

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

T.R., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, San Diego, CA, Employer**

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**Docket No. 10-1781
Issued: April 8, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 23, 2010 appellant filed a timely appeal from a June 8, 2010 merit decision of the Office of Workers' Compensation Programs. 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 is whether appellant has more than a 28 percent left leg permanent impairment.

FACTUAL HISTORY

On February 4, 2008 appellant, then a 52-year-old nurse, filed a traumatic injury claim (form CA-1) alleging that she sustained a left ankle fracture in the performance of duty on February 1, 2008. She underwent left ankle surgery on February 2, 2008. The Office accepted the claim for left closed bimalleolar ankle fracture and open fracture left ankle.

In a report dated February 25, 2009, Dr. Lindy O'Leary, an occupational medicine specialist, provided results on examination. He opined that under the fifth edition of the

American Medical Association, *Guides to the Evaluation of Permanent Impairment* appellant had a 20 percent whole person impairment. The rating included impairments for atrophy, arthritis and loss of motion.

The Office referred the medical evidence to an Office medical adviser for review. In a report dated March 22, 2009, the medical adviser opined that appellant had a 24 percent left leg impairment due to cartilage space narrowing, pursuant to Table 17-31. He found the date of maximum medical improvement was February 25, 2009.

By decision dated April 2, 2009, the Office issued a schedule award for a 24 percent left leg permanent impairment. The period of the award was 69.12 weeks of compensation commencing February 25, 2009.

Appellant requested a review of the written record. She submitted an April 10, 2009 report from Dr. O'Leary, who stated that he disagreed with the Office medical adviser and reiterated his opinion that appellant had a 20 percent whole person impairment.

By decision dated July 13, 2009, an Office hearing representative remanded the case for further development. The hearing representative found a conflict existed under 5 U.S.C. § 8123(a), and the case was remanded for resolution of the conflict.

The Office referred appellant to Dr. James Tasto, a Board-certified orthopedic surgeon selected as a referee physician. In a report dated December 10, 2009, Dr. Tasto found appellant had a 39 percent left leg impairment under the fifth edition of the A.M.A., *Guides*. The Office requested that Dr. Tasto provide an opinion under the sixth edition of the A.M.A., *Guides*.

In a report dated January 12, 2010, Dr. Tasto, utilizing the sixth edition, identified Table 16-2, and found appellant had a 22 percent impairment for a healed bimalleolar ankle fracture. He indicated that no adjustments were warranted from the default value of 22 percent. Dr. Tasto also indicated there was joint space narrowing for the talonavicular joint, for a Class 1 problem with a default value of 10 percent. He reduced the default value to eight percent, noting that both history and physical examination would be -1 modifications to the default value. Combining the 22 percent and 8 percent under the Combined Values Chart, Dr. Tasto found appellant had a 28 percent left leg impairment.

By decision dated February 17, 2010, the Office awarded appellant an additional four percent left leg permanent impairment. The period of the award was 11.52 weeks commencing at the end of the prior award.

Appellant again requested a review of the written record. By decision dated April 20, 2010, an Office hearing representative remanded the case, finding that an Office medical adviser should have reviewed the file.

In a report dated May 28, 2010, the Office medical adviser concurred that the left leg impairment was 28 percent under the sixth edition of the A.M.A., *Guides*. The medical adviser opined that appellant had a 22 percent leg impairment under Table 16-2 for residual problems from the open reduction internal fixation of a bimalleolar ankle fracture with documented loss of motion, and an 8 percent left lower extremity impairment for residual problems with post-

traumatic arthritis with documented joint space narrowing of the talonavicular joint. The impairments were combined under the Combined Values Chart for a 28 percent left leg impairment.

By decision dated June 8, 2010, the Office issued a revised schedule award that again found appellant was entitled to a total of 28 percent impairment to the left leg.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.¹ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.² For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.

Office procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*.³ Any recalculations of previous awards which result from hearings or reconsideration decisions issued on or after May 1, 2009, should be based on the sixth edition of the A.M.A., *Guides*. A claimant who has received a schedule award calculated under a previous edition and who claims an increased award, will receive a calculation according to the sixth edition for any decision issued on or after May 1, 2009.⁴

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁵

ANALYSIS

The Office issued a schedule award for a 24 percent left leg impairment on April 2, 2009. This award was appropriately based on the fifth edition of the A.M.A., *Guides*. The June 8, 2010 decision before the Board on this appeal determined that appellant had a 28 percent permanent impairment under the sixth edition of the A.M.A., *Guides*.

¹ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

² *A. George Lampo*, 45 ECAB 441 (1994).

³ FECA Bulletin No. 09-03 (issued March 15, 2009); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010).

⁴ *Id.*

⁵ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

In the present case, the Office found that there was a conflict under 5 U.S.C. § 8123(a) between attending physician Dr. O’Leary and the Office medical adviser as to the degree of left leg permanent impairment.⁶ Dr. Tasto was selected as a referee physician and initially provided an opinion under the fifth edition of the A.M.A., *Guides*. As noted above, any decision after May 1, 2009 must be based on the sixth edition, even if the initial impairment was calculated under the fifth edition.

Dr. Tasto identified Table 16-2 in the sixth edition, which provides diagnosis-based impairments for the ankle. Once the diagnostic criteria is identified, the severity is determined and a Class of Diagnosis (CDX) identified. Table 16-2 provides a default impairment (Grade C) for the specific criteria and severity. The default value then may be adjusted based on grade modifiers for functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS). The adjustment formula is (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX).⁷ Dr. Tasto identified a Class 2 (moderate) impairment for bimalleolar ankle with moderate to severe motion deficits, which has a default (Grade C) value of a 22 percent leg impairment. The referee physician determined that no adjustment for GMFH, GMPE or GMCS was warranted under the appropriate formula.

In addition, Dr. Tasto identified arthritis in the talonavicular joint, with one millimeter cartilage interval. Under Table 16-2, the Grade C impairment is 10 percent. Dr. Tasto modified the impairment to a Grade B, or eight percent, based on the adjustment formula noted above. The impairments of 22 percent and 8 percent were then combined under the Combined Values Chart for a 28 percent left leg impairment.⁸

The Board finds that the referee physician provided a rationalized medical opinion that represents the weight of the medical evidence.⁹ He identified the appropriate tables and provided a rationalized medical opinion under the sixth edition of the A.M.A., *Guides*.

The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the leg, the maximum number of weeks of compensation is 288 weeks. Since appellant’s impairment was 28 percent, she is entitled to 28 percent of 288 weeks, or 80.64 weeks of compensation. It is well established that

⁶ The Act provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). The implementing regulations state that, if a conflict exists between the medical opinion of the employee’s physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

⁷ A result of +2 is Grade E, +1 Grade D, -1 Grade B and -2 is Grade A.

⁸ See A.M.A., *Guides* 499 (lower extremity diagnosis-based impairments are combined, rather than added, using the Combined Values Chart).

⁹ An Office medical adviser concurred with the 28 percent impairment rating. The Board notes that, when the case is referred to a referee physician, it is the referee physician who must resolve the conflict. See *Thomas J. Fragale*, 55 ECAB 619 (2004).

the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.¹⁰ In this case, the Office medical adviser concluded that the date of maximum medical improvement was February 25, 2009, the date of examination by Dr. O’Leary.

On appeal, appellant argues that her injury occurred and maximum medical improvement was established, while the fifth edition of the A.M.A., *Guides* was in use by the Office. She argues it was unfair to change to the sixth edition, which resulted in a lower impairment than would have been calculated under the fifth edition. In *Harry D. Butler*,¹¹ the Board notes that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.¹² On March 15, 2009, the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of the Office should reflect use of the sixth edition of the A.M.A., *Guides*.¹³ The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed.

CONCLUSION

The Board finds the evidence of record does not establish more than a 28 percent left leg permanent impairment.

¹⁰ *Albert Valverde*, 36 ECAB 233, 237 (1984).

¹¹ 43 ECAB 859 (1992).

¹² *Id.* at 866.

¹³ FECA Bulletin No. 90-03 (March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 8, 2010 is affirmed.

Issued: April 8, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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