U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA J. PYGMAN and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, GRAND TETON NATIONAL PARK, Moose, WY

Docket No. 01-1604; Submitted on the Record;
Issued December 26, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether appellant has greater than a six percent impairment of her left lower extremity, for which she received a schedule award.

On October 30, 1997 the Office of Workers' Compensation Programs accepted that appellant sustained a left ankle sprain while in the performance of duty on June 9, 1997.[1]

On June 28, 1999 the Office referred appellant to Dr. Adrian J. Wolbrink, a second opinion physician and a Board-certified orthopedic surgeon, for an impairment evaluation.

In a report dated July 20, 1999, Dr. Wolbrink noted that he had examined appellant and provided a seven percent impairment rating for her left lower extremity. He noted that appellant's left ankle had 25 degrees dorsiflexion, 40 degrees plantar flexion, normal subtalar motion and mild laxity of 2 to 3 millimeters on the left ankle as opposed to the right. Dr. Wolbrink further noted that her left calf atrophy of 36½ centimeters versus, 38 centimeters on the right, that she had good circulation in her foot and no significant neurological deficit. He stated that appellant had a seven percent impairment of the left lower extremity due to measurable atrophy based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a report dated December 12, 1999, Dr. David Smink, the Office medical adviser and an orthopedic surgeon, reviewed appellant's record and provided an impairment rating of six percent for her left lower extremity.

By decision dated February 22, 2001, the Office awarded appellant a six percent impairment for her left lower extremity.

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[1] Appellant was a temporary employee, who was terminated on September 24, 1997.

The Board finds that appellant has established entitlement to a seven percent permanent impairment of his left lower extremity.

The schedule award provisions of the Federal Employees' Compensation Act[2] and its implementing regulation[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[4]

In the instant case, Dr. Wolbrink, appellant's treating physician, in his July 20, 1999 report, expressed his opinion regarding appellant's impairment as follows:

> "Strength testing is quite good throughout although [appellant] has definite calf atrophy with the left calf measuring 36-1/2 centimeters circumference of the largest point compared to 38 centimeters on the right. [Appellant] has good circulation in her foot and no significant neurological deficit."
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> "In my opinion, [she] does continue to have significant pain and disability due to her fairly severe ankle sprain. She has a permanent impairment of [seven] percent of the lower extremity or [two] percent of the whole person due to measurable atrophy. This is based upon the '*Guides* to Evaluation of Permanent Impairment' by the American Medical Association, [f]ourth [e]dition."

The Office medical adviser in a report dated December 12, 1999, reviewed Dr. Wolbrink's report and stated:

> "Extrapolating from Table 37 (p. 3/77) of the A.M.A., *Guides*, the claimant deserves an award of 6 percent permanent impairment of the lower extremity for moderate (1.5 centimeters) calf atrophy on the left."

Table 37 is entitled impairment from leg muscle atrophy. Under (b), calf atrophy, a difference in circumference of 1 to 1.9 centimeter yields a mild impairment and a two percent whole person impairment or a three to eight percent impairment of the lower extremity. Although Dr. Wolbrink did not identify the Table number as Table 37, he indicated that he was basing his impairment rating of 7 percent based on "measurable atrophy" of the lower extremity of the left calf.

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[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id*.

The Office medical adviser, a nonexamining physician, used Dr. Wolbrink's measurements and the only chart in the A.M.A., *Guides* for measuring leg muscle atrophy and arrived at a six percent impairment without explaining why or how he arrived at one percentage point less when the range of impairment under the A.M.A., *Guides* was from three to eight percent.[5]

The Board finds that the nonexamining Office medical adviser's decision is arbitrary and without any rationale for arriving at six percent impairment using the same identical table as the examining physician and thus reverses the Office's decision awarding appellant's a six percent impairment. The Board awards appellant a seven percent impairment based on the opinion of the examining physician, Dr. Wolbrink, who clearly used the identical table of the A.M.A., *Guides* as did the Office medical adviser.

[5] *John Keller*, 39 ECAB 543 (1988) (The Office medical adviser, as the nonexamining physician, cannot select a percentage without explanation or reference to the examining physician's findings); *Ronnie V. Jones*, Docket No. 90-1149 (issued February 11, 1991) (opinion of the examining physician takes precedence where the A.M.A., *Guides* requires subjective judgment on the percentage of impairment).

The February 22, 2001 decision of the Office of Workers' Compensation Programs is reversed and the case record returned to the Office for an award of a seven percent impairment in accordance with the rating of appellant's treating orthopedic surgeon.[6]

Dated, Washington, DC
December 26, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] On appeal, appellant asked whether she was being compensated for her suffering as a result of her work-related injury. There are no provisions in the Act for an award of compensation on the basis of nondisabling pain, suffering or other physical discomfort or distress; *see Dominic Meli*, 15 ECAB 185 (1963). Appellant also inquired regarding how her compensation was determined. The Act authorizes schedule awards for loss of a leg up to a maximum of 288 weeks of compensation. 5 U.S.C. § 8107(c). In this case, using the six percent previously awarded appellant, six percent multiplied by 288 weeks equaled 17. 28 weeks of compensation. Further, the Act authorizes two-thirds of appellant's monthly pay at the time of the injury for individuals without any dependents. 5 U.S.C. § 8107(a). Based on appellant's hourly rate of pay of $10.27 plus a Sunday differential, the Office determined that her monthly pay was $1,947.00 and that her weekly pay was $486.75. Two-thirds of that amount was $324.50 for 17.28 weeks.