

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA SWINNEY and U.S. POSTAL SERVICE,
POST OFFICE, Jersey City, NJ

*Docket No. 03-793; Submitted on the Record;
Issued May 19, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

This case is before the Board for the second time. In the first appeal, the Board found that the opinion of the impartial medical examiner was insufficient to constitute the weight of the medical evidence on the issue of whether appellant had more than a nine percent permanent impairment of her right leg.¹ The Board set aside the Office of Workers' Compensation Programs' February 9, 1999 decision and remanded the case for the Office to obtain a supplemental report from Dr. Paul Anthony Foddai, a Board-certified orthopedic surgeon and impartial medical examiner, or, if necessary, to refer appellant for a second impartial medical examination.

On remand, the Office requested that Dr. Foddai explain how he determined the extent of appellant's permanent impairment with reference to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993). Dr. Foddai, however, indicated that he could not provide any further assistance to the Office.

By letter dated October 16, 2000, the Office referred appellant to Dr. Lester Lieberman, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 26, 2000, Dr. Lieberman reviewed the medical evidence of record and listed findings on physical examination. He noted that appellant "states she has no pain. She only has swelling of the area of the right ankle." Dr. Lieberman stated:

"Measurements at 6 [inches] above the mid-patella are 18 [inches] and equal bilaterally; at 5 [inches] below the mid-patella are 15 [inches] and equal

¹ *Brenda Swinney*, Docket No. 99-1523 (issued August 4, 2000).

bilaterally. Measurements at the ankle are 11 [inches] and equal bilaterally. There was no pitting edema. Range of motion of both knees was 0 [to] 120 degrees of flexion with extension to zero. There was no medial, lateral, anterior or posterior instability. She moved her toes quite well and had no pain on volar flexion. Palpation of the foot did not reveal any tenderness of the extensor tendons. She had a good range of motion on plantar flexion. There was no instability of the ankle. There was no tenderness over the lateral or medial ligaments of the ankle, or over the tibia, fibula or talus. Using a goniometer, the following range of motion of the ankles were determined: left ankle 10 degrees above the ankle; right ankle to neutral; plantar flexion 45 degrees and equal bilaterally; eversion was 30 degrees on the left side and 20 degrees on the right side; inversion was 20 degrees and equal bilaterally.

“According to the [A.M.A., *Guides*] [T]able 42, ankle motion impairment; plantar flexion was equal. She had mild extension deficit of the right ankle. This was 10 percent of the lower extremity. There was 20 degrees eversion on the right side with 30 degrees on the left side. This was a 10 degree difference. It had to be estimated, as the goniometer could not be used on this. It was therefore estimated as moderate, or [a] 5 percent impairment [of the] lower extremity according to [T]able 43 hind foot impairment. Combining the 2 would be 15 percent for the lower extremity.”

Dr. Lieberman further found that appellant had no edema on examination.

By decision dated November 27, 2000, the Office granted appellant a schedule award for an additional six percent permanent impairment of the right lower extremity. The period of the award ran for 17.28 weeks from June 21 to October 19, 1997.

By letter dated December 6, 2000, appellant requested a hearing. In a decision dated July 11, 2001 and finalized July 17, 2001, the hearing representative set aside the Office's November 27, 2000 decision after determining that Dr. Lieberman's report required clarification on the issue of whether appellant had edema of the right ankle on physical examination.

In a letter dated July 27, 2001, the Office requested that Dr. Lieberman explain the apparent discrepancy between his statements that appellant had swelling of the right ankle in his findings on physical examination and his conclusion that she had no ankle edema.

Dr. Lieberman, in an August 7, 2001 response, related that he had not found edema or swelling on examination of appellant. Dr. Lieberman indicated that his statement that appellant had no pain but swelling of the right ankle was based on her complaints rather than his observation.

In a decision dated September 18, 2001, the Office found that appellant had no more than a 15 percent permanent impairment of the right lower extremity for which she had received schedule awards.

On September 24, 2001 appellant requested a hearing. In a decision dated June 6, 2002, the hearing representative affirmed the Office's September 18, 2001 decision. The hearing

representative found that Dr. Lieberman had mistakenly failed to include in his impairment rating appellant's two percent impairment due to loss of inversion. The hearing representative further found that Dr. Lieberman mistakenly concluded that appellant's decreased ankle extension constituted a 10 percent impairment of the lower extremity rather than a 7 percent impairment. The hearing representative combined the 5 percent impairment due to loss of eversion, the 2 percent impairment due to loss of inversion and the 7 percent impairment due to loss of extension and concluded that appellant had a 14 percent permanent impairment of the lower extremities. Therefore, the hearing representative affirmed the Office's finding that appellant was not entitled to an increased schedule award.

The Board finds that appellant has no more than a 15 percent permanent impairment of the right lower extremity for which she received schedule awards.

Under section 8107 of the Federal Employees' Compensation Act,² and section 10.404 of the implementing federal regulations,³ schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁴

In accordance with the Board's instructions, on remand the Office referred appellant to a second impartial medical examiner, Dr. Lieberman, a Board-certified orthopedic surgeon. In a report dated October 26, 2000, Dr. Lieberman measured appellant's right ankle motion and found that she had a moderate impairment in eversion of the hindfoot which constituted a 5 percent impairment of the lower extremity pursuant to Table 43 on page 78 of the A.M.A., *Guides*. He further found that appellant had a mild loss of ankle extension which constituted a 10 percent impairment according to Table 42 on page 78 of the A.M.A., *Guides*. Dr. Lieberman determined that appellant had no impairment due to loss of inversion of the hindfoot because the measurements were equal on both sides. He combined the 10 percent impairment due to loss of ankle extension with the 5 percent impairment in eversion and concluded that appellant had a 15 percent impairment of the right lower extremity.

However, as discussed by the Office hearing representative, Dr. Lieberman should have included appellant's loss of inversion on the right side, a two percent lower extremity impairment according to Table 43 on page 78, in determining the extent of her permanent impairment. The hearing representative further noted that Dr. Lieberman found that appellant had a 10 percent impairment due to mild loss of ankle extension under Table 42 on page 78; however, the 10 percent impairment is the degree of impairment to the foot rather than the lower extremity. For the lower extremity, Table 42 provides a 7 percent impairment for a mild loss of

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *James J. Hjort*, 45 ECAB 595 (1994).

extension. The hearing representative combined the 7 percent impairment due to loss of extension, the 2 percent impairment due to loss of inversion, the 5 percent impairment due to a moderate loss of eversion and concluded that appellant had a 14 percent impairment of the right lower extremity.

Where there exists a conflict in medical opinion and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁵

The Board finds that Dr. Lieberman's report, which is detailed and based on a thorough physical examination and review of the medical evidence, is entitled to special weight. Dr. Lieberman provided detailed range-of-motion measurements and applied the tables and pages of the A.M.A., *Guides* to his findings. While Dr. Lieberman miscalculated the extent of appellant's impairment due to loss of inversion and extension, the hearing representative properly corrected the miscalculations based on Dr. Lieberman's own findings. The weight of the evidence, therefore, establishes that appellant has no more than a 15 percent permanent impairment of the right lower extremity.

The decision of the Office of Workers' Compensation Programs dated June 6, 2002 is affirmed.

Dated, Washington, DC
May 19, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ *Leanne E. Maynard*, 43 ECAB 482 (1992).