

**United States Department of Labor
Employees' Compensation Appeals Board**

W.F., Appellant

and

**U.S. CAPITOL POLICE, Washington, DC,
Employer**

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**Docket No. 09-1358
Issued: January 22, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 1, 2009 appellant filed a timely appeal from a March 30, 2009 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the schedule award claim.

ISSUE

The issue is whether appellant has more than two percent right lower extremity impairment, for which he received a schedule award.

FACTUAL HISTORY

On March 6, 2001 appellant, then a 34-year-old police officer, twisted his right ankle while in the performance of his federal duties. He stopped work on March 7, 2001. The Office accepted the claim for right ankle severe sprain and lateral instability. It paid appropriate compensation benefits and authorized a lateral ankle stabilization procedure, which appellant underwent on April 3, 2001. Appellant returned to full duty on August 8, 2001. The employing establishment advised that he worked a 40-hour-per-week schedule at \$45,403.00 plus a night differential of \$2.18 per hour for 5 hours a day from the date of injury. On February 2, 2002

appellant resigned from the employing establishment. On March 10, 2006 he also sprained his left ankle while boxing on a wrestling mat.

On April 15, 2008 appellant filed a claim for a schedule award. In a February 27, 2008 report, Dr. Edward G. Alexander, Jr., a Board-certified orthopedic surgeon, noted the history of both ankle injuries and appellant's medical treatment. He diagnosed status post lateral ligament reconstruction in both ankles with residual pain and slight loss of inversion/eversion. Examination of the right foot revealed 15 degrees ankle dorsiflexion, 50 degrees plantar flexion, 30 degrees inversion and 5 degrees eversion. No gait derangement was noted and appellant exhibited full strength in both ankles with no sensory deficit. Tenderness over the healed scars of both lateral ankles were noted with no major swelling. Dr. Alexander opined that appellant reached maximum medical improvement. Utilizing the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),¹ he opined that appellant had three percent impairment of the right lower extremity. Dr. Alexander advised that there was no impairment for gait derangement or motor function under Tables 17-5 and 17-7, pages 529, 531, respectively. Under Table 17-12, page 537 he opined that appellant had two percent inversion/eversion. Dr. Alexander also added one percent impairment for pain.

In a February 23, 2009 report, an Office medical adviser reviewed the medical evidence of record and opined that appellant had two percent right leg impairment under the A.M.A., *Guides*. Using Dr. Alexander's February 27, 2008 examination findings and citing to appropriate tables within the A.M.A., *Guides*, he stated 15 degrees of extension, and 50 degrees plantar flexion; and 30 degrees inversion at the hind foot resulted in no impairment 5 degrees eversion at the hind foot represented two percent impairment. The medical adviser opined that the date of maximum medical improvement for the right leg was April 3, 2002.

By decision dated March 30, 2009, the Office granted appellant a schedule award for two percent right lower extremity impairment. The award covered the period April 3 to May 13, 2002 for a total 5.7 weeks of compensation or \$4,008.18. The effective date of pay rate was March 6, 2001 (date of injury). Appellant's weekly pay of \$927.82 was multiplied by the augmented 75 percent compensation rate to equal \$695.86.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulations³ 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. The Act, however, 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

¹ A.M.A., *Guides* (5th ed. 2001).

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.404.

uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁴

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.⁵

ANALYSIS

Appellant's claim was accepted for injury to his right ankle. In support of his claim for a schedule award, he submitted the report of Dr. Alexander who rated appellant's right leg impairment at three percent. Dr. Alexander advised there was no impairment for gait derangement under Table 17-5, page 529 or motor function under Table 17-7, page 531. Under Table 17-12, page 537, he found two percent impairment for inversion/eversion.⁶ To this impairment, Dr. Alexander added one percent impairment for pain. However, he did not explain how his pain impairment rating was made pursuant to any specific provision in the A.M.A., *Guides*. The Board has held that the impairment ratings in the body organ system chapters of the A.M.A., *Guides* make allowance for any accompanying pain.⁷ Consequently, Dr. Alexander's opinion is of diminished probative value with regard to his rating for pain.⁸

The Office medical adviser reviewed Dr. Alexander's report and agreed with him that appellant had two percent impairment under Table 17-12, page 537, for eversion of the right foot. He noted the ranges of motion found by Dr. Alexander on examination and found, as did Dr. Alexander, that such ranges of motion did not yield any impairment except for the eversion finding. The Office medical adviser found no other basis on which to attribute any permanent impairment of the right leg pursuant to the A.M.A., *Guides*.

The Board finds that the medical evidence of record establishes no greater than two percent impairment of the right lower extremity for which appellant was granted a schedule award.

On appeal, appellant's attorney questioned whether appellant was paid under the proper pay rate. Monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly pay.⁹ Under section 5 U.S.C. § 8101(4), monthly pay means the monthly pay at the time of injury, or the monthly pay at the time disability begins or the monthly

⁴ *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

⁶ Using Dr. Alexander's figures, the Board notes 30 degrees inversion results in zero percent impairment and 5 degrees eversion results in two percent impairment under Table 17-12, page 537.

⁷ *C.J.*, 60 ECAB ____ (Docket No. 08-2429, issued August 3, 2009).

⁸ See *Linda Beale*, 57 ECAB 429 (2006) (an attending physician's opinion is of diminished probative value where it fails to provide an estimate of impairment conforming to the A.M.A., *Guides*).

⁹ See 5 U.S.C. §§ 8105, 8106, 8107.

pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater. The Office granted appellant a schedule award for two percent impairment of the right lower extremity on March 30, 2009 based on a weekly pay rate of \$927.82. The effective date of pay rate was March 6, 2001, the date of injury, which is essentially the same time that disability began, March 7, 2001. In these circumstances, basing the pay rate on the date of injury was proper as there was no recurrence of disability. The employing establishment advised on the date of injury appellant worked a 40-hour-per-week schedule at \$45,403.00 a year plus a night differential of \$2.18 per hour for 5 hours a day. This results in a weekly pay rate of \$942.82. The Office then properly multiplied the weekly pay rate of \$927.63 by 75 percent augmented compensation rate to arrive at \$695.86 weekly pay.¹⁰

CONCLUSION

The Board finds that appellant has no greater than two percent impairment to his right lower extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 22, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁰ Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).