

head when he was struck by a car while on travel status in Puerto Rico. He underwent multiple surgical procedures and received appropriate continuation of pay and compensation. Appellant returned to full-time work on September 24, 2001 and on January 22, 2003 filed a claim for a schedule award. By letter dated February 5, 2003, the Office advised appellant that he needed to submit a medical report in accordance with the fifth edition of the American Medical Association, *Guides to Permanent Impairment* (A.M.A., *Guides*).¹

Appellant's attending Board-certified orthopedic surgeon, Dr. Thomas Kristiansen, submitted a report dated January 10, 2003 in which he advised that appellant's functional level had remained unchanged for over a year and no further surgery was needed. The physician concluded that appellant was at the end point of medical treatment. Appellant also submitted a number of x-rays describing the healing of his leg fractures.² In an appended response to the February 5, 2003 Office letter, it was noted that maximum medical improvement had been reached on January 10, 2003 and that Dr. Kristiansen did not rate permanent impairment.³

The Office thereafter referred appellant, along with the statement of accepted facts and the medical record, to Dr. Daniel C. Wing, a Board-certified physiatrist, for an evaluation of appellant's permanent impairment. By report dated July 16, 2003, Dr. Wing, noted physical findings of a 1.25 inch leg length discrepancy with areas of complete anesthesia over the leg, especially over a 5 x 9 cm skin graft and decreased light touch sensation in the deep and superficial peroneal area over the dorsum of the foot. The physician advised that appellant had full range of motion of the ankle with no apparent motor weakness in the foot. Dr. Wing opined that appellant had not reached maximum medical improvement because he needed a corrective shoe and physical therapy. Regarding impairment, the physician stated that, according to Table 17-5 of the fifth edition of the A.M.A., *Guides*, appellant was entitled to a 15 percent whole person impairment due to gait derangement but perhaps with an improvement to a 7 percent whole person impairment after the treatment he had outlined was completed.

The Office forwarded Dr. Wing's report and the statement of accepted facts to an Office medical adviser for review. In a December 1, 2003 report, an Office medical adviser reported that, pursuant to Table 17-4 of the fifth edition of the A.M.A., *Guides*, appellant would be entitled to a 15 percent impairment based on a his leg length discrepancy. He further found that, pursuant to Table 17-37, appellant had the maximum allowed or a 17 percent pain and sensory deficit which, under Table 16-10, correlated with the maximum found in Grade 3 or 60 percent and concluded that 60 percent of 17 percent produced an additional 10 percent impairment. He then utilized the Combined Values Chart and found that when the 10 percent pain and sensory deficit was combined with the 15 percent limb length discrepancy, a 24 percent permanent impairment was reached. The Office medical adviser indicated that maximum medical improvement had been reached on January 10, 2003 when Dr. Kristiansen advised that an end point had been reached.

¹ A.M.A., *Guides* (5th ed. 2001); *Joseph S. Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

² A December 18, 2002 x-ray demonstrated, *inter alia*, mild lateral displacement of a healing tibial fracture. In x-rays dated February 18 and May 21, 2003, it was reported that the alignment had not changed.

³ It is unclear who appended the notes to the February 13, 2003 letter.

By decision dated January 9, 2004, the Office granted appellant a schedule award for a 24 percent permanent impairment of the right lower extremity, for a total of 352 days, to run from January 10 to December 27, 2003. On February 4, 2004 appellant requested reconsideration, contending that he was entitled to an additional schedule award for his foot. He submitted a January 14, 2004 treatment note in which Dr. Kristiansen noted examination findings of mild tenderness over the fracture site. An attached x-ray revealed incomplete healing of the mid-shaft tibial fracture that was unchanged since an October 14, 2003 film. In a decision dated April 29, 2004, the Office denied appellant's request for reconsideration, finding that the Office medical adviser correctly determined the degree of impairment. The Office further noted that appellant's contention that he was entitled to an additional award did not have a reasonable color of validity.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulation⁵ sets 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. The Act, however, 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.⁶

ANALYSIS -- ISSUE 1

In this case, the Office accepted that appellant sustained fractures to his right leg, pelvis and ribs and a laceration of the head for which he underwent multiple surgical procedures. His attending orthopedic surgeon, Dr. Kristiansen, advised on January 10, 2003 that appellant had reached an end point regarding medical treatment, and the Office referred him to Dr. Wing for an impairment rating.

In his July 16, 2003 report, Dr. Wing advised that appellant had a limb length discrepancy of 1.25 inches. Section 17.2b of the A.M.A., *Guides* describes the procedure to be followed in determining limb length discrepancy and indicates that a discrepancy of 1.0 to 1.5 inches equals a 15 percent lower extremity impairment.⁷ The Office medical adviser thus properly found that appellant's limb length discrepancy of 1.25 inches would entitle him to a 15 percent impairment.

Dr. Wing also stated that appellant had full range of motion of the ankle and no apparent motor weakness in the foot but had areas of complete anesthesia over the leg, particularly over a 5 x 9 cm skin graft. He further described decreased light touch sensation in the deep and

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.404.

⁶ *Ronald R. Kraynak*, 53 ECAB (Docket No. 00-1541, issued October 2, 2001).

⁷ A.M.A., *Guides*, *supra* note 1 at 528.

superficial peroneal area over the dorsum of the foot. The Office medical adviser determined that, Dr. Wing's findings indicated that, under Table 17-37, appellant had a 17 percent lower extremity sensory deficit. He then determined that, under Table 16-10, appellant had the maximum impairment found under Grade 3 or 60 percent and that 60 percent of 17 percent produced an additional 10 percent impairment.

Section 17.21 of the A.M.A., *Guides* describes the procedure to be followed in determining peripheral nerve injuries⁸ and Table 17-37 provides impairment ratings based on motor and sensory deficits and dysesthesias of specific nerves.⁹ Under Table 17-37, the maximum allowed for peroneal sensory deficits is 10 percent.¹⁰ While neither Dr. Wing nor the Office medical adviser specifically indicated which nerve was implicated in the finding of leg anesthesia, as the A.M.A., *Guides* indicate that sensory deficits are subjective,¹¹ the Board finds that it was reasonable for the Office medical adviser to award an additional 7 percent, thus making appellant's sensory deficit total 17 percent under Table 17-37. The Board also finds that the Office medical adviser properly chose the Grade 3 multiplier found in Table 16-10.¹² Grade 3 is described as distorted superficial tactile sensibility¹³ such as the diminished light touch sensation found by Dr. Wing. Finally, the Board finds that the Office medical adviser permissibly assigned appellant the maximum sensory deficit allowed under Grade 3 or 60 percent and then properly found that the 60 percent found under Table 16-10, when multiplied by the 17 percent found under Table 17-37, equaled an additional 10 percent right lower extremity impairment.

Sections 17.2b and 17.21 of the A.M.A., *Guides* indicate that limb length discrepancy and sensory deficits should be combined.¹⁴ In this case, the Office medical adviser properly utilized the Combined Values Chart¹⁵ and determined that appellant's limb length discrepancy impairment of 15 percent, when combined with his sensory deficit of 10 percent, totaled a 24 percent right lower extremity impairment. While Dr. Wing advised that, under Table 17-5, appellant was entitled to a 15 percent whole person impairment due to gait derangement, section 17.2c of the A.M.A., *Guides* provides that gait derangement impairment stands alone and is not to be combined with any other impairment evaluation method.¹⁶ Appellant would thus not be entitled to an additional award for gait derangement. The medical evidence of record, therefore,

⁸ *Id.* at 550-52.

⁹ *Id.* at 552.

¹⁰ *Id.*

¹¹ *See* section 17.21, *supra* note 8.

¹² A.M.A., *Guides*, *supra* note 1 at 482.

¹³ *Id.*

¹⁴ *Id.* at 528, 550.

¹⁵ *Id.* at 604-06.

¹⁶ *Id.* at 529; *see also* Table 17-2 at 526.

does not establish that appellant was entitled to a schedule award greater than the 24 percent granted.

The Board however notes that appellant submitted x-rays indicating that he had a mild displacement of a healing tibial fracture. Section 17.2j of the A.M.A., *Guides* discusses diagnosis-based impairments and Table 17-33 indicates that a malalignment of a tibial shaft fracture may entitle appellant to an increased award.¹⁷ Table 17-2 does not preclude combining diagnosis-based estimates with impairments for limb length discrepancy and peripheral nerve injury.¹⁸ Table 17-33 indicates, however, that precise measurement of the malalignment must be provided¹⁹ and the x-rays submitted by appellant do not contain such measurements. They would thus not be sufficient to entitle him to an increased award.

LEGAL PRECEDENT -- ISSUE 2

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).²⁰ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.²¹ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.²²

ANALYSIS -- ISSUE 2

The Board initially notes that this is not a case where appellant is requesting an increased schedule award because his conditions had worsened.²³ Rather, in his letter requesting reconsideration, appellant merely asserted that he was entitled to an additional award for his foot.

¹⁷ A.M.A., *Guides*, *supra* note 1 at 545-47.

¹⁸ *Id.* at 526.

¹⁹ *Id.* at 547.

²⁰ 20 C.F.R. § 10.608(a).

²¹ 20 C.F.R. § 10.608(b)(1) and (2).

²² 20 C.F.R. § 10.608(b).

²³ Office procedures state that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure. To the extent that a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on new exposure or on medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).

In denying merit review, the Office found that this argument did not have a reasonable color of validity. The Board has held that where, as here, the residuals of an injury to a schedule member of the body extend into an adjoining area of a member also enumerated in the schedule, such as an injury of a foot into the leg, the schedule award should be made on the basis of the percentage loss of use of the larger member.²⁴ Furthermore, the A.M.A., *Guides* indicates that, in calculating lower extremity impairment, all the impairment ratings must be calculated for the lower extremity and not, *e.g.*, for the foot.²⁵ The Board therefore finds appellant's assertion does not support that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office.

Appellant also submitted a treatment note dated January 14, 2004 in which Dr. Kristiansen merely noted findings of mild tenderness over the fracture site and contains no findings relevant to whether appellant is entitled to an increased schedule award. Appellant also submitted a January 14, 2004 x-ray which revealed incomplete healing of the mid-shaft tibial fracture and was otherwise unchanged. This report, however, is duplicative of x-rays received previously and therefore does not constitute relevant and pertinent new evidence not previously considered by the Office.²⁶ As appellant is not entitled to a review of the merits of his schedule award pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied his February 4, 2004 request for reconsideration.

CONCLUSION

The Board finds that appellant has not established that he is entitled to greater than a 24 percent permanent impairment of the right lower extremity. The Board also finds that the Office properly denied his request for merit review.

²⁴ *Charles B. Carey*, 49 ECAB 528 (1998).

²⁵ A.M.A., *Guides*, *supra* note 1 at 560.

²⁶ *See* discussion *supra*.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 29 and January 9, 2004 be affirmed.

Issued: November 24, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member