range of motion. He further found that appellant exhibited a motor strength deficit of 3/5 in her dorsiflexor and 4/5 in her plantar for a 17 percent impairment due to loss of strength. Dr. Weiss concluded that appellant had a 53 percent impairment of her left lower extremity.

By decision dated January 25, 1999, the hearing representative remanded the case for a second opinion medical examination to determine the extent of her permanent impairment.

The Office referred appellant to Dr. Howard Baruch, a Board-certified orthopedic surgeon. He completed a report on March 4, 1999 and found that appellant had 0 degrees of dorsiflexion, 10 degrees of plantar flexion, 0 degrees of pronation and 0 degrees of supination. Dr. Baruch stated that appellant had a significant loss of range of motion with severe discomfort. In a supplemental report dated April 7, 1999, Dr. Baruch stated that appellant's loss of range of motion was a 10 percent impairment of the left lower extremity. The Office medical adviser reviewed this report on April 19, 1999 and agreed that appellant had a 10 percent impairment of her left lower extremity.

By decision dated April 20, 1999, the Office granted appellant a schedule award for an additional 1 percent impairment of her left lower extremity, for a total impairment of 10 percent. Appellant requested an oral hearing on April 26, 1999. By decision dated January 13, 2000, the hearing representative found a conflict of medical opinion evidence between Dr. Baruch and Dr. Weiss and remanded appellant's claim for review by an impartial medical examiner.

The Office referred appellant to Dr. David Basch, a Board-certified orthopedic surgeon, on February 11, 2000. He completed a report on February 21, 2000 and found that appellant had limited range of motion noting that her ankle arc was 30 degrees, that her ankle joint did not reach neutral and that there was 0 degrees of dorsiflexion. Dr. Basch also found that appellant's plantar flexion was 30 degrees, and that she had 0 degrees of both inversion and eversion as well as 10 degrees of supination. He also found decreased strength with 4/5 of ankle dorsiflexors, tibialis anterior and gastroc-soleus. Dr. Basch concluded that appellant had a 40 percent impairment of her left lower extremity under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The Office medical adviser reviewed this report on April 3, 2000 and agreed with Dr. Basch's findings.

By decision dated April 4, 2000, the Office granted appellant a schedule award for an additional 30 percent impairment of her left lower extremity, on a total impairment of 40 percent. Appellant requested an oral hearing on April 11, 2000.

By decision dated August 17, 2000, the hearing representative found that Dr. Basch's report was not sufficiently well rationalized to constitute the weight of the medical opinion evidence. He remanded for the Office to secure a supplemental report.

In a supplemental report dated April 25, 2001, Dr. Basch stated that appellant's current symptoms were worse, that she was experiencing pain resulting in a bigger limp and spending less time on her left leg. He repeated his loss of range of motion and loss of strength findings and concluded that appellant now had a 50 percent impairment of her left lower extremity.

The Office medical adviser applied the fifth edition of the A.M.A., *Guides* to Dr. Basch's findings and concluded that appellant had a 37 percent impairment of her left lower extremity.

By decision dated May 18, 2001, the Office denied appellant's claim for an additional schedule award finding that she had not established more than 40 percent permanent impairment of her left lower extremity.

Appellant requested an oral hearing. By decision dated September 27, 2001, the hearing representative found that Dr. Basch's report was not sufficient to constitute the weight of the medical opinion evidence and remanded the claim for review by a new impartial medical specialist.¹

The Office referred appellant to Dr. Stanley Soren, a Board-certified orthopedic surgeon, on March 19, 2003. In a report dated April 18, 2003, Dr. Soren noted appellant's history of injury and history of medical treatment. He also reviewed appellant's x-rays from March 7, 8 and 26, November 19 and 23 and December 8, 1993, January 26, February 25, April 4, July 6, August 3, September 1 and December 7, 1994 and February 8, 1995. Dr. Soren noted that x-rays beginning on December 8, 1993 demonstrated a mild lateral talar shift and that the July 6, 1994 x-ray demonstrated an arthritic change in the superior medial talar dome. He found no changes in the subsequent x-rays.

On physical examination, Dr. Soren found that appellant had a normal gait, but loss of range of motion of the ankle joint. He found that appellant lacked 5 degrees of dorsiflexion, 10 degrees of plantar flexion and 15 degrees of both supination and pronation. He concluded that appellant reached maximum medical improvement on January 18, 1995. Dr. Soren evaluated appellant using the arthritis and diagnosis-based estimate of the fifth edition of the A.M.A., *Guides*, and found that she had 5 percent impairment under Table 17-31 and 20 percent impairment under Table 17-33. He utilized the Combined Values Chart to reach 24 percent impairment of the left lower extremity.

¹ The Office referred appellant to Dr. Carl Mercurio, a Board-certified orthopedic surgeon, for an impartial examination. However, Dr. Mercurio performed examinations for the employing establishment as recently as September 13, 2002.

Dr. Soren also provided appellant's impairment rating based on her loss of range of motion and found that loss of 5 degrees of dorsiflexion was a 7 percent impairment, loss of 10 degrees of plantar flexion was 15 percent impairment, loss of 15 degrees of inversion was a 2 percent impairment and loss of 9 degrees of eversion was a 2 percent impairment. He added these figures to reach an impairment rating of 26 percent. Dr. Soren stated, "It is, therefore, reasonable to go with either the range of motion at 26 percent of the lower extremity or the [a]rthritis and [d]iagnosed[-][b]ased [e]stimate which yielded 24 percent (because of the difference and need for using Combined Values Chart)."

The Office medical adviser reviewed this report on May 1, 2003 and found that appellant had a 26 percent impairment of the left ankle due to loss of range of motion. By decision dated May 9, 2003, the Office denied appellant's claim for an additional schedule award. Appellant requested an oral hearing on May 13, 2003.

Appellant's attorney attended the oral hearing on January 28, 2004 and objected to Dr. Soren's report on the grounds that he expressed appellant's range of motion in the terms of degrees lost, that he did not address a motor strength rating and that his report required clarification. By decision dated March 31, 2004, the hearing representative found that Dr. Soren's report was entitled to special weight and that appellant had no more than a 40 percent impairment of her left lower extremity entitling her to a schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ sets 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. 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.⁴

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁵ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

⁵ *Thomas J. Fragale*, 55 ECAB ____ (Docket No. 04-835, issued July 8, 2004); 5 U.S.C. § 8123(a).

an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.⁶

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.⁷

ANALYSIS

In this case, appellant submitted a report from Dr. Weiss, an osteopath, supporting that she had 53 percent impairment to her left lower extremity. The Office then referred appellant to Dr. Baruch, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Baruch found that appellant had a 10 percent impairment of her left lower extremity due to loss of range of motion. The Office properly found that this disagreement between appellant's physician and the Office referral physician on the nature and extent of appellant's permanent impairment constituted a conflict of medical opinion evidence.

Due to the existing conflict of medical opinion evidence, the Office properly referred appellant to Dr. Soren, a Board-certified orthopedic surgeon, to determine the extent of her permanent impairment. In his April 18, 2003 report, Dr. Soren examined appellant's medical records including x-rays. He found that beginning in December 1994 appellant's ankle had a lateral talar displacement and that she demonstrated arthritic changes on July 6, 1994 which remained stable through February 8, 1995. He found that she reached maximum medical improvement on January 18, 1995. Dr. Soren's review of appellant's x-rays enabled him to evaluate her arthritis in accordance with the A.M.A., *Guides*.⁸ He found that appellant had a five percent impairment of her lower extremity due to three millimeter cartilage interval of the ankle.⁹ Dr. Soren also found had 20 percent impairment due to an ankle fracture with intra-articular displacement.¹⁰

The A.M.A., *Guides* state and the Board has found that the Office should apply the more objective and valid method for assigning impairment estimates.¹¹ The A.M.A., *Guides* conclude that the utilization of x-rays in determining impairment due to arthritis is more objective than physical findings such as range of motion.¹² Dr. Soren properly evaluated appellant's impairment by utilizing this method and also properly concluded that appellant's impairment

⁶ *Id.*

⁷ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

⁸ A.M.A. *Guides* at 544, 17.2h arthritis.

⁹ *Id.* at 544, Table 17-31.

¹⁰ *Id.* at 546-47, Table 17-33.

¹¹ *Id.* at 544; *Rose V. Ford*, 55 ECAB ____ (Docket No. 04-15, April 6, 2004).

¹² *Id.*

ratings due to arthritis and her diagnosis of ankle fracture with displacement should be combined¹³ to reach her impairment rating of 24 percent.¹⁴

Dr. Soren also noted that appellant had a similar percentage of impairment based on her loss of range of motion and that either rating was appropriate. The Office medical adviser and the Office relied on the range of motion impairment rating in determining that appellant had no more than a 40 percent impairment of her left lower extremity. However, for the reasons mentioned above, the Board finds that appellant's impairment rating should be based on the diagnosis-based estimates and the x-ray determined cartilage intervals in accordance with Dr. Soren's opinion and that the weight of the medical opinion evidence rests with his well-reasoned report that appellant has no more than a 24 percent impairment of her left lower extremity.

The A.M.A., *Guides* also provide that muscle strength impairments should not be combined with loss of range of motion and that diagnosis-based impairments should not be combined with either loss of range of motion or muscle strength impairments.¹⁵ Therefore, appellant's objections to Dr. Soren's report before the hearing representative did not conform with the protocols of the A.M.A., *Guides*.

CONCLUSION

The Board finds that the report of the impartial medical examiner, Dr. Soren is sufficiently well reasoned to be entitled to special weight and that the report resolves the existing conflict of medical opinion evidence by finding that appellant has no more than a 40 percent impairment of her left lower extremity for which she has already received schedule awards.

¹³ *Id.* at 544, 545, Example 17-13.

¹⁴ *Id.* at 604, Combined Values Chart.

¹⁵ *Id.* at 526, Table 17-2.

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member