

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANCIS E. CURRAN and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Atlantic City, NJ

*Docket No. 98-787; Submitted on the Record;
Issued June 23, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has more than a 28 percent permanent impairment of the left lower extremity for which he received a schedule award.

On February 18, 1993 appellant, a 45-year-old woodcrafter, injured his left leg when the scaffold on which he was standing collapsed, causing appellant to fall to the ground. Appellant filed a claim for benefits on the date of injury, which the Office of Workers' Compensation Programs accepted for left leg fracture.

In a report and impairment evaluation dated February 29, 1996, Dr. David Weiss, an osteopath, calculated that appellant had a 43 percent impairment of the left lower extremity pursuant to the fourth edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*, (the A.M.A., *Guides*). Dr. Weiss calculated this rating based on: gastrocnemius muscle atrophy on the left, times 3, for a 13 percent impairment pursuant to Table 37, page 77 of the A.M.A., *Guides*; the tibial shaft fracture and malalignment of the left leg of 10 to 14 degrees, for a 20 percent impairment pursuant to Table 64, page 85; and ankylosis of the left ankle in neutral position, for a 10 percent impairment pursuant to Table 56, page 80 of the A.M.A., *Guides*. On April 15, 1996 appellant filed a Form CA-7 claim for a schedule award based on partial loss of use of his left lower extremity.

In an impairment rating worksheet/report dated July 24, 1996, an Office medical adviser found that appellant had a 28 percent impairment to the left lower extremity. Applying Dr. Weiss's calculations, the Office medical adviser calculated his impairment rating by combining the 20 percent tibial shaft malalignment and the 10 percent left ankle neutral ankylosis and applying them to the Combined Values Chart, to arrive at a 28 percent impairment to the left lower extremity. The Office medical adviser discounted Dr. Weiss's findings which relied on Table 64, at page 85, stating that this table was not permitted to be used in conjunction with Table 37, page 77 due to Office FECA Bulletin No. 95-17.

By decision dated July 29, 1996, the Office granted appellant a schedule award based on a 28 percent permanent impairment of the left lower extremity for the period February 20 to September 6, 1996, for a total of 80.64 weeks of compensation.

By letter dated August 7, 1996, appellant's attorney requested a hearing, which was held on July 29, 1997.

By decision dated October 10, 1997, an Office hearing representative affirmed the Office's July 29, 1996 decision. The hearing representative found that the Office had properly based its schedule award on the Office medical adviser's July 24, 1996 report, which compared the clinical findings to the applicable figures and tables in the A.M.A., *Guides* and determined that appellant had a 28 percent impairment of the left lower extremity. The hearing representative stated that the Office medical adviser properly disallowed one of Dr. Weiss's findings which relied on Table 64, in accordance with FECA Bulletin 95-17,¹ which was issued to prevent duplicative findings in impairment rating cases. The hearing representative, therefore, concluded that appellant had failed to provide probative, supportable medical evidence that he was entitled to a schedule award greater than the 28 percent permanent impairment of the left lower extremity, which he had already been awarded.

In his appeal to the Board, appellant's attorney contests the Office's reliance on the Office medical adviser's rating of a 28 percent permanent impairment of the left lower extremity, as opposed to Dr. Weiss' calculation of a 43 percent left lower extremity impairment. Appellant's attorney specifically argues that the Office medical adviser's summarily reliance on FECA Bulletin 95-17 was erroneous and asserts that impairments that can be calculated using two or more Tables under the A.M.A., *Guides* have been taken into consideration by the A.M.A., *Guides*. He contends that, at the very least, there is a conflict in the medical evidence between the Dr. Weiss' opinion and that of the Office medical adviser.

The Board finds that the case is not in posture for a decision.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ 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 loss of use.⁴ However, neither the Act nor its regulations specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to 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 seeking schedule

¹ FECA Bulletin 95 (March 23, 1995).

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

³ 20 C.F.R. § 10.304.

⁴ 5 U.S.C. § 8107(c)(19).

awards. The A.M.A., *Guides* (fourth edition) have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.⁵

In the instant case, the Office medical adviser determined that appellant had a 28 percent permanent impairment of the left leg by adding together the impairment findings of Dr. Weiss, appellant's treating physician, regarding tibial shaft malalignment and left ankle neutral ankylosis and applying them to the Combined Values Chart. The Office medical adviser eliminated Dr. Weiss's finding of a 13 percent impairment based on gastrocnemius muscle atrophy on the left, stating that FECA Bulletin 95-17 precluded the use of Table 64, p.p. 85-86 in conjunction with Table 37 at page 77. The Office medical adviser erred, however, in using this citation from FECA Bulletin 95-17 as a *per se* rule and as a substitute for a rationalized, probative medical opinion that Table 37 at page 77, with specific regard to a finding based on atrophy, had already been considered in regard to Tibial Shaft Fracture, Table 64 at Page 85. The principle underlying Table 85, which is included under the section entitled, "Diagnosis-based Estimates," is enunciated at paragraph 3.2i, page 84 of the A.M.A., *Guides*, states:

"Comment: Impairment due to malunion of a fracture should be estimated according to the diagnosis. The expected muscle weakness or atrophy is included in the diagnosis-related estimates, but shortening is a different impairment."⁶

Because duplication of impairment using Table 64 at page 85 for malalignment of Tibial shaft fracture and gastrocnemius atrophy using Table 37, page 77 is not obvious or readily distinguishable, the Office medical adviser when asked to render an impairment rating is required to provide medical rationale demonstrating why a specific table as identified by FECA Bulletin 95-17 may not be used in combination with another table in the A.M.A., *Guides*. The Board, therefore, finds that the Office medical adviser's general citation to FECA Bulletin 95-17 as the only rationale for excluding an impairment under a specific Table is insufficient grounds to exclude said impairment. The Office medical adviser should further address those sections of the A.M.A., *Guides* which apply to the duplication of impairments or provide medical rationale demonstrating why using both tables would result in duplicate measurements and an artificially high percentage of impairment.

After such further development as it may find necessary, the Office should issue a *de novo* decision. The Office's decision of October 10, 1997 is, therefore, set aside.

⁵ *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

⁶ A.M.A., *Guides* at 84.

The Office of Workers' Compensation Programs' decision of October 10, 1997 is, therefore, set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
June 23, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member