

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARREN L. GAFFNEY and DEPARTMENT OF JUSTICE,
FEDERAL LAW ENFORCEMENT TRAINING CENTER, Glynco, GA

*Docket No. 03-1604; Submitted on the Record;
Issued December 5, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant is entitled to more than a nine percent impairment to his right lower extremity, for which he received a schedule award.

The Office of Workers' Compensation Programs accepted appellant's claim for right ankle fracture. On July 29, 2002 appellant filed a claim for a schedule award.

On an Office form dated August 6, 2002 appellant's treating physician, Dr. Anthony J. Spataro, a Board-certified orthopedic surgeon, indicated that appellant's right ankle had dorsiflexion of 10 degrees, plantar flexion of 20 degrees, a 15 degree inversion and a 10 degree eversion. Dr. Spataro noted that appellant had weakness of the calf and gastrocnemius-soleus muscle group. On the same form dated August 15, 2002 he indicated no loss of range of motion, no weakness or atrophy and no factors of impairment.

In a report dated July 15, 2002, Dr. Spataro stated that appellant had a 25 percent loss of function according to the workmen's compensation guidelines. In a report dated August 6, 2002, Dr. Spataro stated that appellant had some loss of function, atrophy in the leg and some pain on range of motion.

On September 5, 2002 the district medical adviser reviewed Dr. Spataro's report and noted no objective information was given to calculate a schedule award.

In a report dated October 23, 2002, the referral physician, Dr. Richard S. Goodman, a Board-certified orthopedic surgeon, found that appellant's right ankle lacked 5 degrees dorsiflexion, 10 degrees plantar flexion and 10 degrees inversion, but had a full range of motion of eversion. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), Tables 17-11 and 17-12, page 537, he found that appellant had a nine percent impairment to the lower extremities.

In an addendum to his report dated November 1, 2002, Dr. Goodman explained that under Table 17-11 appellant's loss of motion of ankle flexion and extension of 10 degrees was equal to a 7 percent impairment of the right lower extremity. Under Table 17-12 the loss of inversion and eversion of 10 degrees, which was mild showed a 2 percent impairment to the right lower extremity. Adding seven percent to two percent, Dr. Goodman obtained a total impairment to appellant's right lower extremity of nine percent.

On December 4, 2002 the district medical adviser agreed with Dr. Goodman's calculation and rating.

By decision dated December 12, 2002, the Office issued appellant a schedule award for a nine percent impairment to his right lower extremity.

By letter dated January 2, 2003, appellant asked for a written review of the record by an Office hearing representative. Appellant also resubmitted a copy of Dr. Spataro's July 15, 2002 report.

By decision dated May 12, 2003, the Office hearing representative affirmed the Office's December 12, 2002 decision.

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

The schedule award provisions, of the Federal Employees' Compensation Act¹ and its implementing regulation² 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.³

In this case, none of the physicians of record properly used the A.M.A., *Guides* (5th ed. 2001) in assessing the degree of impairment to appellant's right lower extremity. In a July 15, 2002 report, Dr. Spataro did not use the A.M.A., *Guides* in determining that appellant had a 25 percent impairment. Dr. Spataro's estimate of impairment is not probative.⁴ In an October 23, 2002 report, Dr. Goodman found that appellant's right ankle lacked 5 degrees dorsiflexion, lacked 10 degrees plantar flexion and lacked 10 degrees inversion but had a full range of motion of eversion. In his November 1, 2002 report, Dr. Goodman stated that under Table 17-11, page 537, appellant's loss of motion of ankle flexion and extension of 10 degrees was equal to a 7 percent impairment of the right lower extremity. He stated that under

¹ 5 U.S.C. § 8107 *et seq.*

² 20 C.F.R. § 10.404.

³ *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁴ *See Paul E. Evans*, 44 ECAB 646, 651 (1993).

Table 17-12, page 537, appellant's loss of inversion and eversion of 10 degrees, which was mild, showed a 2 percent impairment to the right lower extremity. Dr. Goodman added the seven percent and two percent range of motion impairments to obtain a total impairment of nine percent to the right lower extremity. Dr. Goodman erred, however, in using Tables 17-11 and 17-12 to measure appellant's loss of retained motion. These tables are to be used to measure specific readings of degrees of retained motion rather than loss of motion. Dr. Goodman's finding that appellant had a nine percent impairment to his right lower extremity rating was based on an erroneous application of the relevant tables in the A.M.A., *Guides* and is of diminished probative value. In a December 4, 2002 report, the district medical adviser made no independent findings but agreed with Dr. Goodman's calculation. This nine percent impairment rating of appellant's right lower extremity is also improper. The case will be remanded for the Office to request that Dr. Goodman, or another appropriate medical specialist if Dr. Goodman is not available, recalculate the degree of appellant's impairment to his right lower extremity with proper reference to and use of the A.M.A., *Guides* (5th ed. 2001). In applying Tables 17-11 and 17-12, page 537, specific readings of degrees of retained motion rather than loss of retained motion should be used. After any further development it deems necessary, the Office should issue a *de novo* decision.

The May 12, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC
December 5, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member