

He indicated that appellant had prominence at the medial aspect of the first metatarsal head and abduction of the hallux towards the second digit. The Office accepted that appellant sustained an aggravation of a right bunion and paid compensation for periods of disability. On July 21, 2005 he underwent bunion surgery, which was authorized by the Office.

On February 21, 2006 appellant filed a claim for a schedule award due to his accepted injury. In an undated report received by the Office on May 11, 2006, Dr. Gardner determined that appellant reached maximum medical improvement on May 4, 2006 and concluded that he had a one percent permanent impairment of his whole person based on limited right toe motion. He indicated that extension of appellant's first metatarsophalangeal joint was limited to 45 to 50 degrees while flexion of the joint was close to 0 degrees. Dr. Gardner stated that appellant demonstrated mild tenderness with palpation of the plantar aspect of the first metatarsal head and lesser metatarsals and that he reported that he had periodic pain in his foot while performing his normal job duties. In reaching his impairment rating, Dr. Gardner made reference to Table 17-14 on page 537 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).¹

On June 7, 2006 the Office district medical adviser reviewed the medical record, including the reports of Dr. Gardner and determined that appellant had a three percent permanent impairment of his right foot based on the limited motion of his right big toe.

By decision dated July 14, 2006, the Office granted appellant a schedule award for a three percent permanent impairment of his right foot. The schedule award ran for 6.15 weeks from May 4 to June 16, 2006.² The award noted that appellant's gross weekly pay rate was \$673.40 (\$897.87 multiplied by the $\frac{3}{4}$ rate for claimants with dependents) and the total of the award was \$2,693.61.

Appellant requested a hearing before an Office hearing representative. At the December 18, 2006 hearing, he asserted that the schedule award was not adequate to compensate him for his years of foot pain. He indicated that he continued to receive disability compensation for his accepted injury.³ On December 30, 2006 Dr. Gardner indicated that appellant was "entitled to more than three percent disability" because he walked essentially all the time in his job.

¹ In an undated report received by the Office on April 6, 2006, Dr. Gardner indicated that appellant was close to maximum medical improvement.

² The schedule award indicated that it was being awarded for the right leg but the number of weeks of the award shows that it was awarded for the right foot. Multiplying three percent times 205 weeks, the number of weeks for total loss of the foot, equals 6.15 weeks, *i.e.*, the number of weeks of compensation granted by the schedule award. The number of weeks for total loss of the leg is 288. *See* 5 U.S.C. § 8107(2), (4).

³ In an August 2, 2006 letter, appellant asserted that multiplying 6.15 weeks times his gross weekly pay of \$673.40 equaled more than \$2,693.61, the total schedule award compensation he received.

In a December 20, 2006 notice, the Office advised appellant of its preliminary determination that he received a \$16,161.00 overpayment of compensation due to receiving six schedule award payments after the schedule award payment period had ended.⁴

In a decision dated and finalized February 8, 2007, the Office hearing representative affirmed the Office's July 14, 2006 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulation⁶ 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.⁷

ANALYSIS

The Office accepted that appellant sustained an aggravation of a right bunion. By decision dated July 14, 2006, the Office granted appellant a schedule award for a three percent permanent impairment of his right foot.

On June 7, 2006 the district medical adviser reviewed the medical record, including the reports of Dr. Gardner, an attending podiatrist, and properly determined that appellant had a three percent permanent impairment of his right foot based on the limited motion of his right great toe. The district medical adviser correctly applied Table 17-14 on page 537 of the A.M.A., *Guides* to find that the limited extension of the metatarsophalangeal joint of appellant's right great toe warranted such a rating.⁸

In an undated report received by the Office on May 11, 2006, Dr. Gardner concluded that appellant had a one percent permanent impairment of his whole person based on limited right toe motion. However, a schedule award is not payable under section 8107 of the Act for an impairment of the whole person.⁹ On December 30, 2006 Dr. Gardner indicated that appellant

⁴ The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment. This overpayment issue is not currently before the Board as the record does not contain a final decision of the Office concerning this matter. *See* 20 C.F.R. § 501.2(c).

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

⁷ *Id.*

⁸ A.M.A., *Guides* 537, Table 17-14.

⁹ *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

was “entitled to more than three percent disability” because he walked essentially all the time in his job, but he did not provide a new impairment rating under the standards of the A.M.A., *Guides*. As the report of the district medical adviser provided the only evaluation which conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.¹⁰

For these reasons, appellant did not meet his burden of proof to establish that he has more than a three percent permanent impairment of his right foot, for which he received a schedule award. However, the Board notes that it appears that the total amount of schedule award compensation that appellant received is incorrect. Appellant received \$2,693.61 in compensation, but multiplying his gross weekly pay (\$673.40) times the 6.15 weeks of the award yields the figure \$4,141.41.¹¹

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a three percent permanent impairment of his right foot, for which he received a schedule award. The Board further finds that the total amount of appellant’s schedule award appears to be \$4,141.41 rather than \$2,693.61.

¹⁰ See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

¹¹ The Board notes that the figure \$2,693.61 appears to have been derived by multiplying \$673.40 times four.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 8, 2007 and July 14, 2006 decisions are affirmed, as modified, to reflect that appellant has not shown that he has more than a three percent impairment of his right foot.

Issued: September 6, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board