

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES T. BLYSTONE and U.S. POSTAL SERVICE,
POST OFFICE, Youngwood, PA

*Docket No. 00-1670; Submitted on the Record;
Issued April 22, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for a schedule award to his left foot.

On January 29, 1991 appellant, then a 37-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on that date, while he was walking on uneven pavement, his left foot buckled and caused pain in the top and side of his foot. The claim was accepted for left foot sprain, ganglion cyst and post-traumatic arthritis of the left foot. Appellant underwent surgery on his left foot on May 19, 1992.

By letter dated February 24, 1994, the Office requested that Dr. William L. Bacon, appellant's treating physician and a Board-certified orthopedic surgeon, determine the extent of permanent impairment of appellant's left foot under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). In a report dated March 4, 1994, Dr. Bacon indicated that appellant had "[m]id [t]arsal [a]rthritis in his left foot which is permanent, his restrictions are permanent." On April 5, 1994 Dr. Bacon responded to questions from the Office and indicated that appellant had a 15 percent impairment of the left lower extremity.

On April 21, 1997 appellant sustained an injury to his right knee. His claim was accepted for right knee sprain and aggravation of preexisting degenerative joint disease to the right knee.¹

By letter dated June 9, 1998, the Office referred appellant to Dr. Herbert Tauberg, a Board-certified orthopedic surgeon, for a second opinion regarding a schedule award for loss of use of appellant's left foot. In a medical report dated June 26, 1998, Dr. Tauberg noted that the injuries appellant sustained to his foot were temporary and had resolved without impairment.

¹ File No. A3-226839. This claim was adjudicated separately by the Office and is not currently before the Board.

Based on Dr. Tauberg's report, the Office terminated appellant's benefits effective September 24, 1998. However, in a decision dated January 19, 1999, an Office hearing representative found that the Office had not met its burden to justify termination of compensation benefits based on Dr. Tauberg's report. The hearing representative returned the case to the Office for the referral of appellant to an impartial medical examiner to resolve the conflict in the medical evidence and determine the extent and degree of any impairment.

By letter dated April 22, 1999, the Office referred appellant to Dr. Robert J. Donofrio, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinions.

On May 7, 1999 the Office denied appellant's claim for an award under the schedule as it found that the medical evidence of record did not support a finding that appellant still had residuals from his work injury nor that he had reached maximum medical improvement. The Office noted that, although appellant was sent a letter scheduling an examination by Dr. Donofrio on May 19, 1999, appellant advised the Office that he had surgery scheduled for his right knee on May 4, 1999 and requested an earlier appointment. However, as no earlier appointment was available, the Office noted that it was not possible for appellant to be examined prior to his knee surgery. The Office stated that, once appellant recovered from his right knee surgery, he should contact the Office and that then an impartial examination would be scheduled.

Appellant objected to this decision and requested an oral hearing, which was held on September 30, 1999. In a decision dated March 24, 2000, the hearing representative affirmed the May 7, 1999 compensation order. The hearing representative stated that as appellant had not submitted evidence that he had reached maximum medical improvement after his knee replacement surgery, the case could not be further developed with regard to the schedule award for the injury to appellant's left foot.

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

The schedule award provision of the Federal Employees' Compensation Act² and its implementing federal regulation,³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of specified members, functions or organs of the body.⁴ Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁵ 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

² 5 U.C.S. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ 20 C.F.R. § 10.5(m) defines impairment as "any anatomic or functional abnormality or loss." A permanent impairment is defined as "any such abnormality or loss after maximum medical improvement has been achieved." Maximum medical improvement is the date upon which the impairment has stabilized and will no longer improve. As permanent impairments can worsen after a finding of maximum medical improvement, the date of maximum medical improvement will not always be the same date that the impairment stabilized for purposes of determining degree of impairment. See *Barbara A. Dunnivant*, 48 ECAB 517, 521 n. 20 (1997).

⁵ 5 U.S.C. § 8107(c)(19).

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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁶

In the instant case, Dr. Bacon found that appellant had sustained a 15 percent impairment of the left lower extremity. The Office then referred appellant to Dr. Tauberg for a second opinion and he determined that appellant's injuries to his foot were temporary and had resolved. Accordingly, there existed a conflict in medical opinions.

Section 8123(a) of the Act provides that when there is a disagreement between a physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁷ In the instant case, the Office, as a result of the hearing representative's decision, referred appellant to Dr. Donofrio for an impartial medical examination. However, this examination could not be completed due to appellant's scheduled surgery on his right knee, the result of an injury in a different claim. Although appellant expressed his willingness to proceed with the examination at an earlier date, *i.e.*, before the surgery, no earlier time was available and the appointment had to be cancelled. Rather than attempt to reschedule the impartial medical examination after the surgery, the Office issued a decision denying appellant's entitlement to a schedule award, finding that the medical evidence was insufficient to determine that he still had residuals from the 1991 injury, whether he still suffered a permanent impairment of his left foot and whether he had reached maximum medical improvement. This decision was affirmed by the hearing representative. This was error. As Dr. Bacon opined that there was a 15 percent impairment and Dr. Tauberg stated that any residuals appellant suffered were temporary and had resolved, there remained an unresolved conflict in the medical evidence with regard to the level of impairment of appellant's left foot that needed to be addressed. The Board notes that appellant did not refuse to undergo this examination, rather the impartial medical examination could not take place until appellant had recovered from his knee surgery.

Accordingly, the conflict remains unresolved between the opinion of appellant's physician, Dr. Bacon, and the second opinion physician, Dr. Tauberg. This case will be remanded for further development of the evidence. Upon remand, the Office shall refer appellant to an impartial medical specialist to resolve whether appellant has a permanent impairment of the left foot due to his accepted medical conditions, pursuant to the A.M.A., *Guides*. After such development as necessary, the Office shall issue a *de novo* decision.

⁶ See 20 C.F.R. § 10.404 (1999).

⁷ *Lawrence C. Parr*, 48 ECAB 445, 452 (1997); *Joseph D. Lee*, 42 ECAB 172 (1990).

The decisions of the Office of Workers' Compensation Programs dated March 24, 2000 and May 7, 1999 are set aside and this case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
April 22, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member