U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIMOTHY J. THEIS and DEPARTMENT OF JUSTICE,
U.S. BORDER PATROL, Chula Vista, CA

Docket No. 98-959; Submitted on the Record;
Issued November 1, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has more than an 18 percent permanent impairment of the right leg, for which he has received a schedule award.

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

On April 4, 1995 appellant, then a 29-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on that date he dislocated/fractured his right ankle while chasing a group of illegal aliens on a steep rocky slope. Appellant stopped work on April 4, 1995.

The Office of Workers' Compensation Programs accepted appellant's claim for a fractured right ankle, with open reduction and internal fixation.

On October 10, 1995 appellant filed a claim for a schedule award (Form CA-7).

By decision dated May 23, 1996, the Office granted appellant a schedule award for an eight percent permanent impairment of the right lower extremity for the period October 10, 1995 through March 19, 1996. In an undated letter, appellant requested reconsideration of the Office's decision.

By decision dated October 16, 1996, the Office denied appellant's request for modification based on a merit review of the claim.

On September 3, 1997 appellant filed a Form CA-7 for an increased schedule award.

In a December 30, 1997 decision, the Office granted appellant a schedule award for an additional 10 percent permanent impairment of the right lower extremity for the period

September 2, 1997 through March 22, 1998 totaling an 18 percent permanent impairment of the right lower extremity.

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation,[2] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[3] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[4]

The record contains a September 2, 1997 medical report of Dr. Thomas W. Harris, an orthopedic surgeon. In his report, Dr. Harris indicated appellant's complaints, and a history of appellant's April 4, 1995 employment injury, medical treatment, family and social life. He further indicated appellant's work status, a description of appellant's job duties, a review of medical records, and his findings on physical and objective examination. Dr. Harris diagnosed right ankle fracture/dislocation with open reduction and internal fixation, and status post hardware removal of the right ankle. He opined that appellant had reached permanent and stationery status based on the employment injury and recent surgery for hardware removal. Dr. Harris indicated that appellant had subjective, as well as objective factors of disability. He concluded that based on the fourth edition of the A.M.A., *Guides*, page 80, appellant had no ligamentous instability based on his physical examination. He further concluded that appellant had loss in ankle motion, and loss of dorsiflexion to neutral, that plantar flexion was limited to 45 degrees of flexion, inversion was limited to 15 degrees and eversion was 10 degrees. Utilizing page 77, Table 37 of the A.M.A., *Guides*, Dr. Harris opined that appellant suffered from an impairment due to leg muscle atrophy in the area of the calf by 1.5 centimeters which resulted in a 7 percent lower extremity impairment. Dr. Harris further opined that combined with appellant's impairment from the loss of dorsiflexion, plantar flexion, varus and valgus, appellant had a combined lower extremity impairment of 28 percent of the lower extremity. He also opined that appellant did not require further surgical care.

An Office medical adviser reviewed a statement of accepted facts and appellant's medical records to determine the extent of impairment of appellant's right leg. In his November 3, 1997 medical report, the Office medical adviser indicated Dr. Harris' subjective

[1] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[2] 20 C.F.R. § 10.304.

[3] 5 U.S.C. § 8107(c)(19).

[4] *See James J. Hjort*, 45 ECAB 595 (1994); *Luis Chapa, Jr.*, 41 ECAB 159 (1989); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

findings and recommended "grading these subjective complaints a maximal Grade III as per the Grading Scheme found in chapter three, fourth edition of the A.M.A., *Guides* for pain that may interfere with activity or a 60 percent grade of a maximal 5 percent for the femoral nerve, equivalent to a 3 percent impairment of the right lower extremity or leg." The Office medical adviser stated:

> "Records indicate limitation of motion with dorsiflexion 0/0 and plantar flexion 45/50 which, according to [T]able 42, chapter three, fourth edition of the A.M.A., *Guides*, would be considered a mild or 7 percent lower extremity impairment. In addition, there was diminished inversion of 15/35 and diminished eversion of 10/20 which would be considered mild, or a 2 percent impairment according to [T]able 43, for a total of 9 percent for loss of ankle and subtalar motion. The report states that muscle testing was 5/5 with all the muscles listed but that the calf girth was 1.5 cm smaller than the opposite side. According to [T]able 37, this would be equivalent to a 6 percent lower extremity impairment.
>
> "Utilizing the Combined Values Chart, the 3 percent for pain factors combined with the 7 percent for loss of ankle motion, combined with the 2 percent for loss of subtalar motion, combined with the 6 percent for calf atrophy, would be equivalent to an 18 percent impairment of the right lower extremity or leg with date of maximum medical improvement corresponding to the September 2, 1997, evaluation performed by Dr. Harris, approximately five months following the April 1997 hardware removal."

In applying Table 42, page 78 of the fourth edition of the A.M.A., *Guides* to Dr. Harris' finding that appellant's plantar flexion was limited to 45 degrees of flexion, the Office medical adviser determined that this "would be considered a mild or 7 percent lower extremity impairment." The Board notes that this table indicates that plantar flexion capability is only measured between 11 degrees and 20 degrees, resulting in a 7 percent impairment of the lower extremity. However, it appears that the Office medical adviser failed to calculate a percentage of impairment for diminished inversion and diminished eversion as noted by Dr. Harris. Therefore, it appears appellant may be entitled to a greater schedule award for his impairment of the right lower extremity. On remand, the Office should request that an Office medical adviser properly determine the extent of appellant's right lower extremity based on the tables in the fourth edition of the A.M.A., *Guides*. After such further development of the case as the Office deems necessary, it should issue an appropriate decision.

The December 30, 1997 decision of the Office of Workers' Compensation Programs is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.
November 1, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member