

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SALVATORE P. DiBETTA and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Avoca, PA

*Docket No. 01-311; Submitted on the Record;  
Issued February 20, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant has established that he has greater than a 19 percent impairment of the right lower extremity for which he had received a schedule award and whether he sustained any impairment of the left lower extremity.

The Board finds that appellant has no more than a 19 percent impairment of the right upper extremity and that he does not have an impairment of the left lower extremity.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision<sup>1</sup> on August 20, 1999 in which it set aside the January 30, 1997 decision of the Office of Workers' Compensation Programs on the grounds that further development of the medical evidence was necessary in order to determine the extent of impairment in each lower extremity.<sup>2</sup>

The Board remanded the case to the Office for a determination of such permanent impairment to include an evaluation and clarification regarding the extent of permanent impairment of each lower extremity. The Board directed the Office to request that Dr. Norman Heyman, a Board-certified orthopedic surgeon, who provided a second opinion in this case, submit a rationalized medical opinion addressing the extent of impairment of each lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The Board then instructed the Office, after such development deemed necessary, to issue an appropriate decision. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

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<sup>1</sup> Docket No. 97-1765.

<sup>2</sup> On June 22, 1991 appellant, then a 37-year-old air traffic controller, sustained an employment-related low back sprain and received compensation for total disability. The Office subsequently awarded appellant a 12 percent impairment for permanent loss of use of the lower extremity.

An employee seeking compensation under the Federal Employees' Compensation Act<sup>3</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,<sup>4</sup> 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.<sup>5</sup>

The schedule award provision of the Act<sup>6</sup> and its implementing regulation<sup>7</sup> 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.<sup>8</sup>

After the Board's August 20, 1999 decision, the Office referred appellant and the case record to Dr. Heyman for a rationalized medical opinion addressing the extent of impairment or each lower extremity pursuant to the A.M.A., *Guides*, (4<sup>th</sup> ed. 1993). By decision dated December 20, 1999, the Office awarded appellant an increase to 19 percent impairment of the right lower extremity and a zero percent impairment of the left lower extremity. By decision dated August 2, 2000 and finalized August 7, 2000, an Office hearing representative affirmed the Office's December 20, 1999 decision.

The Board notes that the Office properly referred the case file to Dr. Heyman for his review and submission of a rationalized medical opinion addressing the extent of impairment of each lower extremity pursuant to the A.M.A., *Guides*. In his November 9, 1999 report, Dr. Heyman stated that appellant's range of motion of lumbosacral spine was approximately 75 percent of normal, with difficulty in both extension, flexion, lateral flexion and lateral rotation. Neurological examination revealed decreased sensation over the dermatome of L4-5 with weakness of dorsiflexion of the foot and the great toe with muscle strength as 3 by 5. Reflexes were full and equal at the ankle and knee. Dr. Heyman noted that appellant's gait was shuffling, not a stoppage-type gait. Appellant had negative straight leg raising, with a negative sitting, recumbent and dynamic LeSegue test and he did not find active root irritation. His sacroiliac and piriformis tests were negative. Dr. Heyman range of motion findings on hip, knees, ankles and feet of both extremities were full and free without restriction. There was no sign of peripheral nerve compression entrapment or of atrophy of one leg greater than the other. His muscle mass appeared normal. Dr. Heyman noted a mild decrease in dorsiflexion of the right ankle and

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

<sup>5</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404 (1999).

<sup>8</sup> *Id.*

plantar flexion with relatively good subtalar motion. He also found that circulation in the lower extremities was normal.

With respect to appellant's right lower extremity, Dr. Heyman found:

“The muscle weakness phenomenon is of greater significance than the abnormal gait and, therefore, the muscle weakness phenomenon is to be determined and that is based on Table 39, page 77 of the A.M.A., *Guides*, (4<sup>th</sup> ed. 1993).

“[Appellant] is a Grade IV and not Grade III, so that he gets a 12 percent [impairment], based upon weakness in dorsiflexion and not in plantar flexion of the ankle. Today, [appellant] has a minimal decreased range of motion of the ankle, which is mild and for that he gets a 7 percent [impairment] and the values are [added] based upon the Combined Values Chart and, therefore, [appellant] should get at this time now, in 1999, three years subsequent to the previous examination, a percentage of impairment of the right leg of 19 percent.

“[Appellant's] left leg is normal, despite the fact that he has subjective complaints and he has normal muscle function and normal range of motion at the hip, knee, and ankle and at the subtalar joint. Therefore, [appellant's] percentage of impairment and disability in the left leg is zero.”

On appeal, appellant argues that the Office should have considered Dr. Weiss' September 11, 1993 report in which he recommended a 47 percent impairment rating and that Dr. Weiss' report creates a conflict in the medical evidence requiring the Office to refer appellant for an impartial examination pursuant to section 8123 of the Act. The Office had previously determined that Dr. Weiss' report and examination did “not properly evaluate impairment in accordance with the A.M.A., *Guides*” and, therefore, is not probative and of insufficient weight to create a conflict. As there is no medical evidence of record that appellant has more than a 19 percent impairment of the right lower extremity or any impairment of the left lower extremity, the Office, properly granted appellant a schedule award for a 19 percent impairment of the right lower extremity.

The decisions of the Office of Workers' Compensation Programs dated August 2, 2000 and finalized August 7, 2000 and December 20, 1999 are hereby affirmed.

Dated, Washington, DC  
February 20, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member