U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MINNIE L. WININGHAM and U.S. POSTAL SERVICE, POST OFFICE, Oklahoma City, Okla.

Docket No. 96-1338; Submitted on the Record;
Issued March 18, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, A. PETER KANJORSKI

The issue is whether appellant has greater than a six percent permanent impairment of her feet bilaterally, for which she received a schedule award.

The Board finds that the evidence of record does not demonstrate that appellant has any greater than a six percent permanent impairment of her feet bilaterally.

A claimant seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative, and substantial evidence.[2] Section 8107 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.[3] Appellant, however, bears the burden of establishing that she is entitled to such a schedule award.

The schedule award provisions of the Act[4] specify the number of weeks of compensation to be paid for permanent loss of use of various members of the body. The Act does not, however, specify the manner in which the percentage loss of use of a member shall be determined. The method used in making such a determination is a matter that rests with the

---

[1] 5 U.S.C. §§ 8101-8193.

[2] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[3] 5 U.S.C. § 8107(a). It is thus the claimant's burden of establishing that she sustained a permanent impairment of a scheduled member or function as a result of her employment injury; *see Raymond E. Gwynn*, 35 ECAB 247 (1983) (addressing schedule awards for members of the body that sustained an employment-related permanent impairment); *Philip N.G. Barr*, 33 ECAB 948 (1982) (indicating that the Act provides that a schedule award be payable for a permanent impairment resulting from an employment injury).

[4] 5 U.S.C. § 8107.

sound discretion of the Office of Workers' Compensation Programs.[5] 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.[6] The Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the standard for evaluating permanent impairment for schedule award purposes, and the Board has concurred with the Office's adoption of this standard.[7]

Although the standards for evaluating the permanent impairment of an extremity under the A.M.A., *Guides* are based primarily on loss of range of motion, all factors that prevent a limb from functioning normally, including pain and loss of strength, should be considered, together with loss of motion, in evaluating the degree of permanent impairment.[8] 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*.[9] Chapter 3.2k of the A.M.A., *Guides* provides a grading scheme and procedure for determining impairment of the lower extremity due to pain, discomfort, or loss of sensation.[10] The element of pain may serve as the sole basis for determining the degree of impairment for scheduled compensation purposes.[11] In the instant case, the Office medical adviser correctly applied the Tables and procedures specified by the A.M.A., *Guides* to determine that appellant had a total of 6 percent permanent impairment of each foot, and appellant has submitted no probative evidence supporting otherwise.

In the present case, the medical evidence appellant submitted consisted of an August 25, 1992 schedule award request and a November 2, 1992 report from Dr. Robert D. Sowell, appellant's treating podiatrist, which stated that, considering appellant's tibial nerve involvement below the midcalf bilaterally, she had a 15 percent impairment for pain, a 15 percent impairment for loss of strength, and a 28 percent impairment for impaired function, for a 48 percent total impairment of each lower extremity which translated into a 38 percent whole person impairment. Dr. Sowell further noted that appellant had developed causalgia secondary to her accepted bilateral tarsal tunnel syndrome, and indicated that she manifested losses in ranges of bilateral foot motion. Appellant requested an award for a 38 percent disability impairment.

---

[5] *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

[6] *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324, 325 (1961).

[7] *Donald Mueller*, 32 ECAB 324 (1980); *Anne E. Hughes*, 27 ECAB 106 (1975); *Theodore P. Richardson*, 25 ECAB 113 (1973).

[8] *See Paul A. Toms*, 28 ECAB 403 (1987).

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

[10] American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Table 68, p.89 (Fourth Edition 1993).

[11] *Paul A. Toms*, 38 ECAB 403 (1987); *Robin L. McClain*, 38 ECAB 398 (1987).

An Office medical adviser properly applied the Third Edition, Revised, of the A.M.A., *Guides*, to Dr. Sowell's findings, graded the degree of decreased sensation or pain, found that appellant had a 15 percent impairment, multiplied it by the maximum percentage allowable for loss of function due to pain, discomfort or sensory deficit for the tibial nerve below the midcalf which was 15 percent, and calculated that appellant had a 2.25 percent impairment of each foot. He repeated this process for impairment determination for loss of function due to loss of strength, which also resulted in a 2.25 percent foot impairment bilaterally. Thereafter he combined these percentages, which resulted in a four percent impairment of each lower extremity, and appellant was granted a schedule award for this amount of impairment bilaterally.

Appellant disagreed with this award and requested a hearing which was held on February 24, 1994. At the hearing Dr. Sowell testified that he felt appellant had causalgia secondary to her tarsal tunnel syndrome, and that he felt appellant's impairment involved three areas: below the midcalf; the lateral plantar branch; and the medial plantar branch of the posterior tibial nerve. Dr. Sowell indicated that his impairment rating was for these 3 areas, and that he had calculated a combined impairment rating of 48 percent for each lower extremity.

The case was remanded for a second opinion evaluation, together with a statement of accepted facts and questions to be addressed, which was performed by Dr. L Phillip Carter, a Board-certified neurosurgeon, on October 3, 1994. Dr. Carter was instructed to determine the extent of appellant's bilateral lower extremity impairment related only to the accepted condition of tarsal tunnel syndrome, and to opine whether appellant had secondary causalgia. By report dated October 24, 1994, Dr. Carter noted his examination results and opined that appellant had no limitation of motion or weakness bilaterally but did have some loss of sensation of the medial plantar aspect of the foot on the right side. He opined that there was no evidence of causalgia, no spinal root involvement, and that appellant had no evidence of impairment above her ankles which would exclude any impairment of her legs, areas which had been included by Dr. Sowell. Dr. Carter calculated that appellant had a 5 percent impairment of each foot.

The Office medical adviser referred to Dr. Carter's findings and, using the Fourth Edition of the A.M.A., *Guides*, Table 68, p. 89 and Table 11, p.48, indicated that the nerve affected was the medial plantar branch of the tibial nerve, opined that appellant demonstrated a medial plantar nerve sensory deficit of 7 percent and a dysesthesia impairment of 7 percent, determined that appellant's pain or sensory deficit was a Grade 3, or a 40 percent impairment, and multiplied 40 percent by 7 percent to arrive at a 3 percent impairment for sensory deficit and a 3 percent impairment for dysesthesia, which, when combined equaled a 6 percent impairment of each foot. The Office medical adviser explained that the difference between his 6 percent impairment rating for each foot and Dr. Carter's 5 percent impairment rating for each foot was due to rounding off.

On October 31, 1994 the Office granted appellant an additional schedule award percentage amounting to a total of a 6 percent permanent impairment of each foot. Thereafter appellant requested a hearing, which was held June 14, 1995, and which resulted in the hearing representative affirming the prior award.

Appellant urges that she should be awarded a greater percentage impairment because Dr. Sowell determined that in 1992 she had a 38 percent impairment. The Board notes that this 1992 impairment rating was given as a whole body impairment, and that under the Act schedule

awards are not payable for whole body impairments.[12] In fact, in appellant's case her impairment rating is specifically awarded for her feet, as her accepted condition was tarsal tunnel syndrome, and not for her bilateral lower extremities, which would be a lesser total percentage of impairment. Further, the Board notes that Dr. Sowell arrived at his impairment rating for each lower extremity by simply combining the rating values for individual components of impairment as determined by him, rather than by following the procedures for impairment determination specified in the A.M.A., *Guides*. He determined his ratings using two subcategories of motor impairment and combined them with sensory impairment, which is not contemplated by the A.M.A., *Guides*. This makes his overall rating results invalid under the Act and under FECA case law.[13] Further, the Board notes that Dr. Sowell included and considered impairment due to weakness and due to loss of range of motion is his 1992 rating, when examination by Dr. Carter in 1994 revealed no evidence of either weakness nor range of motion impairment. As appellant manifested no weakness or loss in range of motion in 1994, allowances for such impairments cannot be substantiated, and an additional schedule award percentage cannot be granted. Therefore, as Dr. Sowell's 38 percent impairment rating was expressed in terms of the whole body, was not determined in accordance with the A.M.A., *Guides*, its Tables and its specified procedures, included ratings for more than just appellant's feet, and included impairments not evidenced upon examination in 1994, it is not a rating that is compensable under the Act.

Accordingly, the decision of the Office of Workers' Compensation Programs dated December 15, 1995 is hereby affirmed.

Dated, Washington, D.C.
March 18, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[12] *See Gordon G. McNeill*, 42 ECAB 140 (1990).

[13] *See Annette M. Dent*, 44 ECAB 403 (1993).