

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

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**M.T., Appellant**

**and**

**DEPARTMENT OF JUSTICE, EXECUTIVE  
OFFICE FOR IMMIGRATION REVIEW,  
San Francisco, CA, Employer**

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**Docket No. 08-1290  
Issued: January 14, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 31, 2008 appellant timely appealed the March 19, 2008 merit decision of the Office of Workers' Compensation Programs, which denied her claim for an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant has more than 24 percent impairment of the right lower extremity.

**FACTUAL HISTORY**

Appellant, a 57-year-old immigration judge, sustained an employment-related injury on July 18, 2001 when a laptop computer fell from a shelf onto her right foot. The Office initially accepted the claim for "right crush foot." On October 19, 2001 appellant underwent a deep peroneal nerve neurectomy. The surgery also included removal of a bony fragment from

appellant's right foot. The Office authorized the surgical procedure and accepted fracture of the metatarsal bones. After a three-month period of temporary total disability, appellant returned to work in a part-time capacity in January 2002. She increased to a full-time work schedule beginning May 28, 2002.

On December 9, 2002 appellant received a schedule award for three percent impairment of the right lower extremity. The Office based the award on the November 18, 2002 report of its medical adviser, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon.<sup>1</sup>

The Office awarded appellant an additional 21 percent impairment of the right lower extremity on December 23, 2003. This award was based on Dr. Harris' December 5, 2003 impairment rating.<sup>2</sup> The Office medical adviser's overall rating of 24 percent included impairments for loss of motion in the right ankle and hindfoot (9 percent), muscle weakness in the ankle and great toe (14 percent) and pain/decreased sensation (3 percent) involving the lateral plantar nerve. Dr. Harris explained that the increased impairment was the result of previously undocumented loss of ankle motion and residual muscle weakness.

Appellant underwent a second surgical procedure on August 26, 2005. She had two neuromas removed from the top (dorsal) of her right foot.<sup>3</sup> Appellant was off work for approximately three months following surgery. She began working part time in December 2005 and resumed full-time work in April 2006. The Office paid her appropriate wage-loss compensation.

On October 30, 2006 appellant filed a claim for an additional schedule award. Dr. James Stavosky, a podiatric surgeon, provided a July 2, 2007 impairment rating of 34 percent of the right lower extremity. He examined appellant on May 2, 2007 and found a combination of impairments involving the right ankle and mid-foot. Dr. Stavosky also found impairment with respect to the first, second and third toes of the right foot. Although he assigned percentages to the identified impairments, he did not otherwise explain how he calculated appellant's impairments due to ankylosis, pain, arthritis, dyesthesia and loss of motion.<sup>4</sup>

Dr. Harris, the Office medical adviser, reviewed the record on July 25, 2007. He found 11 percent impairment for loss of ankle motion. Dr. Harris also found six percent impairment for loss of motion in the first, second and third toes (two percent each toe). He also found three percent impairment due to pain/decreased sensation involving the right lateral plantar nerve and Dr. Harris noted four percent impairment for muscle weakness. This represented two percent impairment each for motor deficits involving the lateral plantar and medial plantar nerves.

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<sup>1</sup> Dr. Harris found impairment due to pain/decreased sensation involving the superficial peroneal nerve.

<sup>2</sup> Dr. Harris reviewed a June 3, 2003 report from Dr. Don Williams, a Board-certified orthopedic surgeon, who found 26 percent impairment of the right lower extremity.

<sup>3</sup> Dr. James W. Stavosky, a podiatric surgeon, performed both the October 19, 2001 and August 26, 2005 surgical procedures.

<sup>4</sup> While Dr. Stavosky indicated that he used the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001), he did not provide specific references to the A.M.A., *Guides*.

Combining the various impairments for loss of motion, sensory and motor deficits resulted in an overall right lower extremity impairment of 23 percent. Dr. Harris noted his disagreement with Dr. Stavosky's 34 percent impairment rating. He explained that Dr. Stavosky's five percent rating for arthritis of the big toe was not supported by the x-ray evidence.<sup>5</sup> The Office medical adviser further explained that the A.M.A., *Guides* (5<sup>th</sup> ed. 2001) did not permit a three percent impairment for residual pain in the first, second and third toes.

By decision dated August 3, 2007, the Office denied appellant's claim for an additional schedule award. It found that the medical evidence did not support more than 24 percent right lower extremity impairment.

Appellant timely requested a review of the written record. She submitted another impairment rating from Dr. Williams, who examined her on October 5, 2007. On November 12, 2007 Dr. Williams found 28 percent impairment of the right lower extremity.<sup>6</sup> He referenced his June 3, 2003 finding of 26 percent impairment of the right lower extremity and also noted that appellant had received an award for 24 percent. Based on his latest examination, Dr. Williams indicated that appellant "has a two [percent] add on for [medial] plantar paresthesias."

On January 24, 2008 the Branch of Hearings and Review vacated the August 3, 2007 decision and remanded the case for further development. The hearing representative instructed the Office to refer Dr. Williams' November 12, 2007 report to the medical adviser to "state his opinion as to whether [appellant was] entitled to an additional impairment rating based on plantar paresthesias."<sup>7</sup>

The Office medical adviser reviewed Dr. Williams' most recent impairment rating. In a February 28, 2008 report, Dr. Harris found an additional three percent impairment for diminished sensation involving the medial plantar nerve. This impairment, when combined with the previous impairments for muscle weakness (4 percent), diminished sensation in the lateral plantar nerve (3 percent) and loss of motion in the ankle (11 percent) and toes (6 percent), represented an overall impairment rating of 24 percent of the right lower extremity.

In a March 19, 2008 decision, the Office denied appellant's claim for an additional schedule.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions

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<sup>5</sup> According to Dr. Harris, the x-rays did "not demonstrate any obvious joint space narrowing."

<sup>6</sup> Dr. Williams identified a combination of impairments that included mid-foot ankylosis (10 percent), loss of ankle dorsiflexion (7 percent), mid-foot pain and dysesthesia (3 percent), loss of motion in the big toe (4 percent), loss of motion of the great toe (2 percent), loss of motion of the second (2 percent) and third (2 percent) toes and medial plantar paresthesias (2 percent).

<sup>7</sup> The hearing representative agreed with Dr. Harris' assessment that the x-ray evidence Dr. Stavosky relied on did not support an additional impairment for arthritis of the big toe. As such, Dr. Williams' reliance on the same x-rays to diagnose arthritis was similarly deemed inadequate to support a finding of four percent impairment of the big toe.

and organs of the body.<sup>8</sup> The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>9</sup> Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).<sup>10</sup>

### ANALYSIS

Appellant has received schedule awards totaling 24 percent impairment of the right lower extremity. On appeal, she questioned the Office's reliance on Dr. Harris' opinion, noting that he had not examined her or reviewed her x-rays. Additionally, appellant contends that she should have been compensated for her "painful and debilitating arthritis," as well as ongoing balance issues.

Regarding the Office medical adviser's qualifications, there is nothing in the record indicating that Dr. Harris' medical license had been revoked, suspended or had expired at the time he reviewed appellant's case record on behalf of the Office. The Board further notes that Dr. Harris is a Board-certified orthopedic surgeon; a qualification he shares with appellant's own examining physician, Dr. Williams. But regardless of the Office medical adviser's qualifications, the burden rests with appellant to demonstrate her entitlement to a schedule award.<sup>11</sup>

Appellant notes that both Dr. Stavosky and Dr. Williams examined her and found evidence of arthritis in her right foot. She specifically challenges Dr. Harris' assessment regarding the extent of any arthritis-based impairment, noting that he neither examined her nor reviewed any x-rays of her foot. While it is true Dr. Harris did not examine appellant, this is not a prerequisite for offering a credible opinion regarding the extent of any permanent impairment.<sup>12</sup> With respect to arthritis-based impairment, Dr. Harris questioned Dr. Stavosky's assignment of five percent impairment for arthritis of the big toe. His reason for disagreeing was that the "x-ray [did] not demonstrate any obvious joint space narrowing." Dr. Stavosky noted that the x-rays "demonstrated calcification and early arthritic changes...." Dr. Williams reportedly reviewed the same x-ray Dr. Stavosky interpreted and he concurred with Dr. Stavosky's reading. It is noteworthy that neither of appellant's physicians identified the specific x-ray they relied on in support of their respective findings. In his November 12, 2007 report, Dr. Williams noted several areas of appellant's right foot where he saw evidence of joint

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<sup>8</sup> For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2000).

<sup>9</sup> 20 C.F.R. § 10.404 (2008).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

<sup>11</sup> See *Veronica Williams*, 56 ECAB 367, 370 (2005).

<sup>12</sup> The Office medical adviser's role is limited to reviewing the relevant medical evidence. See *Tommy R. Martin*, 56 ECAB 273, 276 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

space “narrowing” indicative of arthritis and ankylosis. Although, he stated there was x-ray evidence of joint space narrowing, he did not specify the cartilage interval in millimeters, as is required under the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).<sup>13</sup> This level of specificity was similarly absent from Dr. Stavosky’s report.

In general, Dr. Stavosky’s July 2, 2007 impairment rating does not conform to the A.M.A., *Guides* (5<sup>th</sup> ed. 2001). As previously indicated, *supra* note 4, Dr. Stavosky failed to explain how he calculated 34 percent impairment under the A.M.A., *Guides*. Dr. Stavosky and Dr. Williams also identified additional pain-related impairments for the mid-foot and several toes. Dr. Williams specifically referenced an “additional three [percent] from Chapter 18.” However, the A.M.A., *Guides* limit the circumstances under which a pain-related impairment may be assessed under Chapter 18. If an impairment can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*, such as Chapters 13, 16 and 17, then pain-related impairments should not be assessed using Chapter 18.<sup>14</sup> Neither Dr. Stavosky nor Dr. Williams explained why additional pain-related impairments should be included in their respective right lower extremity ratings. Appellant also argued that she has “ongoing balance issues from the removal of the nerves” in her right foot. Apart from the sensory and motor deficits already identified, neither Dr. Stavosky, Dr. Williams nor Dr. Harris identified additional impairment specifically attributable to appellant’s reported “balance issues.”

In his February 28, 2008 report, Dr. Harris properly found an additional three percent impairment for sensory deficit involving the medial plantar nerve.<sup>15</sup> However, this additional 3 percent impairment when properly combined with the previously identified impairments, did not exceed 24 percent of the right lower extremity.<sup>16</sup> The Board finds that appellant has not provided any credible medical evidence indicating that she has more than 24 percent permanent impairment of the right lower extremity.

### **CONCLUSION**

Appellant has not demonstrated that she has greater than 24 percent impairment of the right lower extremity.

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<sup>13</sup> See section 17.2h (Arthritis), A.M.A., *Guides* 544.

<sup>14</sup> See section 18.3b, A.M.A., *Guides* 571.

<sup>15</sup> The rating was based on a Grade 3 sensory deficit (60 percent) under Table 16-10, A.M.A., *Guides* 482. The 60 percent sensory deficit is then multiplied by 5 percent, which represents the maximum lower extremity sensory deficit for the medial plantar nerve as indicated under Table 17-37, A.M.A., *Guides* 552.

<sup>16</sup> See Combined Values Chart, A.M.A., *Guides* 604-06.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 19, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 14, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board