

Dr. David Weiss, an osteopath, nor the Office medical adviser provided a probative medical report on the issue of the extent of his impairment in accordance with the America Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). The Board remanded the case for further development and an appropriate decision. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On remand, the Office medical adviser again reviewed the January 29, 2001 report from Dr. Weiss. Citing the A.M.A., *Guides*, the Office medical adviser found that appellant had a 7 percent impairment due to dorsiflexion of 0 to 5/15 degrees and no impairment due to plantar flexion of 0 to 55/55 degrees and eversion of 0 to 20/20 degrees.² He further determined that he was entitled to an additional three percent impairment due to pain according to Figure 18-1 on pages 576 of the A.M.A., *Guides*. The Office medical adviser explained that Dr. Weiss described in detail appellant's pain, including problems which occurred due to changes in the weather. He concluded that the pain increased the burden of appellant's condition. The Office medical adviser added the 3 percent for pain and the 7 percent due to loss of range of motion to find a total right lower extremity impairment of 10 percent.

By decision dated February 7, 2005, the Office found that appellant was not entitled to an increased schedule award as he had no more than a 16 percent lower extremity impairment previously awarded.

On February 10, 2005 appellant, through counsel, requested an oral hearing. At the hearing, held on November 30, 2005 counsel contended that appellant was entitled to an impairment award for loss of motor strength and pain rather than loss of range of motion and pain because that would provide the most favorable award. The hearing representative held the record open for 30 days as requested for the submission of additional medical evidence; however, no further evidence was submitted.

By decision dated February 16, 2006, the Office hearing representative affirmed the February 7, 2005 decision after finding that the evidence showed that appellant had no more than a 16 percent right lower extremity impairment.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing federal regulation,⁴ sets 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 for all claimants, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard

² A.M.A., *Guides* 537, Tables 17-11, 17-12.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

applicable to all claimants.⁵ Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.⁶

The A.M.A., *Guides* states that manual muscle testing depends on the examinee's cooperation and is subject to his or her conscious and unconscious control. To be valid, the results should be concordant with other observable pathologic signs and medical evidence.⁷ The A.M.A., *Guides* further requires that measurements be made by one or two observers and if made by one observer that the measurements should be consistent on different occasions.⁸

ANALYSIS

The Board remanded the case for the Office to obtain a rationalized medical report addressing the extent of appellant's lower extremity impairment in conformance with the A.M.A., *Guides*. On December 29, 2004 the Office medical adviser again reviewed the January 29, 2001 report of Dr. Weiss. He properly determined that 0 to 5/15 degrees of dorsiflexion constituted a 7 percent impairment.⁹ The Office medical adviser further properly found that 0 to 55/55 degrees of plantar flexion and 0 to 20/20 degrees of eversion constituted no impairment.¹⁰ He noted that he could not combine findings of atrophy and loss of range of motion.¹¹ The Office medical adviser explained that Dr. Weiss described appellant's complaints of pain, particularly with changes in the weather. He found that pain slightly increased the burden on appellant which constituted an additional three percent impairment due to pain according to Table 18-1 on page 574 of the A.M.A., *Guides*. The Office medical adviser added the 3 percent impairment due to pain and the 7 percent impairment due to loss of range of motion for a total right lower extremity impairment of 10 percent. As this is less than the 16 percent previously awarded to appellant the Office properly found that he was not entitled to an increased schedule award.

On appeal, counsel contends that the report of Dr. Weiss conforms to the A.M.A., *Guides* and creates a conflict with the Office medical adviser. As previously determined by the Board, however, Dr. Weiss improperly combined the 7 percent impairment due to loss of range of motion with a 17 percent impairment due to loss of plantar flexion muscle strength.¹² Table 17-2 of the A.M.A., *Guides* precludes utilizing muscle strength and range of motion in determining

⁵ 20 C.F.R. § 10.404(a).

⁶ See FECA Bulletin No. 01-5, issued January 29, 2001.

⁷ A.M.A., *Guides* 531.

⁸ *Id.*

⁹ *Id.* at 537, Table 17-11.

¹⁰ *Id.* at 537, Tables 17-11, 17-12. Dr. Weiss additionally measured inversion of 0 to 35/35 degrees, which constitutes no impairment. *Id.* at 537, Table 17-12.

¹¹ *Id.* at 526.

¹² See Philip A. Norulak, *supra* note 1.

the extent of a lower extremity impairment.¹³ Thus, his opinion did not conform to the A.M.A., *Guides*.

Counsel additionally argues that the Office should have based its schedule award on Dr. Weiss' finding that appellant had a 17 percent impairment due to loss of muscle strength of plantar flexion according to Table 17-8 on page 532 of the A.M.A., *Guides* as it is more favorable to appellant than the impairment for loss of range of motion. The A.M.A., *Guides*, however, provide that strength measurements are functional tests influenced by subjective factors that are difficult to control; consequently, the A.M.A., *Guides* does not assign a large role to such measurements.¹⁴ The manual muscle testing for the lower extremities requires that the results be concordant with other observable pathologic signs and medical evidence; if the measurements are made by one examiner, they should be consistent on different occasions.¹⁵ Dr. Weiss did not indicate that he performed manual muscle testing on more than one occasion or discuss the physical findings supporting muscle weakness. The Office medical adviser, consequently, properly relied on range of motion measurements rather than muscle weakness in reaching his impairment determination.

CONCLUSION

The Board finds that appellant has no more than a 16 percent impairment of the right lower extremity for which he received a schedule award.

¹³ A.M.A., *Guides* 526, Table 17-2.

¹⁴ *Id.* at 507.

¹⁵ *Id.* at 531.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 16, 2006 is affirmed.

Issued: December 28, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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