

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of IRVIN K. PENDLEY and DEPARTMENT OF THE AIR FORCE,
BUILDING 414 METAL SHOP, TINKER AIR FORCE BASE, Okla.

*Docket No. 97-857; Submitted on the Record;
Issued October 23, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained greater than a 7 percent permanent impairment of the right foot for which he received a schedule award.

On October 4, 1995, appellant, then a 44-year-old welder, filed a claim for a right foot injury sustained on October 2, 1995 when a heavy locker fell on his foot. On February 20, 1996, the Office accepted that appellant sustained a right foot contusion and fracture of the first metatarsal. On March 8, 1996, appellant claimed a schedule award.

Appellant submitted periodic progress reports from Dr. Thomas C. Howard, an attending Board-certified orthopedic surgeon, from October 3, 1995 through June 10, 1996. In a January 3, 1996 report, Dr. Howard found "catching, locking and pain in [the] first metatarsophalangeal joint," and decompensated hallux rigidus. Dr. Howard injected the first metatarsophalangeal joint with good relief of symptoms. In a February 5, 1996 report, Dr. Howard noted continued hallux rigidus, and opined that appellant had a 10 percent permanent impairment of the right foot according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (hereinafter, the A.M.A., *Guides*).¹ In a June 10, 1996 report, Dr. Howard stated that appellant had reached maximum medical improvement and discharged him from treatment. Dr. Howard stated that in arriving at the 10 percent impairment figure,² he used appellant's "symptoms and A.M.A., *Guides* which involve x-ray changes and his restricted motion ... inherent in his hallux rigidus. Functionally, he has an ankylosed MTP [metatarsophalangeal] joint," with continuing mid-foot discomfort.

¹ Dr. Howard did not refer to a specific page, table or grading scheme of the A.M.A., *Guides* in this report.

² The Office requested, in a May 24, 1996 letter, that Dr. Howard explain how he arrived at the 10 percent permanent impairment figure using the A.M.A., *Guides*.

In a September 18, 1996 report, Dr. John F. Tompkins, a Board-certified orthopedic surgeon and second opinion physician, reviewed the medical record and statement of accepted facts. On examination, Dr. Tompkins found limited motion of the right first metatarsophalangeal joint, slight swelling over the region of the first metatarsal shaft on the dorsum of the right foot, loss of 10 degrees flexion and 10 degrees extension of the right first metatarsophalangeal joint, grossly intact sensation in the right foot, and no pain or instability. Dr. Tompkins obtained x-rays showing a healed fracture of the first metatarsophalangeal joint with a “very slight osteophyte along the lateral aspect of the first MT [metatarsal] head,” and a “prominence on the dorsum of the first MT head.” Dr. Tompkins diagnosed “[c]hronic right foot pain secondary to crushing type of injury,” and recommended an orthotic shoe inset.

In an October 22, 1996 report, Dr. Ronald H. Blum, an Office medical adviser, reviewed Dr. Tompkins’ September 18, 1996 report. Dr. Blum found that, according to Table 45, page 78 of the A.M.A., *Guides*, 4th ed., entitled “Toe Impairments,” a loss of 10 degrees of extension of the right first metatarsophalangeal joint was classified as “moderate,” equivalent to a 7 percent impairment of the right foot. Dr. Blum found no impairment due to loss of strength, sensory deficit or pain. He noted that appellant reached maximum medical improvement on April 1, 1996.

By decision dated November 4, 1996, the Office issued a schedule award for a seven percent permanent impairment of the right foot.³

The Board finds that the case is not in posture for a decision due to a conflict of medical opinion between Dr. Howard, appellant’s attending Board-certified orthopedic surgeon, and Dr. Tompkins, a Board-certified orthopedic surgeon and second opinion physician, for the government.

Section 8107 of the Federal Employees’ Compensation Act⁴ and section 10.304 of the implementing regulations⁵ provide that schedule awards are payable for permanent impairment of specified body members, functions or organs, but do not specify how to determine the percentage of impairment. Therefore, the Office has adopted the A.M.A., *Guides* (4th ed.) as a standard for determining the percentage of impairment and the Board has concurred in such adoptions.⁶ Proper use of the A.M.A., *Guides* ensures consistent results and equal justice for all claimants. The A.M.A., *Guides* lists specific procedures for determining impairment of affected body parts, including deficits due to impact on life activities, pain, loss of motion or weakness.

Dr. Howard based his 10 percent impairment rating on deficits due to pain, loss of motion, and ankylosis of the first metatarsophalangeal joint. In a February 5, 1996 report, Dr. Howard noted continued hallux rigidus, and opined that appellant had a 10 percent

³ The period of the award ran from April 1 to July 10, 1996, or 14.35 weeks, and was paid in a lump-sum check in the amount of \$6,987.02.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.304.

⁶ *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

permanent impairment of the right foot according to the A.M.A., *Guides*. Dr. Howard explained in a June 10, 1996 report that the 10 percent impairment was due to appellant's "symptoms," which included mid-foot discomfort, x-ray changes, loss of motion and an ankylosed metatarsophalangeal joint.

In contrast, Dr. Tompkins, in his September 18, 1996 report, did not find ankylosis of the first metatarsophalangeal joint, and while he diagnosed "chronic right foot pain," did not indicate any degree of permanent impairment due to pain. Dr. Tompkins noted a loss of range of motion of 10 degrees flexion and 10 degrees extension of the right first metatarsophalangeal joint, and degenerative changes of the first metatarsophalangeal joint by x-ray.

The Office relied on Dr. Tompkins' report in determining the percentage of permanent impairment for schedule award purposes. In an October 22, 1996 report, Dr. Blum, an Office medical adviser, using Dr. Tompkins' September 18, 1996 report, found that a loss of 10 degrees of extension of the right first metatarsophalangeal joint was classified as "moderate," equivalent to a 7 percent impairment of the right foot according to Table 45, page 78 of the A.M.A., *Guides* 4th ed. The Board notes that Dr. Blum found no impairment due to sensory deficit or pain, although both Dr. Tompkins and Dr. Howard mentioned pain in their reports.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

Consequently, the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an examination and a rationalized medical opinion to resolve the medical conflict regarding the specific nature of appellant's permanent impairment, including any deficit due to pain or ankylosis, and the percentage of such impairment according to the A.M.A., *Guides*. Following this and other such development the Office deems necessary, the Office shall issue an appropriate decision in the case.

The decision of the Office of Workers' Compensation Programs dated November 4, 1996 is hereby set aside, and the case remanded for further development consistent with this decision and order.

Dated, Washington, D.C.
October 23, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member