

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM M. BENTON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Houston, TX

*Docket No. 01-2276; Submitted on the Record;
Issued September 16, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issue is whether appellant is entitled to greater than an additional nine percent schedule award for permanent impairment of his left lower extremity.

The Office of Workers' Compensation Programs accepted that on November 20, 1994 appellant, then a 50-year-old boiler plant operator, sustained a fracture of his left fifth metatarsal when wooden planking upon which he was walking broke and pinned his left foot. The Office subsequently accepted that appellant also sustained left reflex sympathetic dystrophy. Appellant underwent physical therapy and continued working.

By report dated August 30, 1995, appellant's treating physician, Dr. A. Brant Lipscomb, Jr., a Board-certified orthopedic surgeon, described his physical condition, indicated that he had reached maximum medical improvement on June 8, 1995, and opined, based upon the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, that appellant had a permanent impairment which was seven percent of his left foot, or five percent of his left lower extremity, or two percent of his whole person.

On February 6, 1996 an Office medical adviser opined that appellant had a seven percent permanent impairment of his left foot.

On March 21, 1996 the Office granted appellant a schedule award for a seven percent permanent impairment of his left foot for the period June 8 to September 16, 1995 for a total of 14.35 weeks of compensation.

Thereafter, as further medical and physical therapy notes were provided, injury sequelae were noted, including arthritis and metatarsalgia of the left foot. Appellant underwent left foot surgery on September 10, 1996 for excision of a traumatic third web space Morton's neuroma, arthrotomy and debridement for a fifth metatarsalphalangeal joint chondral loose body, and a fifth metatarsal head lateral exostectomy for dorsal and lateral exostosis. Appellant developed postoperative cellulitis. Thereafter he developed superficial peroneal neuralgia. On January 29,

1997 appellant was diagnosed as having symptoms of left reflex sympathetic dystrophy syndrome. Left plantar neuropathy with musculoskeletal leg pain without signs of radiculopathy was diagnosed.

On October 31, 1997 appellant's attending physician provided impairment testing which included multiple range-of-motion measurements.

Based upon that report on May 25, 1998 an Office medical adviser calculated that appellant now had a 17 percent permanent impairment of his left lower extremity. The Office noted that appellant had been "already awarded seven percent [for permanent impairment] to the left foot."

On June 5, 1998 the Office granted appellant a schedule award for a 17 percent impairment of his left lower extremity but noted that he was "previously award[ed] seven percent permanent partial impairment to the left lower extremity, therefore[,] it has been deducted from the current amount of permanent impairment."¹

Appellant continued with medical treatment and physical therapy for his accepted conditions and the treating physicians noted that his reflex sympathetic dystrophy (RSD) was slowly resolving. In 1998 Dr. W. Grant Braly, a Board-certified orthopedic surgeon, noted that appellant continued with signs of RSD but that he was basically at *status quo*. In 1999 Dr. Braly recommended hydrotherapy and a magnetic resonance imaging (MRI) scan of the spine. He further noted appellant's complaints of left L4 dermatomal pattern pain as well as chronic left plantar neuritis. Dr. Braly found that appellant's condition was stable with left foot RSD. In 2000 extreme hypersensitivity of the left forefoot was noted, with marginal RSD.

On February 9, 2000 Dr. Braly diagnosed appellant as having chronic regional pain syndrome, Type I, without sympathetically maintained pain and probable plantar neuritis. Diffuse allodynia across the dorsal and plantar aspects of the left foot was noted. He indicated that appellant continued to work with restrictions.

On October 10, 2000 appellant requested an increased schedule award and asked that complex regional pain syndrome be added to his list of accepted conditions. He also pointed out that the Office added the seven percent impairment of his left foot as though it had been a seven percent impairment of his left lower extremity, in calculating how much it subtracted as being previously paid, from the 17 percent total impairment award in his 1998 schedule award.

On February 28, 2001 the Office medical adviser calculated, based upon the medical information provided in the preceding medical reports and the Fourth Edition of the A.M.A., *Guides*, that appellant now had a 26 percent left lower extremity permanent impairment, from which he subtracted the 17 percent previously awarded, to determine that appellant was entitled to an additional 9 percent permanent impairment schedule award.

¹ The Office actually had awarded appellant for a seven percent impairment of his left foot, which equaled a five percent impairment of his left lower extremity.

On April 2, 2001 the Office granted appellant an additional 9 percent award for permanent impairment of his left lower extremity, for the period November 30, 2000 to April 21, 2001 for a total of 25.92 weeks of compensation. The Office noted that appellant had already been paid a full 17 percent award for permanent left lower extremity impairment.

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

The Federal Employees' Compensation Act² provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.³ In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment, the Act compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.⁴

The schedule award provision of the Act⁵ and its implementing regulation⁶ 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.⁷

The A.M.A., *Guides*' standards for evaluating the impairment of extremities are based primarily on loss of range of motion.⁸ However, all factors that prevent a limb from functioning normally, including pain or discomfort, should be considered, together with loss of motion, in evaluating the degree of permanent impairment.⁹

² 5 U.S.C. §§ 8101-8193.

³ *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

⁴ *See Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986).

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

⁷ *Id.* With the changes in the Code of Federal Regulations effective April 1, 1999, the implementing regulations formally adopted the A.M.A., *Guides* in determining how schedule awards are calculated, and any awards calculated after that date are controlled by 20 C.F.R. § 10.404.

⁸ *See William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

⁹ *See Paul A. Toms*, 28 ECAB 403 (1987).

The Act¹⁰ and its implementing federal regulation¹¹ provide for payment of compensation for the permanent loss or loss of use of specified members, functions, and organs of the body. However, no schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.¹² Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,¹³ no claimant is entitled to such an award.¹⁴ In the 1960 amendments, the Act was modified such that the schedule award provisions thereafter provided for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member.¹⁵ As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of the impairment originated in the spine.¹⁶

With respect to appellant's left lower extremity, his initial award granted on March 21, 1996 was for a seven percent permanent impairment of his left foot, not a seven percent impairment of his left lower extremity. In accordance with the A.M.A., *Guides* such a seven percent permanent impairment of his left lower foot translates to a five percent permanent impairment of his left lower extremity. Thereafter the Office, however, described the prior award as a 7 percent impairment of his left lower extremity and incorrectly subtracted that 7 percent from the 17 percent total left lower extremity impairment then found. When appellant sought an increased schedule award, the Office concluded that appellant had previously received a schedule award for a 17 percent permanent impairment of his left lower extremity. The case will be remanded to the Office for recalculation of appellant's entire schedule award entitlement based on permanent impairment of his left lower extremity, to be followed by a *de novo* decision on his entitlement to a greater schedule award.

¹⁰ 5 U.S.C. § 8107(a).

¹¹ 20 C.F.R. § 10.404.

¹² *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment, and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dieterich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

¹³ The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19); *see also Pamela J. Darling*, 49 ECAB 286 (1998).

¹⁴ *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

¹⁵ *See Thomas J. Engelhart*, 50 ECAB 319 (1999); *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹⁶ *Id.*

The decision of the Office of Workers' Compensation Programs dated April 2, 2001 is hereby set aside and the case is remanded for further action in accordance with this decision.

Dated, Washington, DC
September 16, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member