United States Department of Labor
Employees' Compensation Appeals Board

VINCENT A. PELLEGRINO, JR., Appellant	)	
and	)	**Docket No. 04-1354**
	)	**Issued: September 27, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Mahopac, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 26, 2004 appellant, through his attorney, filed a timely appeal of the merit schedule award decision of the Office of Workers' Compensation Programs dated February 24, 2004, finding that he had no more than a 16 percent permanent impairment of his right lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUE

The issue is whether appellant has more than a 16 percent permanent impairment of the right lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On December 28, 2000 appellant, then a 47-year-old rural carrier, filed a traumatic injury claim alleging that on December 23, 2000 he fractured and dislocated his right ankle when he

slipped on an icy patch in a driveway. He stopped work on December 24, 2000.[1] Appellant underwent a closed reduction and an open reduction internal fixation of his right ankle on December 23, 2000. The Office accepted appellant's claim for a trimalleolar fracture and osteoarthritis of the right ankle.

On July 15, 2003 appellant filed a claim for a schedule award. By letter dated July 24, 2003, the Office requested that Dr. Victor Khabie, a Board-certified orthopedic surgeon and appellant's treating physician, determine the extent of permanent impairment of appellant's right lower extremity due to his December 23, 2000 employment injury utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). In response, Dr. Khabie submitted a June 30, 2003 medical report in which he provided a history of appellant's accepted employment injury. He noted his range of motion findings on physical examination and the results of a magnetic resonance imaging (MRI) scan, which provided that appellant had a one centimeter focal area of osteochondritis laterally. Dr. Khabie opined that all injuries sustained by appellant were a direct result of his December 23, 2000 employment injury. He also opined that appellant's right ankle injury disabled him from work and restricted his ability to work full time as a carrier. He stated that appellant sustained permanent impairment to his right lower extremity as a result of his accepted employment injury. Dr. Khabie diagnosed post-traumatic arthrosis and stated that appellant reached maximum medical improvement on June 17, 2003. He provided his range of motion findings on that date, which included radial deviation of 15 degrees, ulnar deviation of 15 degrees, dorsiflexion of 10 degrees and plantar flexion of 30 degrees. Based on the fifth edition of the A.M.A., *Guides*, he stated that appellant's lack of motion was moderate which constituted a 25 percent loss of use of his right lower extremity. Dr. Khabie further stated that there were other problems with appellant's joint that increased his percentage loss. He noted that an additional impairment of 25 percent was secondary to atrophy, weakness, pain and the fact that appellant was developing degenerative changes in the ankle which would most likely require further surgery. He also noted that appellant retained active flexion of 10 degrees, active extension of 30 degrees, internal rotation of 30 degrees and external rotation of 20 degrees. Dr. Khabie further noted that the joint was not anklylosed. He concluded that appellant had a 50 percent permanent impairment of the right ankle due to his December 23, 2000 employment injury.

On February 17, 2004 the Office requested an Office medical adviser to review Dr. Khabie's June 30, 2003 report and accompanying statement of accepted facts to provide a rationalized medical opinion regarding the extent of permanent impairment of appellant's right lower extremity based on the fifth edition of the A.M.A., *Guides*. The Office medical adviser responded that appellant reached maximum medical improvement on June 17, 2003. Based on the A.M.A., *Guides* 537, Tables 17-11 and 17-12, the Office medical adviser determined that 10 degrees of dorsiflexion constituted a 7 percent impairment, plantar flexion of 30 degrees constituted a 0 percent impairment, eversion of 15 degrees constituted a 2 percent impairment, inversion of 15 degrees constituted a 2 percent impairment and a 1 centimeter focal area of osteochondritis based on the MRI scan constituted a 5 percent impairment totaling a 16 percent

[1] On April 26, 2001 appellant returned to limited-duty work for four hours a day. On March 9, 2002 appellant returned to limited-duty work 35 hours a week, 6 days a week.

permanent impairment of the right lower extremity. Regarding Dr. Khabie's findings, the Office medical adviser stated that he did not support his impairment rating with the pages and tables he used in the A.M.A., *Guides* and his estimate of appellant having degenerative joint disease was vague when he stated that it was based on the finding of weakness, atrophy and degenerative arthritis. The Office medical adviser stated that specific measurements and x-ray evidence were necessary noting that all Dr. Khabie had was an MRI scan demonstrating a one centimeter focal area of osteochondritis.

By decision dated February 24, 2004, the Office granted appellant a schedule award for a 16 percent permanent impairment of the right lower extremity.[2]

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] set forth the number of weeks of compensation payable to employees who sustain 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 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

In this case, appellant's treating Board-certified orthopedic surgeon, Dr. Khabie, found that he reached maximum medical improvement on June 17, 2003. Dr. Khabie determined that appellant had a 50 percent permanent impairment of the right lower extremity based on the A.M.A., *Guides*. In so doing, however, he failed to identify the specific tables and figures of the A.M.A., *Guides* that he used.

The Office medical adviser reviewed Dr. Khabie's June 30, 2003 report and stated that appellant reached maximum medical improvement on June 17, 2003. The Office medical adviser applied the A.M.A., *Guides* 537, Tables 17-11 and 17-12 to the information provided in Dr. Khabie's June 30, 2003 findings and determined that appellant had a 16 percent permanent impairment of the right lower extremity. Table 17-11 provides the method for assessing ankle motion impairments and the Office medical adviser properly found that appellant's measurement of 10 degrees for dorsiflexion constituted a 7 percent impairment and that plantar flexion did not

[2] Subsequent to the Office's February 24, 2004 decision, the Office received additional medical evidence. In addition, appellant has submitted new evidence on appeal. 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, 36 n.2 (1952); 20 C.F.R. § 501.2(c). The Board notes that appellant can submit the new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2) (2003).

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (2003).

indicate an impairment. In evaluating appellant's ankle inversion and eversion measurements under Table 17-12, the Office medical adviser correctly determined that the inversion measurement of 15 degrees constituted a 2 percent impairment. However, the Office medical adviser incorrectly found that the eversion measurement of 15 degrees constituted a 2 percent impairment rather than a 0 percent impairment. Section 17.2f of the A.M.A., *Guides* provides that range of motion impairments are to be added.[5] Therefore, appellant's total impairment based on range of motion deficits equals 9 percent.

In finding that one centimeter in the focal area of osteochondritis constituted a five percent impairment, the Office medical adviser did not indicate which tables and figures, with references to page numbers, of the A.M.A., *Guides* were used. It is not clear how the Office medical adviser obtained an impairment rating of five percent.

Since the Office medical adviser neither properly applied the A.M.A., *Guides* to Dr. Khabie's range of motion measurements nor made specific references to the fifth edition of the A.M.A., *Guides*, the Office medical adviser's opinion is of diminished probative value and precludes the Board's review of the Office's decision.

On remand the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist to provide a fully explained medical opinion with specific references to physical findings in the record and to figures or tables, with page numbers, of the A.M.A., *Guides* in determining the extent of permanent impairment of appellant's right lower extremity. After further development as it deems necessary, the Office should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding the issue whether appellant has more than a 16 percent permanent impairment of the right lower extremity, for which he received a schedule award.

[5] A.M.A., *Guides* 533.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration consistent with this decision.

Issued: September 27, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member