

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD W. DENT and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION, Colts Neck, NJ

*Docket No. 00-2213; Submitted on the Record;
Issued May 29, 2001*

DECISION and ORDER

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

The issue is whether appellant is entitled to a schedule award for a permanent loss of use of his right leg.

The Office of Workers' Compensation Programs accepted that appellant's April 26, 1995 employment injury resulted in a sprain of the right foot and a fracture of the right ankle. On May 28, 1997 appellant filed a claim for a schedule award and submitted a report dated March 10, 1997 from Dr. Ronald J. Potash, a Board-certified surgeon, who opined that appellant had a 10 percent permanent impairment of his right leg based on chronic arthritis, loss of inversion and calf atrophy. The Office referred appellant to Dr. Joseph C. Tauro, a Board-certified orthopedic surgeon, for a second opinion and Dr. Tauro, in a report dated October 20, 1997, stated that appellant had equal right and left ankle motion, full stability, no atrophy, no swelling and minimal pain. An Office medical adviser reviewed Dr. Tauro's report and concluded that it showed zero percent permanent impairment of appellant's right leg.

By decision dated January 29, 1998, the Office found that the weight of the medical evidence established that appellant was not entitled to schedule award for his right leg. Appellant requested a hearing and an Office hearing representative, by decision dated August 4, 1998, found that there was a conflict of medical opinion between Drs. Tauro and Potash on the question of whether appellant had a permanent impairment of his right leg. To resolve this conflict, the Office referred appellant, the case record and a statement of accepted facts, to Dr. Munir Ahmed, a Board-certified orthopedic surgeon. In a report dated September 18, 1998, Dr. Ahmed noted that appellant had no atrophy, no sensory or motor deficit, a normal gait and full ranges of right ankle motion in dorsiflexion, plantar flexion, inversion and eversion. He stated that x-rays revealed a healed chip fracture of the right medial malleolus in satisfactory position and alignment and chronic arthritis of the right ankle, both of which were causally related to appellant's employment injury. Dr. Ahmed concluded that appellant had "zero [percent] impairment to the right lower extremity."

By decision dated November 6, 1998, the Office found that the weight of the medical evidence established that appellant was not entitled to a schedule award for his right leg. Appellant requested a hearing and an Office hearing representative, by decision dated March 1, 1999, found that the Office's November 6, 1998 decision was premature, as Dr. Ahmed did not provide measurements of ankle motion, did not indicate whether an impairment rating should be assessed for chronic arthritis and did not explain why he declined assessment of an impairment rating due to pain.

The Office referred appellant to Dr. Ahmed for a supplemental report. In a report dated April 25, 1999, he reported ranges of motion of the right ankle: 35 degrees of dorsiflexion, 35 degrees of plantar flexion, 5 degrees of inversion and 5 degrees of eversion. Dr. Ahmed noted that appellant reported pain with weather changes and when he stood or walked for prolonged periods of time and stated that he found zero percent impairment due to pain in the right lower extremity, as he found "no objective clinical findings to support his subjective complaints of pain." He then stated, "Arthritis impairment to the right ankle, based on x-ray findings, is some five percent." In a note dated June 16, 1999, an Office medical adviser stated that appellant had zero percent permanent loss of use of the right leg, based on Dr. Ahmed's report stating that he had a zero percent impairment.

By decision dated June 18, 1999, the Office found that the weight of the medical evidence established that appellant had a zero percent impairment of the right leg due to his April 26, 1995 employment injury.

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

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to 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* has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.³

There was a conflict of medical opinion on the question of whether appellant had a permanent impairment of his right leg causally related to his April 26, 1995 employment injury, accepted by the Office for a fracture of the right ankle. To resolve this conflict, the Office,

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

³ *Quincy E. Malone*, 31 ECAB 846 (1980).

pursuant to section 8123(a) of the Act,⁴ referred appellant to Dr. Ahmed, a Board-certified orthopedic surgeon. An Office hearing representative recognized that Dr. Ahmed's initial report, which was dated September 18, 1998, did not contain measurements of right ankle and foot motion, or of cartilage intervals revealed by x-rays of appellant's ankle. The case was remanded to him for a supplemental report.

Dr. Ahmed's supplemental report, which was dated April 25, 1999, contains measurements of appellant's ranges of motion of the right ankle. In a June 16, 1999 note, an Office medical adviser apparently did not review this report, but rather appears to have again reviewed the initial report, as the medical adviser quotes the September 18, 1998 report to conclude that appellant had a zero percent impairment. The Board's review of Dr. Ahmed's April 25, 1999 report, reveals measurements of inversion and eversion of five degrees each that result, respectively, in five and two percent impairment of the leg, using Table 43 of Chapter 3 of the fourth edition of the A.M.A., *Guides*. Dr. Ahmed, however, did not provide a measurement of the cartilage interval in appellant's right ankle, which is needed to apply Table 62 of Chapter 3 of the fourth edition of the A.M.A., *Guides*, titled "Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals." Although he assigned five percent for chronic arthritis of the right ankle, absent the cartilage interval, the Board is unable to determine whether this assignment conforms to Table 62.

The case will be remanded to the Office in order to obtain either Dr. Ahmed's measurement of the cartilage interval of appellant's right ankle, or the actual x-rays taken by Dr. Ahmed. In either event, the findings in Dr. Ahmed's April 25, 1999 report and the findings on Dr. Ahmed's x-rays should be reviewed by an Office medical adviser, who should assign percentages of impairment using the appropriate tables of the A.M.A., *Guides*. The Office should then issue an appropriate schedule award.

⁴ 5 U.S.C. § 8123(a) states 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."

The June 18, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC
May 29, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member