United States Department of Labor
Employees' Compensation Appeals Board

JOSEPH GERMINARO, Appellant	)	
and	)	**Docket No. 05-391**
	)	**Issued: May 17, 2005**
DEPARTMENT OF THE NAVY, COMMANDER NAVAL TRAINING CENTER, Great Lakes, IL, Employer	)	

Appearances:
Jeffrey Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On December 1, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decision dated December 12, 2003. 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 on appeal is whether appellant sustained more than a 14 percent permanent impairment of the right lower extremity.

FACTUAL HISTORY

On November 6, 2000 appellant, then a 54-year-old roofing foreman, filed a traumatic injury claim alleging that on November 4, 2000 he sustained injuries to his right and left heels when he tripped over a roll of "ice shield" and fell approximately 20 feet in the performance of

duty.[1] Appellant stopped work on November 4, 2000. The Office accepted appellant's claim for right calcaneus fracture with reduction on November 28, 2000,[2] left ankle strain, and expanded the claim to include right post-traumatic subtalar arthritis and a right subtalar fusion on October 8, 2002. Appellant received appropriate benefits.

On January 14, 2003 appellant filed a claim for a schedule award.

By letter dated February 6, 2000, the Office requested that Dr. Robert C. Seipel, a Board-certified orthopedic surgeon and appellant's treating physician, determine the extent of permanent impairment of the right lower extremity.

In a February 14, 2003 report, Dr. Seipel indicated that appellant was four months post right subtalar fusion and post-traumatic arthritis after an open reduction internal fixation of an intra-articular calcaneus fracture. Dr. Seipel advised that appellant still had discomfort, especially if he was on his feet for a long period of time, mainly in the lateral midtarsal region. He explained that appellant related that, if he was on his feet for up to four hours a day, he would have significant discomfort the next day. Dr. Seipel also noted that appellant had a flare-up of metatarsophalangeal (MTP) joint arthritis of the right foot, which he had been documenting throughout the course of his treatment. He noted that appellant had also tried a University of California Berkeley Laboratory (UCBL) insert, which gave him support but did not relieve the pain. Dr. Seipel also advised that appellant had persistent swelling at the end of the day. He conducted a physical examination and noted mild fullness and swelling through appellant's hind foot which he advised was consistent with appellant's injury. Dr. Seipel also noted tenderness over the calcaneocuboid joint, limited ankle range of motion, 5 degrees of dorsiflexion and 30 degrees of plantar flexion, with minimal inversion/eversion secondary to the subtalar fusion. He indicated that appellant had a UCBL brace in his shoe, and had strength of 5/5 of the tibialis anterior. Dr. Seipel indicated that gastroc-soleus, peroneals, and posterior tib were within the limited range. He noted that previous x-rays showed consolidation of the subtalar joint, with degenerative changes and incongruity at the calcaneocuboid joint and diagnosed subtalar fusion, post-traumatic arthritis and calcaneus fracture.

In a report dated June 17, 2003, Dr. Seipel referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001), (A.M.A., *Guides*) and provided the measurements for an impairment rating for appellant's right ankle. Regarding appellant's ankle pain, the physician advised that appellant had moderate pain in the lateral mid-talar area and could not tolerate four hours a day on his feet. He indicated that there was no sensory loss. Regarding range of motion, for the subtalar joint compared to the opposite ankle, he indicated that appellant had 5 degrees as opposed to 25 degrees with normal being 20 degrees. Regarding plantar flexion, he advised that appellant had 30 degrees as opposed to 45 degrees, with normal being 40 degrees. Regarding inversion, Dr. Seipel indicated that appellant had zero degrees as opposed to 35 degrees with normal being 30 degrees, and eversion was 0 degrees as opposed to 30 degrees with normal being 20 degrees. He indicated that appellant had subtalar

[1] The record reflects a prior claim for a contusion to the knee on September 3, 1999. Claim No. 100491110. (See case management sheet. It does not specify which knee.)

[2] Physical therapy was also authorized if needed.

fusion, no atrophy or weakness of the lower extremity and flare ups of the great toe in the MJP joint and arthritis pain, with maximum medical improvement on February14, 2003.

In an October 27, 2003 report, the Office medical adviser noted appellant's history of injury and treatment, which included a right ankle calcaneal fracture with subsequent right post-traumatic subtalar arthritis. He also explained that appellant underwent a procedure for an open reduction and internal fixation of the comminuted intra-articular calcaneal fracture, and developed subtalar post-traumatic arthritis, and subtalar fusion on October 10, 2002. The Office medical adviser reviewed Dr. Seipel's reports and utilized the A.M.A., *Guides*. He stated that appellant's range of motion revealed dorsiflexion of five degrees, which was equivalent to four percent pursuant to Table 17-11.[3] Regarding plantar flexion of 30 degrees, he advised that this was equivalent to 0 percent.[4] Regarding inversion of zero degrees, he referred to Table 17-12[5] and advised that this was equivalent to five percent and that and eversion of zero degrees was equivalent to two percent. The Office medical adviser determined that these figures were equivalent to 11 percent. Further, he explained that appellant was entitled to a three percent right lower extremity impairment based upon a grade of three for pain in the distribution of the lateral plantar nerve to his right foot according to Tables 16-10 and 17-37.[6] The Office medical adviser referred to the Combined Values Chart[7] to combine the 3 percent foot impairment for loss of sensation and pain with the 11 percent for range of motion to yield a rating of 14 percent to the right lower extremity and opined that appellant reached maximum medical improvement on February 14, 2003.

By decision dated December 12, 2003, the Office granted appellant a schedule award for a total of 40.32 weeks of compensation for a 14 percent permanent impairment of the right lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[8] and its implementing regulation[9] sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage 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

[3] A..M.A., *Guides* 537.

[4] *Id.*

[5] *Id*. at 537.

[6] *Id*. at 482, Table 16-10; 552, Table 17-37.

[7] *Id*. at 604.

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

uniform standards applicable to all appellants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[10]

ANALYSIS

In support of his claim for a schedule award, appellant submitted the reports of Dr. Seipel, his treating physician dated February 14 and June 17, 2003. In a February 14, 2003 report, Dr. Seipel advised that appellant was four months post right subtalar fusion and post-traumatic arthritis after an open reduction internal fixation of an intra-articular calcaneus fracture and still had discomfort, in the lateral midtarsal region, depending upon the amount of time appellant was on his feet. Dr. Seipel diagnosed subtalar fusion, post-traumatic arthritis and calcaneus fracture. In his June 17, 2003 report, Dr. Seipel utilized the A.M.A., *Guides* and provided the measurements for an impairment rating to the right ankle and indicated that appellant reached maximum medical improvement on February 14, 2003. However, he did not provide a specific figure for an impairment rating.

In an October 27, 2003 report, the Office medical adviser reviewed Dr. Seipel's reports, and utilized the A.M.A., *Guides*. He noted that appellant's range of motion revealed dorsiflexion of 5 degrees, and extrapolated this figure to derive at a 4 percent impairment pursuant to Table 17-11.[11] Regarding plantar flexion of 30 degrees, he referred to Table 17-11 and determined that this figure was equivalent to 0 percent.[12] Regarding inversion of zero degrees, he referred to Table 17-12[13] and determined that this was equivalent to five percent and that eversion of zero degrees was equivalent to two percent. The Office medical adviser determined that these figures would be totaled to equate to 11 percent for loss of range of motion. Further, he explained that appellant was also entitled to a three percent right lower extremity impairment based upon a grade of three for pain in the distribution of the lateral plantar nerve to his right foot according to Tables 16-10 and 17-37.[14] The Board notes that this would comport with the A.M.A., *Guides*, as a grade of 3 for pain would warrant a sensory deficit multiplier with a range of 26 to 60 percent. The Board also notes that, if the maximum multiplier of 60 percent is multiplied by 5, which is the figure for the lateral plantar nerve, as indicated in Table 17-37,[15] this would warrant the 3 percent for pain. The Office medical adviser subsequently referred to the Combined Values Chart[16] and combined the 3 percent foot impairment for loss of sensation and pain with the 11 percent for range of motion to yield a rating of 14 percent to the right lower extremity and opined that appellant reached maximum medical improvement on February 14, 2003.

[10] *Id.*

[11] *Id*. at 537.

[12] *Id.*

[13] *Id*. at 537.

[14] *Id*. at 482, Table 16-10; *Id*. at 552, Table 17-37.

[15] *Id*. at 552, Table 17-37.

[16] *Id*. at 604.

The Board finds that there is no other medical evidence of record, based upon a correct application of the A.M.A., *Guides*, to establish that appellant has more than a 14 percent permanent impairment of the right lower extremity, for which he received a schedule award. Accordingly, the Board finds that the Office followed standardized procedures for determining the extent of appellant's permanent impairment.

CONCLUSION

The Board finds that appellant sustained no more than a 14 percent permanent impairment of the right lower extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 12, 2003 is affirmed.

Issued: May 17, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member