

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN S. HUDSON and U.S. POSTAL SERVICE,
POST OFFICE, Greenville, S.C.

*Docket No. 97-1499; Submitted on the Record;
Issued January 19, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has a permanent impairment to her left lower extremity, such that she would be entitled to a schedule award under section 8107 of the Federal Employees' Compensation Act.

On October 23, 1992 appellant, then a 38-year-old TE-city carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging on the same date that she severely sprained her left ankle when she stepped into a hole and fell. The Office of Workers' Compensation Programs accepted the claim for left ankle sprain, reflex sympathetic dystrophy and paid compensation.

In progress notes dated March 1, 1994, Dr. John R. Rowell, Jr., an attending Board-certified orthopedic surgeon, opined that appellant had reached maximum medical improvement and had a 25 percent permanent impairment of her left lower extremity.

On October 25, 1994 the Office medical adviser noted that Dr. Rowell did not provide any measurement or objective evidence to support his determination that appellant had a 25 percent permanent impairment of her left lower extremity.

By letter dated November 18, 1994, the Office requested Dr. Rowell to provide objective evidence and to correlate his findings with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition).

In a letter dated December 28, 1994, appellant, through counsel, requested a schedule award.

The Office medical adviser reviewed Dr. Rowell's March 1, 1994 progress notes and opined that there was no evidence of a permanent impairment according to the A.M.A., *Guides*.

By report dated February 7, 1995, Dr. Rowell stated that appellant's rating was "due to changes in the subtalar joint as shown on [computerized axial tomography] CAT scan and described in an office note of February 17, 1994. This is despite the fact that the patient has very good ankle motion with dorsal and plantar flexion as well as inversion and eversion." Dr. Rowell then noted that according to the A.M.A., *Guides*, based upon arthritis impairments, that the subtalar joint narrowing to 1 millimeter (mm) was equal to a 15 percent impairment and 0 mm narrowing of the subtalar joint was equal to a 25 percent impairment. Dr. Rowell opined that since appellant continued to have ankle and foot pain she had a total 25 percent impairment of the left lower extremity.

In a report dated April 25, 1995, the Office medical adviser noted that in order to be entitled to a schedule award for subtalar arthritis, an x-ray finding of joint space narrowing measured in millimeters and reported by a radiologist was required.

By letter dated May 2, 1995, the Office requested Dr. Rowell to furnish the x-ray interpretation as requested by the Office medical adviser. On May 11, 1995 Dr. Rowell suggested the Office contact Greenville Memorial hospital as his office did not release test results.

By letter dated August 22, 1995, the Office requested Greenville Memorial hospital to send the x-ray films, CAT scan results or measurement taken by a radiologist of appellant's left ankle. In a February 4, 1994 CAT scan, Dr. K. Gallagher-Oxner reported that the scan was initially "obtained at 3 mm intervals. Subsequently, 1.5 mm interval scans were obtained through the area of abnormality in the coronal projection."

By letter dated November 1, 1995, the Office referred appellant, along with a statement of accepted facts and medical records to Dr. William B. Jones, a Board-certified orthopedic surgeon, to provide a second opinion as to the extent and degree of appellant's current disability.

In a report dated November 17, 1995, Dr. Jones determined that appellant had no impairment of her left lower extremity. In reaching this determination, Dr. Jones noted that appellant "can dorsiflex the ankle through 60 deg[rees] on both left and right and can plantar flex to approximately 75 deg[rees] on either side." Dr. Jones also noted that appellant had no ankylosis in her ankle and that her inversion and eversion was 50 degrees with no difference between right and left ankle.

In a letter dated April 25, 1996, the Office medical adviser concurred with the finding by Dr. Jones that appellant had a zero percent impairment of her left lower extremity.

By decision dated May 1, 1996, the Office denied appellant's claim for a schedule award on the grounds that the weight of the evidence established that appellant does not have a permanent impairment due to her accepted employment injury. In the accompanying memorandum, the Office noted that Dr. Rowell diagnosed a 25 percent impairment, but did not explain how he arrived at this rating based on the A.M.A., *Guides* as required under the Act. The Office found that medical evidence rested with Dr. Jones' report, which was thorough and supported by the objective evidence, that appellant was not entitled to a schedule award as she did not have a permanent impairment due to her employment injury.

On July 3, 1996 appellant's counsel requested reconsideration of the Office's May 1, 1996 decision and enclosed a May 28, 1996 report by Michael D. Smith and a statement from William J. Martin. Appellant argued that, contrary to the Office's memorandum, Dr. Rowell did refer to the A.M.A., *Guides* in determining appellant's impairment rating. Appellant also argued that Dr. William B. Evins,¹ a Board-certified orthopedic surgeon, supported that appellant was permanently disabled supported by the rating determined by Dr. Rowell.

In a decision dated August 1, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to establish modification of the prior decision. The Office noted that Dr. Evins performed his examination in August 1993 only for a second opinion.

By letter dated November 5, 1996, appellant's counsel requested reconsideration and submitted reports from Dr. Evins.

Appellant submitted a report dated August 19, 1996 by Dr. Evins, who diagnosed residual pain and instability. Dr. Evins also opined that appellant had "some residual disability in her left lower extremity as a result of this injury. I think after four years one has to consider this is permanent" and "I think considering all factors that the rating given by Dr. Rowell is a realistic one, certainly more realistic than the zero rating given by Dr. Bill Jones."

In a letter dated September 30, 1996, Dr. Evins agreed with Dr. Rowell's impairment rating of 25 percent.

By decision dated November 22, 1996, the Office denied appellant's request for reconsideration.

By letter dated January 6, 1997, appellant requested reconsideration of the Office's November 22, 1996 decision.

By nonmerit decision dated January 22, 1997, the Office denied appellant's request for reconsideration on the basis that appellant did not submit any relevant evidence or present any legal contentions not previously considered.

By letter dated January 30, 1997, appellant requested reconsideration of the denial of her claim for a schedule award.

By nonmerit decision dated February 24, 1997, the Office denied appellant's request for reconsideration.

The Board finds that appellant has not established that she has a permanent impairment of her left lower extremity causally related to her October 23, 1992 employment injury that would entitle her to a schedule award under section 8107 of the Act.

¹ The Office had sent appellant to Dr. Evins for a second opinion on whether she was still disabled.

An employee seeking compensation under the Act² has the burden of establishing the essential elements of her claim by the weight of the reliable, probative, and substantial evidence,³ including that she sustained an injury in the performance of duty as alleged and that her disability, if any, was causally related to the employment injury.⁴

Section 8107 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.⁵ 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 Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁶

In order to meet her burden, appellant must submit sufficient medical evidence to show a permanent impairment causally related to employment that is ratable under the A.M.A., *Guides*. The Office's procedures discuss the type of evidence required to support a schedule award. The evidence must show that the impairment has reached a permanent and fixed state and indicate the date this occurred, describe the impairment in detail, and contain an evaluation of the impairment under the A.M.A., *Guides*.⁷

In the present case, appellant has not submitted sufficient medical evidence to show entitlement to a schedule award as Dr. Rowell failed to correlate his findings to the A.M.A., *Guides*. Dr. Rowell, in his report dated February 7, 1995 referred to the A.M.A., *Guides* for a schedule award for subtalar arthritis. This report is insufficient as a schedule award for subtalar arthritis⁸ requires an x-ray interpretation of the joint space measured in millimeters reported by a radiologist, which Dr. Rowell did not provide and the record contains a CAT scan, but no x-ray interpretation. Thus, Dr. Rowell's opinion is insufficient to support a schedule award as he has not provided the objective evidence to support his findings or a correlation with the A.M.A., *Guides*. Similarly, Dr. Evins' opinion is also insufficient as he has not correlated his impairment rating to the A.M.A., *Guides* and failed to provide sufficient rationale to support his conclusion that appellant had a 25 percent permanent impairment of the left lower extremity. Dr. Jones opined that appellant had no permanent impairment based upon the objective evidence. Accordingly, neither the reports of Dr. Evins nor Dr. Rowell are sufficiently rationalized to

² 5 U.S.C. §§ 8101-8193.

³ *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ 5 U.S.C. § 8107(a).

⁶ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 1995).

⁸ Table 62, page 83 and pages 82-83.

support their conclusions that appellant had at least a 25 percent permanent impairment of the left lower extremity, and as Dr. Jones found a zero percent permanent impairment, the evidence submitted does not establish entitlement to a schedule award under 5 U.S.C. § 8107.

The decisions of the Office of Workers' Compensation Programs dated February 24 and January 22, 1997, November 22, August 1 and May 1, 1996 are affirmed.

Dated, Washington, D.C.
January 19, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member