U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA SWINNEY and U.S. POSTAL SERVICE,
POST OFFICE, Jersey City, NJ

Docket No. 99-1523; Submitted on the Record;
Issued August 4, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that she has more than a nine percent permanent impairment of her right lower extremity for which she received a schedule award.

On February 1, 1987 appellant, then a 36-year-old supervisor, filed a traumatic injury claim alleging that on January 12, 1987 she twisted her foot walking to her car. The Office of Workers' Compensation Programs accepted the claim for a sprain of the right ankle, edema of the right foot and tenosynovitis of the right foot.

Appellant returned to limited-duty employment following her injury. In a decision dated March 12, 1996, the Office found that appellant's actual wages in her modified position effective May 1, 1995 fairly and reasonably represented her wage-earning capacity.

On October 25, 1996 appellant filed a claim for a schedule award. By letter dated November 13, 1996, the Office requested that Dr. Herman I. Frank, a Board-certified orthopedic surgeon and appellant's attending physician, evaluate her to determine the extent of any permanent impairment in accordance with the American Medical Association (A.M.A.,) *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993).

On November 26, 1996 appellant filed a notice of recurrence of disability on November 19, 1996 causally related to her January 12, 1987 employment injury.

In a report dated December 21, 1996, Dr. Frank diagnosed chronic ankle sprain and post-traumatic edema of the right foot and ankle. He found that appellant had reached maximum medical improvement on December 13, 1996 and listed range of motion findings for the ankle of 10 degrees dorsiflexion, 40 degrees plantar flexion, 30 degrees inversion and 10 degrees eversion. He concluded that, according to Table 42 on page 78 of the A.M.A., *Guides*, appellant had a 7 percent impairment of the upper extremity due to loss of ankle motion and a 2 percent

impairment due to subtalar loss of motion based on Table 43 on page 78. Dr. Frank founmd no impairment due to ankylosis, weakness, atrophy, pain or sensory deficit. He further indicated:

> "According to Table 69, page 389, [appellant's] condition corresponds to the description '[t]here is persistent edema of a moderate degree incompletely controlled by elastic supports.['] This is considered a Class 2 impairment with 10 [to] 39 [percent] of the leg. I would estimate [appellant] at 15 [percent]. Total impairment of [the] right leg [is] 27 [percent]."

On February 10, 1997 an Office medical adviser found that, using Dr. Frank's range of motion findings of the right ankle, appellant had no impairment in flexion, a seven percent impairment in extension, no impairment in inversion and a two percent impairment in eversion, which he added to find a total right lower extremity impairment of nine percent.

By decision dated February 11, 1997, the Office granted appellant a schedule award for a nine percent impairment of the right lower extremity. The period of the award ran for 25.92 weeks from December 21, 1996 to June 20, 1997. In another decision of the same date, the Office denied appellant's claim for a recurrence of disability in November 1996 causally related to her accepted employment injury.

In a letter dated February 21, 1997, appellant, through her attorney, requested a hearing. By decision dated November 22, 1997, the hearing representative vacated the Office's February 11, 1997 decisions on the grounds that the case was not in posture for decision due to a conflict in medical opinion regarding the degree of appellant's permanent impairment and whether she sustained a recurrence of disability.

By letter dated December 16, 1997, appellant, through her attorney, requested to participate in the selection of the impartial medical specialist so that she could "receive a truly impartial evaluation concerning this matter."

By letter dated January 26, 1998, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Paul Anthony Foddai, a Board-certified orthopedic surgeon, for an impartial medical evaluation on the issue of the degree of appellant's permanent impairment and whether she sustained an employment-related recurrence of disability beginning November 1996.

In a report dated March 2, 1998, Dr. Foddai discussed appellant's medical history and listed findings on physical examination. He noted swelling of one and a half to two centimeters of the dorsum of the foot, the ankle and the calf. Dr. Foddai stated, "[r]ange of motion of the ankle is tested and subtalor motion is reduced by 10 [percent] of normal. I could not elicit a draw sign. There is no apparent instability." He further related:

> "I certainly agree with Dr. Frank's statement that [appellant] did indeed sustain an ankle sprain and tenosynovitis. I feel that she does have a permanent disability of nine [percent] of total. I feel that the cellulitis may have been aggravated by her edema…. She does continue to have pain and swelling about the foot and ankle and I agree with the estimate that this is a permanent disability of nine [percent]."

On March 6, 1998 an Office medical adviser reviewed Dr. Foddai's report and noted that the finding of a nine percent impairment of the right lower extremity "remains unchanged."

In a decision dated March 11, 1998, the Office found that appellant was not entitled to participate in the selection of the impartial medical specialist, was not entitled to a supplemental schedule award and had not established an employment-related recurrence of disability beginning November 16, 1996.

By letter dated March 16, 1998, appellant, through her attorney, requested a hearing. She further submitted a report dated November 25, 1998 from Dr. David Weiss, an osteopath, who concluded that appellant had a 45 percent permanent impairment of the right lower extremity.

In a decision dated February 9, 1999 and finalized February 10, 1999, the hearing representative affirmed the Office's finding in its March 11, 1998 decision that appellant had no more than a nine percent permanent impairment of her right lower extremity and that she was not entitled to participate in the selection of the impartial medical specialist. The hearing representative set aside the Office's finding that appellant had failed to establish that she sustained a recurrence of disability on November 16, 1996 and remanded the case for the Office to obtain a supplemental opinion from Dr. Foddai.

The Board finds that the case is not in posture for decision on the issue of whether appellant has established that she has more than a nine percent permanent impairment of her right lower extremity.

Under section 8107 of the Federal Employees' Compensation Act,[1] and section 10.304 of the implementing federal regulations,[2] schedule awards are payable for permanent impairment of specified body members, functions or organs. 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 A.M.A., *Guides* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[3]

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[4] However, when the Office secures an opinion from an impartial specialist and the opinion of the specialist requires clarification of

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

[3] *James J. Hjort*, 45 ECAB 595 (1994).

[4] *James P. Roberts*, 31 ECAB 1010 (1980).

elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.[5]

In the instant case, the report of Dr. Foddai is not sufficiently complete to constitute the weight of the medical evidence. Dr. Foddai did not refer to the tables and pages of the A.M.A., *Guides* or explain how he derived his assessment of appellant's degree of permanent impairment. Dr. Foddai noted decreased range of motion findings for appellant's ankle and swelling over the foot and ankle. However, it is not possible to determine whether Dr. Foddai based his finding that appellant had a nine percent permanent impairment of the right lower extremity on these factors in accordance with the A.M.A., *Guides*. Therefore, as Dr. Foddai failed to explain his findings of permanent impairment in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses, his report is not sufficiently complete to constitute the weight of the evidence.[6] On remand, the Office should request that Dr. Foddai provide a supplemental report in which he evaluates appellant's condition in accordance with the A.M.A., *Guides*. If Dr. Foddai is not sufficiently rationalized, the Office must refer appellant to a second impartial specialist for a rationalized medical report on the issue of the degree of permanent impairment of the right lower extremity.

The decision of the Office of Workers' Compensation Programs dated February 9, 1999 and finalized February 10, 1999 is set aside regarding the issue of the degree of appellant's permanent impairment and the case is remanded for further findings consistent with this opinion by the Board.

Dated, Washington, D.C.
August 4, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[5] *Harold Travis*, 30 ECAB 1071 (1979).

[6] *See James Kennedy, Jr.*, 40 ECAB 620 (1989).