

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY M. MORGAN and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Savannah, GA

*Docket No. 98-1659; Submitted on the Record;
Issued January 18, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained greater than an eight percent permanent impairment of the left foot for which he received a schedule award.

On July 10, 1994 appellant, then a 44-year-old flat sorting machine clerk, sustained left plantar fasciitis in the performance of duty when a cart rolled over his foot.

In a report dated February 24, 1997, Dr. Steven L. Shapiro, a Board-certified orthopedic surgeon, provided a history of appellant's condition and findings on examination. He opined that appellant had a 20 percent permanent impairment of the left foot based upon weakness, atrophy, pain or anesthesia. In a report dated March 24, 1997, Dr. Shapiro stated that appellant had reached maximum medical improvement if he chose not to undergo surgery.¹

On April 19, 1997 appellant filed a claim for a schedule award.

In a report dated May 1, 1997, Dr. Reid McAuley, an Office of Workers' Compensation Programs' medical adviser, stated his opinion that appellant had sustained a five percent permanent impairment of the left foot. In a report dated August 15, 1997, he opined that appellant had a three percent permanent impairment.

Due to the conflict in medical opinion between Dr. Shapiro, appellant's attending physician and Dr. McAuley, the Office medical adviser, the Office, by letter dated November 20, 1997 referred appellant, together with a statement of accepted facts, to Dr. J. Melvin Deese, Jr., a Board-certified orthopedic surgeon, for an examination and evaluation as to the extent of the permanent impairment of appellant's left foot.

¹ The opinion of Dr. Shapiro that appellant sustained a 20 percent permanent impairment is of limited probative value in that he failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In a report dated December 5, 1997, Dr. Deese provided a history of appellant's condition and course of treatment. He indicated that he had reviewed appellant's x-rays, bone scan and computerized axial tomography (CAT) scan. He stated:

"On examination, [appellant] is ambulating on his forefoot and toes with an antalgic gait. He is very tender at the central aspect of his heel and over a callus, which has developed at the plantar aspect of the fifth metatarsal head and toe. Ankle dorsiflexion is 4 degrees, plantar flexion is 20 degrees, subtalar motion is present, but somewhat limited as compared to the opposite foot. He has a 'quick pain' and trigger point at the mid-foot in the area of the first metatarsal medial cuneiform."

* * *

"Subjective complaints relate mostly to pain at the fifth metatarsal from change of weight bearing status and inability to weight bear on the medial column or heel.

"Measurements of active motion reveal 2 degrees of dorsiflexion, 20 degrees of plantar flexion, otherwise range of motions are normal.

"In using the [A.M.A., *Guides*], fourth edition, as well as recommendations of the American Board of Independent Medical Examiners, [appellant] should be rated based on closest estimates available. If we were to assign a permanent impairment rating based on his current status, we would have to use the forefoot deformity and assume elevation of the first metatarsal causing shift to assist metatarsal within an impairment rating of 10 [percent] of the lower extremity, according to Table 64, page 86. However, there will be an additional 4 [percent] of the incomplete, painful plantar fascia release and possible painful nonunion of the mid-foot given a combined permanent impairment of lower extremity of 8 [percent] and 4 [percent] of the whole body."

By decision dated April 2, 1998, the Office granted appellant a schedule award based on an eight percent permanent impairment of the left foot.²

The Board finds that appellant sustained greater than an eight percent permanent impairment of the left foot for which he received a schedule award.

In this case, appellant sustained an injury to his left foot in the performance of duty and subsequently filed a claim for a schedule award. Due to a conflict between appellant's physician and the Office physician as to the degree of appellant's permanent impairment, he was referred

² The Board notes that appellant submitted additional evidence following issuance of the Office's April 2, 1998 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952). The Board also notes that this case record contains a document belonging to another claimant. Upon return of the case record to the Office, this document should be placed in the correct file.

to an impartial medical specialist for a determination as to the extent of his permanent impairment.³

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.⁴ 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 A.M.A., *Guides* as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁵

In his December 5, 1997 report, Dr. Deese a Board-certified orthopedic surgeon and the impartial medical specialist, selected to resolve the conflict in medical opinion evidence, provided findings on examination and stated that appellant had an impairment rating of 10 percent of the left lower extremity according to Table 64 at page 86 of the A.M.A., *Guides* and a 4 percent impairment due to the incomplete, painful plantar fascia release and possible painful nonunion of the mid-foot, yielding a combined permanent impairment of the lower left extremity of 8 percent. However, a 10 percent permanent impairment of the left lower extremity combined with a 4 percent permanent impairment of the left lower extremity equals a 14 percent permanent impairment according to the Combined Values Chart at page 322 of the A.M.A., *Guides*, 4th edition. Additionally, the Office granted appellant a schedule award based upon 16.40 weeks of compensation for impairment of the foot.⁶ However, Dr. Deese calculated a permanent impairment based upon the lower extremity, not the foot.⁷

Upon return of the case record the Office should issue a corrected schedule award based upon a 14 percent permanent impairment of the left lower extremity.

³ Section 8123(a) of the Federal Employees' Compensation Act provides, in pertinent part, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

⁴ 5 U.S.C. § 8107(a).

⁵ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁶ Section 8107(4) of the Act provides for calculation of a schedule award for a permanent foot impairment based upon 205 weeks for 100 percent loss of use.

⁷ Section 8107(2) provides for a schedule award for permanent impairment of a leg based upon 288 weeks for a 100 percent loss of use.

The April 2, 1998 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for issuance of a corrected schedule award in accordance with this decision of the Board and a determination as to the amount of compensation to which appellant is entitled.

Dated, Washington, D.C.
January 18, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member