U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILDRED C. GRESHAM and U.S. POSTAL SERVICE,
POST OFFICE, Lanham, MD

Docket No. 03-109; Submitted on the Record;
Issued June 23, 2003

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has more than a 15 percent permanent impairment of her right lower extremity, for which she received a schedule award.

On December 11, 1995 appellant, then a 45-year-old mail carrier, filed an occupational disease claim alleging that on February 17, 1995 she first realized that her swollen feet, tender joints, numbness in her toes and sharp pains in the bottom of both feet and ankles were caused by factors of her federal employment. Appellant alleged that she stood on a concrete floor for four hours straight lifting, bending and moving the mail with no breaks at a very frenzied pace.

The Office of Workers' Compensation Programs accepted appellant's claim for right foot strain and right and left tarsal tunnel syndrome of the ankle and foot. The Office authorized right tarsal tunnel decompression of the right foot, which was performed on February 28, 1996.

On September 10, 1996 appellant filed a claim for a schedule award. By decision dated July 25, 1997, the Office granted appellant a schedule award for a 15 percent permanent impairment of the right lower extremity.[1]

On March 8, 2000 appellant filed another claim for a schedule award. By letter dated March 20, 2000, the Office advised Dr. H.S. Pabla, a Board-certified orthopedic surgeon and appellant's treating physician, to determine the extent of appellant's permanent impairment due to her February 17, 1995 employment injury based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

The Office received Dr. Pabla's August 2, 2000 report, finding that appellant had a 15 percent permanent impairment of the right lower extremity. The Office also received Dr. Pabla's June 27, 2001 report, indicating that appellant's range of dorsiflexion was

[1] On September 22, 1997 the Office approved right tarsal tunnel decompression of the right foot, which was performed on November 21, 1997.

10 degrees, plantar flexion was 30 degrees, inversion was 5 degrees and eversion was 10 degrees. Dr. Pabla diagnosed bilateral pes planus, tarsal tunnel syndrome and lumbar muscle strain and noted appellant's medical treatment plan.

On March 15, 2002 an Office medical adviser reviewed appellant's medical records and determined that the maximum for sensory loss was five percent and concluded that appellant had no additional impairment based on the fifth edition of the A.M.A., *Guides*.

By decision dated April 4, 2002, the Office found that appellant was not entitled to a schedule award greater than the 15 percent, for which she had already been compensated. In an April 10, 2002 letter, appellant requested reconsideration. Appellant's request was accompanied by medical evidence, which included a January 30, 2002 report from Dr. Frank J. Smith, a Board-certified podiatric surgeon, who indicated that the average range of dorsi-plantar flex was 60 degrees and that appellant could dorsi-flex to 5 degrees and plantar flex to 5 degrees. He stated that appellant could invert from neutral to three degrees and evert from neutral to seven degrees. Dr. Smith concluded that appellant had an additional 30 percent impairment rating of the right lower extremity due to weakness, atrophy, pain or anesthesia.

In a July 18, 2002 decision, the Office denied modification of the April 4, 2002 decision.[2]

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

The schedule award provisions of the Federal Employees' Compensation Act[3] and its implementing regulation[4] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[5] However, neither the Act nor the regulations specify the manner, in which the percentage of impairment shall be determined. For consistent results and to insure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[6]

In this case, the Office relied on the opinion of an Office medical adviser that appellant had a maximum sensory loss of five percent and no additional impairment of the right lower

[2] The Board notes that subsequent to the Office's July 18, 2002 decision, the Office received factual and medical evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).

[3] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[4] 20 C.F.R. § 10.404.

[5] 5 U.S.C. § 8107(c)(19).

[6] *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

extremity utilizing the fifth edition of the A.M.A., *Guides*. The Office medical adviser, however, did not explain how the determination that appellant had a maximum sensory loss of five percent and no additional impairment was reached in accordance with the relevant standards of the A.M.A., *Guides*.

Section 8123(a) of the Act provides in pertinent part: "If there is a 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."[7]

There is a conflict in the medical opinion evidence between the Office medical adviser who opined that appellant had no additional impairment and appellant's treating physicians, Dr. Pabla, who opined that appellant had a 15 percent impairment and Dr. Smith, who opined that appellant had a 30 percent impairment of the right lower extremity. Thus, the case must be remanded to the Office for further development. To resolve the outstanding conflict, the Office shall refer appellant, the case record and a statement of accepted facts to an appropriate specialist to obtain a detailed, well-rationalized opinion regarding the degree of permanent impairment of appellant's right lower extremity pursuant to the A.M.A., *Guides*. After such development as necessary, the Office shall issue a *de novo* decision.

The July 18 and April 4, 2002 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
June 23, 2003

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] 5 U.S.C. § 8123(a).