United States Department of Labor
Employees' Compensation Appeals Board

SHALANYA ELLISON, Appellant	)	
and	)	**Docket No. 04-824**
	)	**Issued: November 10, 2004**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Milwaukee, WI, Employer	)	

Appearances:
Shalanya Ellison, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 9, 2004 appellant timely appealed the January 9, 2004 decision of the Office of Workers' Compensation Programs, which denied modification of a September 12, 2002 decision granting a schedule award for a 16 percent impairment of the right leg. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether appellant has more than a 16 percent permanent impairment of the right leg.

FACTUAL HISTORY

On November 3, 1999 appellant, then a 27-year-old mail handler, was injured when the gate of an all-purpose carrier fell, striking her right ankle. She was referred for a magnetic resonance imaging (MRI) scan of the right ankle.

In an April 27, 2000 report, Dr. Scott J. Erickson, a Board-certified radiologist, indicated that the MRI scan showed a complete tear of the majority of the anterior talofibular ligament.

The MRI scan also showed mild irregularity of the calcaneofibular ligament without discontinuity. Dr. Erickson concluded that appellant had enlargement of the tibialis posterior tendon with subtle, linear foci, consistent with tendinitis and possible partial tearing. His findings were compatible with a previous lateral collateral ligament injury with avulsion fragment adjacent to the inferior aspect of the fibula. Dr. Erickson found soft tissue focus within the anterolateral gutter which could represent an impingement lesion. He noted that the anterior tibiofibular ligament was abnormal in this region and commented that appellant had a probable previous injury to the distal aspect of the superficial deltoid. Dr. Erickson found tibiotalar degenerative disease, most pronounced in the anterior half of the joint with osteophyte formation, subchondral cyst formation and joint space narrowing. He noted that this finding did not have the appearance of a typical osteochondral lesion and indicated that appellant had tibiofibular degenerative disease of a lesser degree. Dr. Erickson stated that appellant also had a probable synovial hyperplasia within the anterior aspect of the ankle.

The Office accepted appellant's claim for a right ankle contusion and paid compensation for the periods appellant missed from work. She underwent arthroscopic surgery of the right ankle on May 10, 2000.

In a February 9, 2001 office note, Dr. David D. Mellencamp, a Board-certified orthopedic surgeon, reported that standing x-rays showed that appellant had anterior tibial talar arthritis. He stated that the only remedy was an ankle fusion. In a February 27, 2001 report, Dr. Mellencamp stated that appellant had sustained an injury in November 1999, which had progressed to post-traumatic ankle arthritis requiring an ankle fusion. She underwent arthroscopic ankle fusion surgery on March 30, 2001.

In a September 24, 2001 report, Dr. Trinh G. Truong, a physiatrist, indicated that he had performed an electromyogram (EMG) and nerve conduction studies and that the bilateral superficial peroneal sensory nerve was technically difficult to obtain. He noted that the EMG was normal in the right leg. There was also no electrodiagnostic evidence for lumbar radiculopathy. Dr. Truong indicated that appellant's right foot pain and paraesthesia was most likely due to local trauma and that she had mechanical low back pain due to right ankle dysfunction, causing left S1 joint pain. In an October 29, 2001 report, he stated that she was still having significant tenderness over the saphenous and right superficial peroneal nerve distribution. Dr. Truong indicated that appellant's ankle range of motion was normal with pain at the extremes of motion. He commented that motor examination, reflexes and sensation were fairly normal in the legs except for mild diminished sensation in the right saphenous nerve.

Appellant filed a claim for a schedule award. The Office requested that she provide a report from her physician setting forth the ranges of motions and other factors indicating any permanent impairment. In a March 22, 2002 report, Dr. Anthony A. Ferguson, a Board-certified orthopedic surgeon, noted that appellant had reached maximum medical improvement as of April 1, 2002 and rated her right ankle impairment as 40 percent based on the *Wisconsin Department of Workforce Development Guidelines.* In an April 17, 2002 report, he noted that he received the Office's letter on evaluating permanent impairment. Dr. Truong stated that appellant had a fusion of the ankle with total loss of motion of the ankle with a range of motion in the right side of dorsiflexion to 0 degrees, plantar flexion to 10 degrees, inversion to 10 degrees and eversion to 5 percent.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Vijay Kulkarni, a Board-certified orthopedic surgeon, for an opinion on the extent of her right ankle impairment. In a June 12, 2002 report, he indicated that she had hyperesthesia and tenderness over the lateral aspect of the right ankle and foot. Dr. Kulkarni found that appellant had 0 degrees dorsiflexion, 20 degrees plantar flexion, 0 degrees supination and 20 degrees pronation in the right ankle. He diagnosed acute trauma of the right ankle with post-traumatic arthritis. Dr. Kulkarni commented that subjective findings outweighed objective signs. He stated that maximum medical improvement was reached in January 2002 and estimated, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[1] that appellant had 10 percent impairment of the right leg due to fusion in the optimal position. Dr. Kulkarni noted that she also had residual chronic pain in the right ankle.

In a May 30, 2002 report, Dr. Ferguson stated that appellant had complete ankylosis of the ankle joint in a neutral dorsal and plantar flexion position which equaled a 30 percent permanent impairment of the leg. He indicated that she had abnormal subtalar and hindfoot range of motion with 0 degrees eversion and 10 degrees inversion. Dr. Ferguson commented that appellant had a four percent impairment for loss of both eversion and inversion. He calculated that she had a total 38 percent permanent impairment based on the third edition of the A.M.A., *Guides*.

The Office referred the case record to Dr. David Anderson, an Office consultant Board-certified in emergency medicine. In a July 20, 2002 report, he reviewed the reports of Dr. Kulkarni and Dr. Ferguson. Dr. Anderson noted that Dr. Ferguson did not report any subjective complaints regarding appellant's right ankle. He stated that, under the fifth edition of the A.M.A., *Guides*, she had a 10 percent permanent impairment of the right leg for ankylosis of the right ankle in the neutral position. Dr. Anderson noted that because inversion/eversion occurred at the subtalar joint, appellant would have additional impairment, noting 2 percent impairment for 10 degrees of inversion and 2 percent impairment for 0 degrees of eversion. He estimated that she also had a 60 percent sensory impairment for pain in the distribution of the superficial peroneal and sural nerves, which represented a 2 percent and 1 percent impairment of the leg respectively. Dr. Anderson concluded that appellant had a total 16 percent permanent impairment of the right leg.

In a September 12, 2002 decision, the Office granted a schedule award for 16 percent impairment of the right leg. The period of the award was from April 6, 2002 to February 22, 2003, for a total of 46.08 weeks of compensation.

In a September 30, 2002 letter, appellant requested a hearing before an Office hearing representative. At the May 8, 2003 hearing, she described and discussed the effects of her right ankle condition. In a June 10, 2003 decision, an Office hearing representative affirmed the September 12, 2002 schedule award.

In an undated letter received by the Office October 13, 2003, appellant requested reconsideration and submitted a September 19, 2003 report from Dr. Ferguson, who stated that appellant, under the fifth edition of the A.M.A., *Guides*, had 10 percent impairment of the leg for

[1] A.M.A., *Guides* (5th ed. 2001).

ankylosis of the ankle in the neutral position. The Office referred the case record to an Office medical adviser for review. In a November 15, 2003 memorandum, the Office medical adviser agreed that appellant had 10 percent impairment of the right leg due to ankylosis of the right ankle in the neutral position. He noted that she also had a seven percent impairment of the right leg due to chronic pain in the distribution to the right ankle. The Office medical adviser concluded that appellant had no more than 16 percent impairment of the right leg.

In a January 9, 2004 decision, the Office denied modification of the June 10, 2003 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[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. The method used in making such a determination is a matter that rests within the sound discretion of the Office.[4] 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.

ANALYSIS

Several medical reports provided estimates for appellant's permanent impairment due to her right ankle injury. In his March 22, 2002 report, Dr. Ferguson, stated that she had a 40 permanent impairment of the right leg based on the *Wisconsin Department of Workforce Development Guidelines.* However, schedule awards under the Act are to be based on the A.M.A., *Guides.* Dr. Ferguson's estimate of appellant's permanent impairment is irrelevant, not probative because it was not based on the A.M.A., *Guides*. In a May 30, 2002 report, Dr. Ferguson found that she had 38 percent impairment under the third edition of the A.M.A., *Guides*. However, his impairment estimate was based on the third edition of the A.M.A., *Guides*. At that time, the Office was using the fifth edition of the A.M.A., *Guides* to determine permanent impairment.[5] This report, therefore, was also not probative. In a September 19, 2003 report, Dr. Ferguson estimated a 10 percent impairment of appellant's right leg due to ankylosis in the neutral position, based on the fifth edition of the A.M.A., *Guides*.[6] Dr. Kulkarni,

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Danniel C. Goings*, 37 ECAB 781, 783-84 (1986); *Richard Beggs*, 28 ECAB 387, 391-93 (1977).

[5] See FECA Bulletin No. 01-05 (issued January 29, 2001) (directs that the Office use the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

[6] A.M.A., *Guides* at 541.

Dr. Anderson and the Office medical adviser all concurred in this assessment. The medical evidence establishes that appellant has 10 percent impairment of the right leg due to ankylosis of the ankle in the neutral position.

In his September 19, 2003 report, Dr. Ferguson did not provide any impairment estimate based on pain. Dr. Kulkarni concluded that appellant had no permanent impairment due to pain because Dr. Ferguson had not reported any subjective complaints arising from her right ankle. The Office medical adviser stated that she had seven percent impairment of the right leg due to chronic pain in the distribution of the right ankle. However, he did not provide any explanation on how he arrived at that estimate under the A.M.A., *Guides*. His report, therefore, does not provide a sufficient basis for determining the extent of permanent impairment due to pain.[7]

Dr. Anderson stated that appellant had 2 percent permanent impairment of the right leg due to 0 degrees of eversion motion and a 2 percent permanent impairment for 10 degrees of inversion motion.[8] He also found that she had two percent impairment for pain involving the peroneal nerve and one percent impairment due to pain involving the sural nerve. Dr. Anderson calculated the percentages by first rating appellant's impairment due to sensory loss as 60 percent under the A.M.A., *Guides*, indicating that her pain showed distorted superficial tacile sensibility with some abnormal sensations or light pain that interfered with some activities.[9] He then multiplied the percentage for pain by the maximum impairment rating for sensory loss for the common peroneal nerve, which is five percent and for the sural nerve, which is two percent.[10] Dr. Anderson concluded that appellant had a two percent and one percent permanent impairment, respectively, for sensory loss involving the injury to the right ankle. He then combined the percentages of impairment for ankylosis, loss of range of motion and pain. Dr. Anderson combined 10 percent for ankylosis, 2 percent for loss of eversion, 2 percent for loss of inversion, 2 percent for sensory loss in the common peroneal nerve and 1 percent for sensory loss in the sural nerve, using the Combined Values Chart of the A.M.A., *Guides* to conclude that appellant had a total 16 percent permanent impairment of the right leg.[11] However, applying the Combined Values Chart to the impairment percentages yields a 17 percent impairment of the right leg. Combining 10 percent for ankylosis with a total 4 percent for loss of range of motion yields 14 percent. Combining 14 percent with a total 3 percent for pain yields 17 percent. The decision of the Office will be modified to find 17 percent impairment of appellant's right leg.[12]

[7] *Carolyn E. Seller*, 50 ECAB 393, 395 (1999).

[8] A.M.A., *Guide* at 537, Table 17-12.

[9] *Id.* at 424, Table 15-15.

[10] *Id.* at 552, Table 17-37.

[11] *Id*. at 604-06.

[12] The Board notes that the number of weeks of compensation provided under 5 U.S.C. § 8107(c)(2) for a 100 percent or total loss of use of the leg is 288 weeks. Multiplying 17 percent by 288 weeks, results in 48.96 weeks compensation.

CONCLUSION

The Board finds that appellant has 17 percent impairment of the right leg.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 9, 2004 and June 10, 2003 be modified to find a 17 percent permanent impairment of appellant's right leg. The decisions are affirmed as modified by the Board.

Issued: November 10, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member