U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATTY L. HUBBS and DEPARTMENT OF THE ARMY,
RED RIVER army DEPOT, Texarkana, TX

Docket No. 02-672; Submitted on the Record;
Issued March 19, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has more than a 30 percent permanent impairment of the right lower extremity for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

The Office accepted that on February 14, 1990 appellant, then a 38-year-old computer operator, sustained a crush injury to her right ankle in the performance of duty. She underwent multiple surgeries on her right ankle and foot, including a fusion of the right subtalar joint on December 28, 1992 and a metatarsal osteotomy of the right ankle on November 24, 1997.

By decision dated June 2, 1994, the Office granted appellant a schedule award for a 30 percent permanent impairment of the right lower extremity. The period of the award ran for 86.40 weeks, from November 11, 1993 to July 8, 1995.

On July 6, 1998 appellant filed a claim for an additional schedule award. By decision dated September 3, 1998, the Office denied appellant's claim on the grounds that the record contained no medical evidence supporting that she had an increased right lower extremity impairment. The Office noted that Dr. Jeffrey T. DeHaan, a Board-certified orthopedic surgeon and appellant's attending physician, had not responded to the Office's request for information.[1]

On March 28, 2000 the Office authorized a right fifth metatarsal osteotomy. On December 8, 2000 Dr. DeHaan performed a hammertoe correction of the right third toe.

By letter dated February 7, 2001, Dr. DeHaan informed the Office that appellant "has had numerous foot procedures on her right foot because of intractable hammertoes, [etceteras]…."

[1] In a letter dated September 8, 1998, appellant requested reconsideration of her claim. However, it does not appear that the Office took further action.

He further diagnosed reflex sympathetic dystrophy and stated that appellant "needs a new impairment rating because I do [not] think everything had been taken into account with her prior impairment ratings."

On March 6, 2001 Dr. Barry M. Green, a Board-certified orthopedic surgeon, examined appellant at the request of Dr. DeHaan to determine the extent of her permanent impairment. He diagnosed reflex sympathetic dystrophy, subtalar traumatic arthritis and hammertoes on the second, third, fourth and fifth toes of the right foot. He stated:

> "[Appellant's] history goes back to 1990 when she caught her right foot between two machines sustaining a twisting injury. She went on to develop subtalar arthritis of the right ankle joint and subsequently underwent a subtalar fusion. [Appellant] also developed hammertoe deformity and she has had surgery on the [second], [third] and [fifth] toes. The [fourth] toe does not have a bad hammertoe deformity, but the toes are stiff and this will be rated. She also has atrophy of the right calf and this will be rated along with the reflex dystrophy, which is well documented."

Dr. Green found that appellant reached maximum medical improvement on March 6, 2001. He stated:

> "Based on the [American Medical Association,] *Guides to the Evaluation of Permanent Impairment*, [(5th edition 2001)] [appellant] receives a 21 percent lower extremity rating. [In] figuring the RSD [reflex sympathetic dystrophy] we will look at [p]age 552, Table 17-37, using the common peroneal and the sensory component, which yields [a] 5 percent lower extremity impairment. Then we will look at [p]age 482, Table 16-10, Grade 2 under sensory and we will use the maximum of 80 percent sensory deficit, because she does have a positive acetone test and has findings consistent with a mild reflex dystrophy. We then multiple 80 percent and 5 percent (.80 and .05), which gives us [a] 4 percent lower extremity impairment. For her atrophy, she had a full inch or 2.5 cm [centimeter] difference and on [p]age 530, Table 17-6, this yields [a] 13 percent impairment. For the stiffness of her toes, we will look at [p]age 543, Table 17-30 and she receives [a] 6 percent impairment. We then combine *13 percent for the atrophy, 6 percent impairment for the stiffness in her toes and 4 percent impairment for the RSD*, which yields [a] 21 [percent] lower extremity impairment. She has no vascular deficits and no other specific disorders." (Emphasis in the original.)

On September 7, 2001 an Office medical adviser reviewed Dr. Green's March 6, 2001 report and concurred with his finding that appellant had a 21 percent impairment of the right lower extremity. The Office medical adviser noted:

> "[Appellant] has an accepted condition crush injury to the right ankle. This has resulted in a subtalar fusion, hammertoes requiring surgical correction, stiffness of the toes of the right foot, and the development of reflex sympathetic dystrophy."

By decision dated September 18, 2001, the Office denied appellant's claim for an increased schedule award on the grounds that the medical evidence did not show that she had more than a 30 percent impairment of the right lower extremity. The Office also accepted that appellant sustained RSD due to her employment injury.

By letter dated September 21, 2001, appellant requested reconsideration of her claim. In support of her request, appellant submitted a medical report from Dr. DeHaan dated October 8, 2001, received by the Office on October 15, 2001.

In a decision dated October 23, 2001, the Office found that appellant did not submit relevant evidence or present a new legal contention in support of her request for reconsideration and thus denied review of the prior decision.

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

The schedule award provisions of the Federal Employees' Compensation Act[2] and its implementing federal regulations,[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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[4] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[5]

In a report dated March 6, 2001, Dr. Green, a Board-certified orthopedic surgeon, found that, according to Table 17-37 on page 552 of the A.M.A., *Guides*, appellant had a 5 percent lower extremity impairment due to reflex sympathetic dystrophy of the common peroneal nerve. He multiplied the 5 percent impairment of the common peroneal nerve by the 80 percent sensory deficit provided in Table 16-10 on page 482 of the A.M.A., *Guides* to find that appellant had a 4 percent impairment of the right lower extremity. Dr. Green further applied Table 17-6 on page 530 of the A.M.A., *Guides* and determined that appellant had a 13 percent impairment due to

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id.*

[5] *See* FECA Bulletin No. 01-5, issued January 29, 2001.

atrophy of the right calf. He then found that appellant had a 6 percent impairment of the toes due to stiffness according to Table 17-30 on page 543 of the A.M.A., *Guides*. Dr. Green combined the 4 percent impairment due to reflex sympathetic dystrophy, the 13 percent impairment due to atrophy and the 6 percent impairment due to stiffness in her toes using the Combined Values Chart on page 604 of the A.M.A., *Guides* and concluded that appellant had a 21 percent impairment of the right lower extremity. The Office medical adviser reviewed Dr. Green's report and concurred with his impairment determination. The Office medical adviser noted, however, that appellant had prior accepted conditions, including a subtalar fusion, for which she had received a prior award. The Office's procedures require that any previous impairment to the member under consideration be included in calculating the schedule award unless the prior impairment is due to a previous employment injury or the Department of Veterans Affairs has paid the claimant for permanent impairment to the scheduled member.[6] In this case, the Office did not include appellant's prior impairment determination in calculating the extent of her permanent impairment. The case, therefore, is remanded for the Office to refer appellant, together with the case record and a statement of accepted facts, for a second opinion evaluation on the issue of the extent of the permanent impairment of her right lower extremity in accordance with the fifth edition of the A.M.A., *Guides*.[7]

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.7(2) (March 1995).

[7] In view of the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for reconsideration under section 8128 is moot.

The decisions of the Office of Workers' Compensation Programs dated October 23 and September 18, 2001 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
March 19, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member