

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE M. SORIANO and DEPARTMENT OF THE ARMY,
FORT DETRICK, Frederick, MD

*Docket No. 03-1668; Submitted on the Record;
Issued November 4, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has more than a three percent impairment of the right lower extremity, for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Office accepted appellant's claim for right ankle sprain and right plantar fasciitis. He underwent a right plantar fascia release on November 16, 2000. On June 1, 2001 appellant filed a claim for a schedule award.

In a report dated November 6, 2001, Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon, examined appellant at the request of the Office. He noted that there was no muscle wasting, both calves measured 15¾ inches in girth at the widest diameter bilaterally and that the right ankle had a normal range of motion dorsiflexion of 20 degrees and plantar flexing of 45 degrees without pain. Dr. Sherman found that the right foot had a well healed, one inch long scar over the plantar aspect of the leading edge of the heel which was tender to direct palpation. He stated that there was marked tenderness over the insertion of the plantar fascia on the heel. Dr. Sherman diagnosed plantar fasciitis of the right foot, status post surgery, with residual pain and tenderness.

In a report dated November 19, 2001, Dr. Arthur S. Harris, a Board-certified orthopedic consultant, reviewed the evidence of record and noted the diagnoses of status post right plantar fascia release and resolved spraining injury of the right ankle. Using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, he found that appellant had an impairment of the medial plantar nerve which at Table 17-37, page 552, provided a maximum of five percent impairment. Dr. Harris graded the impairment for decreased sensation which interfered with some activity at 60 percent. He multiplied the Office medical consultant's 60 percent by the maximum of 5 percent, finding that appellant had a 3 percent impairment of the right lower extremity.

By decision dated December 3, 2001, the Office granted appellant a schedule award for a three percent impairment of the right lower extremity.

Appellant requested an oral hearing before an Office hearing representative, which was held on January 27, 2003. At the hearing, appellant stated that he had a recent report from his treating physician, Dr. Donald R. Marram, a podiatrist, who opined that appellant had lost 25 percent of his work capacity. Appellant submitted Dr. Marram's medical report dated January 22, 2003 at the hearing. In his report, he considered appellant's history of injury, performed a physical examination and diagnosed plantar fasciitis of the right foot. Dr. Marram stated that appellant had lost 25 percent of his work capacity.

By decision dated April 23, 2003, the Office hearing representative affirmed the Office's April 23, 2003 decision.

The Board finds that appellant has no more than a three percent impairment of the right lower extremity, for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act¹ and its implementing regulation² 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.³

In this case, in his November 19, 2001 medical report, Dr. Harris reviewed Dr. Sherman's November 6, 2001 report and noted the diagnoses of status-post right plantar fascia release and resolved spraining injury of the right ankle. He used the A.M.A., *Guides* (5th ed. 2001) to determine that the maximum impairment for sensory loss of the medial plantar nerve was five percent. Dr. Harris noted that appellant had a Grade 3 pain/decreased sensation, which interfered with some activity, (60 percent) resulting in a total 3 percent impairment for pain which interfered with function. The three percent impairment rating of Dr. Harris was based on a review of Dr. Sherman's report and is consistent with the A.M.A., *Guides* (5th ed. 2001). The January 22, 2003 report of appellant's treating physician, Dr. Marram, in which he opined that appellant had lost 25 percent of his work capacity, is of diminished probative value because Dr. Marram did not explain how he used the A.M.A., *Guides* (5th ed. 2001).⁴

By letter dated May 15, 2003, appellant requested reconsideration of the Office's decision and submitted an additional medical report from Dr. Marram dated May 12, 2003. In

¹ 5 U.S.C. § 8107 *et seq.*

² 20 C.F.R. § 10.404.

³ *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁴ *See Paul R. Evans*, 44 ECAB 646, 651 (1993).

his report, Dr. Marram stated that the physical examination as of January 22, 2003 demonstrated a tenderness at the plantar aspect of the right heel and appellant's gait pattern demonstrated an antalgic gait due to applying less weight to his right foot. He diagnosed chronic plantar fasciitis of the right foot. Dr. Marram stated that he rated appellant's foot disability to be approximately 25 percent.

By decision dated May 29, 2003, the Office denied appellant's request for reconsideration.

The Board finds that the Office properly refused to reopen appellant's claim for merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁵ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).⁶

In this case, the additional evidence appellant submitted consisted of Dr. Marram's May 12, 2003 report, in which he stated that appellant's foot disability was approximately 25 percent. Dr. Marram's opinion is duplicative of his January 22, 2003 report that appellant lost 25 percent of his work capacity which was previously considered. Appellant, therefore, did not submit relevant and pertinent new evidence not previously considered by the Office nor did he meet the other criteria for reopening his claim for a review of the merits. The Office therefore properly denied appellant's request for reconsideration.

⁵ Section 10.606(b)(2)(i-iii).

⁶ Section 10.608(a).

The May 29 and April 23, 2003 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 4, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member