

¹ Docket No. 06-155 (issued August 28, 2006).

appellant had more than 14 percent impairment to her right foot. The Board noted that a conflict remained unresolved, as Dr. James Nutt, a Board-certified orthopedic surgeon and impartial medical examiner, failed to clarify whether appellant had an impairment of the foot or her lower extremity. The Board directed the Office to secure a supplemental report from Dr. Nutt to correct the defect in his original opinion. The facts and the history contained in the prior appeal are incorporated by reference. The facts, history and analysis germane to the present issue have been reiterated.

By letter dated September 27, 2006, the Office requested that Dr. Nutt, clarify his opinion with regard to whether appellant sustained impairment to her foot or lower extremity.

In a September 28, 2006 report, Dr. Nutt opined that appellant's injury could be evaluated utilizing Table 17-31.² This resulted in a "4 percent impairment of the whole person or a 10 percent impairment of the lower extremity or a 14 percent impairment of the foot from the calcaneo-cuboid joint."

By decision dated January 11, 2007, the Office found that the medical evidence did not support an increased schedule award. The Office found that Dr. Nutt had clarified his opinion that appellant was entitled to either 10 percent impairment of the lower extremity or 14 percent impairment to the foot. The Office indicated that the number of compensation days payable was essentially the same. The Office indicated that appellant would be entitled to payment for 200.90 days for 14 percent to the foot or 201.60 days for 10 percent of the right leg. The Office found that the evidence did not support an increase in impairment for which appellant had been compensated.

By letter dated January 17, 2007, appellant's representative requested a hearing, which was held on April 2, 2007.

At the hearing, appellant's representative alleged that the report of the impartial medical examiner was inadequate as the reference utilized by Dr. Nutt related to whole person impairment. He also alleged that a second clarification was not allowed and a new impartial medical examiner should be obtained.

By decision dated June 19, 2007, the Office hearing representative affirmed the January 11, 2007 decision. The Office hearing representative found that the report of Dr. Nutt addressed the conflict as specified by the Board and that the Office properly denied an increase in the schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulations⁴ set forth the number of weeks of compensation payable to employees

² A.M.A., *Guides* 544.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

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 appellants, good administrative practice necessitates the use of a single set of tables so that there may be 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.⁵

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.⁶ However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.⁷

ANALYSIS

The Office determined that a conflict in medical opinion was created between Dr. Weiss, appellant's physician, who found that appellant had 27 percent impairment to the right lower extremity, and Dr. Whittaker, who determined that appellant had no more than 10 percent impairment of the right lower extremity. The Office referred appellant to Dr. Nutt, a Board-certified orthopedic surgeon and impartial medical examiner, to resolve the conflict. On the prior appeal, the Board directed that the Office request clarification from Dr. Nutt with regard to appellant's impairment.

Section 8123(a) of the Act⁸ provides, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁹ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁰

⁵ A.M.A., *Guides* (5th ed. 2001).

⁶ See *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

⁷ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000); see also *Paul A. Toms*, 28 ECAB 403 (1987).

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Id.* at 8123(a).

¹⁰ *Barbara J. Warren*, 51 ECAB 413 (2000).

In a September 28, 2006 report, Dr. Nutt opined that appellant's injury could be evaluated utilizing Table 17-31.¹¹ Under that table, a claimant with impairment to the calcaneo-cuboid could receive either "4 percent impairment of the whole person or 10 percent impairment of the lower extremity or 14 percent impairment of the foot from the calcaneo-cuboid joint." The Board notes that Table 17-31 provides the option of choosing any of these percentages. In applying Dr. Nutt's findings to the A.M.A., *Guides*, the Office's medical adviser expressed appellant's impairment as impairment to the lower extremity. The Board has held that where the residuals of an injury to a scheduled member of the body extend into an adjoining area of a member also enumerated in the schedule, such as an injury of a finger into a hand, or a hand into the arm, or of a foot into the leg, the schedule award should be made on the basis of the percentage loss of use of the larger member.¹² Thus, appellant's impairment is more properly expressed in terms of impairment to the right leg and this is consistent with Dr. Nutt's opinion.

The Board finds that Dr. Nutt provided a well-rationalized report based on a proper factual background and explaining his application of Table 17-31. His opinion is entitled to the special weight accorded an impartial medical examiner. Dr. Nutt's report, therefore, constitutes the weight of the medical opinion evidence and establishes that appellant has no more than 10 percent impairment of the right leg.

While the difference between calculating impairment as being attributable to the leg or to the foot is minimal, there is a slight difference. According to 5 U.S.C. § 8107(c)(2), the compensation for total loss of a leg is equal to 288 weeks. Whereas under 5 U.S.C. § 8107(c)(4) the compensation for total loss of a foot is equivalent to 205 weeks. As appellant has 10 percent impairment of the leg, he is entitled to 28.8 weeks of compensation. If he had 14 percent impairment of the foot, he would be entitled to 28.7 weeks of compensation. Appellant is entitled to an additional .1 (one tenth) week in addition to the 28.7 weeks he has already received for the impairment to his right foot.¹³ There is no other medical evidence, conforming with the A.M.A., *Guides* that establishes any greater impairment. The Board finds that the medical evidence establishes that appellant has 10 percent right lower extremity impairment. Therefore, appellant's award is modified to reflect that appellant is entitled to an award of 10 percent to the right lower extremity.

On appeal, appellant's representative alleged that appellant was entitled to greater impairment than the amount awarded and that the weight of the medical evidence should not rest with the impartial medical examiner, as his report was insufficient to resolve the medical conflict. However, Dr. Nutt clarified the nature of his rating of appellant's lower extremity in conformance with the A.M.A., *Guides*. His report is sufficient to resolve the medical conflict. Subsequent to Dr. Nutt's report, appellant did not submit any medical evidence, conforming with the A.M.A., *Guides*, to support a greater impairment.¹⁴

¹¹ *Supra* note 2.

¹² *Charles B. Carey*, 49 ECAB 528 (1998).

¹³ 28.8 minus 28.7=.10

¹⁴ Appellant is not precluded from submitting relevant medical evidence to the Office in support of a request for an additional schedule award.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained more than a 10 percent impairment of the right lower extremity for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 19, 2007 is affirmed, as modified.

Issued: May 23, 2008
Washington, DC

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

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

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