

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAMILLE M. BROWN and U.S. POSTAL SERVICE,
POST OFFICE, Dayton, Ohio

*Docket No. 96-1525; Submitted on the Record;
Issued June 5, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has more than a 5 percent permanent impairment of his left foot for which he received a schedule award.

The Board has duly reviewed the case record in the present appeal and finds that the case is not in posture for decision.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order¹ on November 22, 1995 in which it set aside the January 27, 1993 decision of the Office and remanded the case to the Office for further development.² The Board indicated that the Office should evaluate whether the cumulative permanent impairment of the toes on appellant's left foot would be greater than the impairment which had been calculated in terms of his left foot under the relevant standards of the Federal Employees' Compensation Act.³ The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

An employee seeking compensation under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative, and substantial evidence,⁴ including that he sustained an injury in the performance of duty as alleged and that his disability,

¹ Docket No. 94-735 (November 22, 1995).

² By award of compensation dated January 27, 1993, the Office granted appellant a schedule award for a 5 percent permanent impairment of his left foot. The award ran for 10.25 weeks from November 9, 1992 to January 19, 1993. The Office had accepted that appellant sustained a Morton's neuroma of his left foot due to a September 12, 1990 employment injury.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

if any, was causally related to the employment injury.⁵ Section 8107(a) of the 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.⁶ 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3rd ed. rev. 1990) as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁷

After the remand of the case to the Office, an Office medical adviser determined that appellant had a five percent permanent impairment of his left foot⁸ and, by decision dated April 5, 1996, the Office found that appellant was not entitled to any additional compensation for his permanent impairment.

The Board notes that the Office medical adviser improperly neglected to evaluate whether the cumulative permanent impairment of the toes on appellant's left foot would be greater than the impairment which had been calculated in terms of his left foot. In Program Memorandum No. 134 the Office stated, "Where the cumulative allowances for the digits [of the hand or foot] is greater than the value of the percentage loss of the hand or foot, the employee should have the benefit of the more favorable award and be compensated in accordance with the scheduled allowances for the sum of the digits."⁹ Under section 8107 of the Act, the schedule award for a total loss of use of the foot runs for 205 weeks while the schedule award for the total loss of use of the great toe runs 38 weeks and the schedule award for the total loss of use of a toe other than the great toe runs 16 weeks.¹⁰ When loss of a given member is partial, compensation is granted at a proportionate rate.¹¹

Under the circumstances of the present case, it appears that a calculation of appellant's impairment based on the cumulative impairment of his left toes would result in a schedule award greater than that already received. The case should be remanded to the Office for the purpose of further evaluating the cumulative permanent impairment of the toes on appellant's left foot under

⁵ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ 5 U.S.C. § 8107(a).

⁷ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁸ The Office medical adviser evaluated findings obtained on February 28, 1996 by Dr. J. Michael Harper, a Board-certified orthopedic surgeon to whom the Office referred appellant.

⁹ Program Memorandum No. 134 (issued February 3, 1971). This procedure for computing the loss of two or more digits is also reflected in the Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4a (October 1995); see also 5 U.S.C. § 8107(c)(17); *Harold T. Nelson*, 42 ECAB 763, 767-68 (1991).

¹⁰ 5 U.S.C. § 8107(c)(4), (8), (11).

¹¹ 5 U.S.C. § 8107(c)(19).

the relevant standards of the A.M.A., *Guides*.¹² After such development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated April 5, 1996 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
June 5, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² It is appropriate to apply the standards of the revised third edition of the A.M.A., *Guides*, in that these were the standards in effect when appellant received his schedule award on January 27, 1993. See FECA Bulletin No. 91-27 (issued September 18, 1991); FECA Bulletin No. 94-4 (issued November 1, 1993).