

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA HERZOG and U.S. POSTAL SERVICE,
POST OFFICE, New Providence, NJ

*Docket No. 02-1632; Submitted on the Record;
Issued January 23, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has greater than an 18 percent permanent loss of use of her right leg.

On July 31, 1997 appellant, then a 38-year-old distribution clerk, filed a claim for an occupational disease for a Morton's neuroma of her right foot.

The Office of Workers' Compensation Programs accepted that appellant sustained an aggravation of a Morton's neuroma of her right foot. On November 13, 1996 appellant underwent excision of the Morton's neuroma.

On November 23, 1997 appellant filed a claim for a schedule award.

On April 29, 1998 an Office medical adviser stated that the 4th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* did not support a schedule award due to a Morton's neuroma.

By decision dated June 9, 1998, the Office found that appellant was not entitled to a schedule award.

Appellant requested a hearing and submitted a report dated September 3, 1998 from Dr. David O. Weiss, an osteopath, who specializes in orthopedic medicine. Dr. Weiss concluded that, using the 4th edition of the A.M.A., *Guides*, appellant had a 12 percent impairment due to a motor strength deficit in dorsiflexion and a 17 percent impairment due to a motor strength deficit in plantar flexion, for a combined total of a 29 percent permanent impairment of the right leg.

By decision dated January 25, 1999, an Office hearing representative found that "Dr. Weiss did not provide any medical rationale supporting that the claimant's condition was causally related to her work injury, particularly taking into account that the claimant's prior

treating physician has indicated that she is suffering from a congenital condition,”¹ but that Dr. Weiss’ report was sufficient to require that the Office further develop the evidence.

On February 11, 2000 the Office referred appellant, a statement of accepted facts and her prior medical records to Dr. Philip K. Keats, a Board-certified orthopedic surgeon, for a second opinion on the permanent impairment of her right leg.

In a report dated February 21, 2000, Dr. Keats noted that appellant’s surgeries on her right foot in 1984 and 1991 were to remove bone spurs and were not related to a Morton’s neuroma. He concluded:

“In my opinion, after careful review of the A.M.A., *Guides*, 4th edition, she is not entitled to a disability rating or a permanent partial impairment of her lower extremity as a result of the Morton’s neuroma aggravation. There is no chart or section that gives any impairment to a plantar neuroma. She has another condition of her right foot, which is not causally related to a work condition and is a congenital problem, and therefore not eligible for an impairment rating causally related to a work condition.”

By decision dated April 5, 2000, the Office found that appellant was not entitled to a schedule award for her right leg.

Appellant requested a hearing, which was held on September 21, 2000.

By decision dated December 7, 2000, an Office hearing representative found that there was a conflict of medical opinion between Drs. Weiss and Keats on the permanent impairment of appellant’s right leg.

On January 26, 2001 the Office referred appellant, the case record and a statement of accepted facts to Dr. Richard Lebovicz, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion regarding the permanent impairment of appellant’s right leg.

In a report dated April 20, 2001, Dr. Lebovicz stated that appellant’s “symptoms as related to the right forefoot region consist of electric-shock type sensations and numbness and pain between her toes that appear to be related to nerve impairment.” Examination revealed a satisfactory gait, some mild calf wasting, satisfactory plantar flexion and dorsiflexion of the right ankle, limited inversion and eversion, and “some mild increased hindfoot valgus on the right side.” Using the 4th edition of the A.M.A., *Guides*, Dr. Lebovicz assigned a 5 percent impairment of the right leg for nerve deficits, and a 10 percent impairment for an ankylosing hindfoot deformity in a neutral position, for a combined total of a 15 percent permanent impairment of the right leg.

An Office medical adviser reviewed Dr. Lebovicz’s report on May 2, 2001 and, using the 5th edition of the A.M.A., *Guides*, assigned a 10 percent impairment for moderate limitation of

¹ Dr. John L. Moglia, a podiatrist, stated in a February 20, 1996 report that appellant had a “congenital abnormal fusion of the subtalar joint” of the right foot.

inversion and eversion and 5 percent for digital nerve neuritis, for a combined total of 15 percent permanent impairment of the right leg.

On May 10, 2001 the Office issued appellant a schedule award for a 15 percent permanent loss of use of her right leg.

Appellant requested a hearing, which was held on November 18, 2001.

At the request of the Office hearing representative who conducted the hearing, Dr. Neven A. Popovic, a Board-certified orthopedic surgeon, reviewed Dr. Lebovich's report on February 4, 2002 and, applying the 5th edition of the A.M.A., *Guides*, concluded:

“The claimant has residual neurologic deficits involving her right foot metatarsal area due to pathology of plantar digital nerve. Using the table 17-37, page 552, the claimant warrants 5 percent PPI [permanent partial impairment] to her right lower extremity. It was also noted that the claimant has limited inversion and eversion of the hind foot with mild increased hind foot valgus. X-rays of the claimant's right foot revealed tarsal coalition, which was considered a preexisting condition but could have possibly aggravated the accepted work-related condition. Several tables could be used in the A.M.A., *Guides* to determine the PPI based on above conditions. Table 17-13 on page 537 would allow the claimant 12 percent PPI based on mild hind foot valgus. Table 17-12 on page 537 would allow 2 percent based on mild loss of inversion and eversion.

“Combining these values ($12 + 2 = 14$) with award for nerve pathology (5 percent) (combined values chart on page 604) equals to 18 percent PPI of the right lower extremity.

“Dr. Lebovich (report dated April 20, 2001) stated ankle motion not in degrees as recommended in the A.M.A., *Guides* but in terminology such as limited or mild. The A.M.A., tables do contain above notations (mild, moderate and severe), and thus I was able to use the data provided by Dr. Lebovich.”

On February 25, 2002 an Office hearing representative found that appellant had an 18 percent permanent loss of use of her right leg.

On March 11, 2002 the Office issued appellant a schedule award for an additional 3 percent permanent loss of use of her right leg, for a total of 18 percent.

The Board finds that appellant has no greater than an 18 percent permanent loss of use of her right leg.

There was a conflict of medical opinion as to appellant's permanent impairment of the right leg. Dr. Weiss, who examined appellant on her behalf, concluded that she had a 27 percent permanent impairment of the right leg. Dr. Keats, who examined appellant for the Office, concluded that appellant no employment-related permanent impairment of her right leg. To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal

Employees' Compensation Act,² referred appellant, the case record and a statement of accepted facts to Dr. Lebovitz, a Board-certified orthopedic surgeon. In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.³

The schedule award provisions of the Act⁴ and its implementing regulation⁵ 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.

In a report dated April 20, 2001 report, Dr. Lebovitz concluded that appellant had a 15 percent permanent impairment of her right leg. However, it appears Dr. Lebovitz incorrectly applied the tables of 4th edition the A.M.A., *Guides* to arrive at a 10 percent impairment for an ankylosing hindfoot deformity.

Effective February 1, 2001 the Office began using the 5th edition of the A.M.A., *Guides*.⁶ Dr. Popovic correctly applied the tables of the 5th edition of the A.M.A., *Guides* to the findings reported by Dr. Lebovitz: Table 17-12 to assign 2 percent for a mild limitation of eversion and inversion and Table 17-13 to assign 12 percent for a mild valgus deformity. Dr. Popovic used Table 17-37 in assigning 5 percent for a sensory deficit in the plantar digital nerve. This table should have been used in conjunction with a grading classification from Table 16-10, but this error is harmless, as Dr. Popovic assigned the maximum allowable for the plantar nerve, 5 percent.

Dr. Popovic assigned a percentage of impairment to each of Dr. Lebovitz's findings. Dr. Lebovitz did not report any impairment due to decreased strength. He did report mild calf wasting, but Table 17-2, the cross-usage chart, states that the table for muscle atrophy is not to be used together with the table for peripheral nerve injury or with the table for range of motion. The weight of the medical evidence establishes that appellant has no greater than a 18 percent permanent loss of use of her right leg.

² 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."

³ *James P. Roberts*, 31 ECAB 1010 (1980).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

⁶ FECA Bulletin No. 01-05 (issued January 29, 2001).

The March 11, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
January 23, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member