

**United States Department of Labor
Employees' Compensation Appeals Board**

JEFFREY D. FELDMAN, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cherry Hill, NJ, Employer**

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**Docket No. 05-1343
Issued: December 20, 2005**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 8, 2005 appellant filed a timely appeal of a February 1, 2005 decision of a hearing representative of the Office of Workers' Compensation Programs that affirmed a schedule award for 10 percent impairment of the left leg. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has greater than a 10 percent permanent impairment of the left leg.

FACTUAL HISTORY

On March 25, 1997 appellant, then a 35-year-old collection carrier, filed a claim for a left ankle sprain sustained on that date when he stepped out of his truck into a hole at the side of the sidewalk. In an April 1, 1997 report, Dr. Christopher Born, a Board-certified orthopedic surgeon, diagnosed a Grade 2 to 3 ligamentous sprain of the left ankle. Appellant returned to his

regular duty on June 16, 1997. An October 3, 1997 magnetic resonance imaging scan revealed peritendinitis of the flexor hallucis longus tendon and no evidence for an osteochondral defect.

On April 25, 2001 appellant filed a claim for a schedule award. He submitted a February 22, 2001 report from Dr. Nicholas Diamond, an osteopath, noting that appellant complained that he had left ankle pain of 6 out of 10, difficulty climbing stairs and that he avoided all pivot sports such as basketball and racquetball and that he curtailed golfing. Examination revealed 10 degrees of dorsiflexion, 45 degrees of plantar flexion, 35 degrees of inversion and 20 degrees of eversion, with pain at the extremes. Calf circumference was 38 centimeters (cm) on the right and 37 cm on the left, sensory examination was within normal limits and motor strength was 5/5 involving dorsiflexion. Rating appellant's impairment, Dr. Diamond assigned 7 percent for loss of dorsiflexion and 8 percent for calf atrophy, for a combined 14 percent impairment of the left leg.

An Office medical adviser reviewed Dr. Diamond's report on April 30, 2001 and assigned 7 percent impairment for 10 degrees of dorsiflexion, 0 percent for each other reported ankle motion and 3 percent for calf atrophy, for a combined total of 10 percent impairment of the left leg. In justification of his lower rating for calf atrophy, the medical adviser stated: "The 1 cm calf atrophy is at the lowest end of the range of impairment (3 [to] 8 [percent]). 1.9 atrophy would = 8 [percent]."

On October 11, 2001 the Office granted appellant a schedule award for a 10 percent permanent impairment of the left leg.

Appellant requested a hearing, which was held on June 18, 2002. He testified that extended activity resulted in ankle pain, which did not get so sharp that he had to stop. He had fractured his left ankle in high school but had recovered with no long-lasting problem. By decision dated August 27, 2002, an Office hearing representative found that the weight of the medical evidence established that appellant had a 10 percent permanent impairment of the left leg, despite a July 8, 2002 report from Dr. David Weiss, an osteopath, who is an associate of Dr. Diamond, stating that the impairment was 17 percent.

Appellant appealed this decision to the Board. In an order dated October 31, 2003, the case was remanded to the Office for completion of the case record,¹ missing was the July 8, 2002 report from Dr. Weiss. This report, which the Office added to the record, stated:

"It appears that the medical adviser's opinion was that the patient should be allotted 3 [percent] impairment for the 1 cm calf atrophy, which was found on physical examination, whereas I had allotted for an 8 [percent] impairment.

"In reviewing the [American Medical Association,] *Guides to the Evaluation of Permanent Impairment*, [(A.M.A., *Guides*)] [f]ifth edition, Table 17-6 on [p]age 530, it is noted that calf atrophy between 1 and 1.9 cm corresponds to a 3 to 8 percent impairment rating. Since this patient measured his pain level at a 6 out of 10 on the pain scale involving his left ankle on a daily basis and showed a [G]rade

¹ Docket No. 03-379 (issued October 31, 2003).

4/5 muscle strength deficit in the left lower extremity, it was my opinion that the higher end of the scale should be used.

“It should also be noted that this patient was entitled to a 3 [percent] impairment rating to the left lower extremity due to pain[-]related impairment due to Figure 18-1, [p]age 574.”

By decision dated March 4, 2004, the Office found that appellant had a 10 percent permanent impairment of the left leg. It noted that the Office medical adviser correctly applied the A.M.A., *Guides* to the findings of Dr. Diamond and that Dr. Weiss’ July 8, 2002 report did not and was not sufficient to warrant review by an Office medical adviser. Appellant requested a hearing, which was held on December 1, 2004. By decision dated February 1, 2005, an Office hearing representative found that appellant had a 10 percent permanent impairment of the left leg.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act² and its implementing regulation³ 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. 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.

After obtaining all necessary medical evidence, the Office should route the file to the Office medical adviser for an opinion concerning the nature and percentage of impairment. The percentage should be computed in accordance with the A.M.A., *Guides* and as a matter of course the Office medical adviser should provide rationale for the percentage of impairment specified.⁴ Where an Office medical adviser believes that the evaluating specialist improperly appraised a particular impairment, the Office should take into consideration the opinion of its Office medical adviser in determining the amount of the schedule award.⁵ When the Office medical adviser provides the only evaluation that conforms to the A.M.A., *Guides*, that evaluation constitutes the weight of the medical evidence.⁶

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.0808.6.d (August 2002).

⁵ *Clyde Franklin Kelly*, 26 ECAB 296 (1975).

⁶ *John L. McClenic*, 48 ECAB 552 (1997). If the clinical findings are fully described, any knowledgeable observer may check the findings with the criteria of the A.M.A., *Guides*. A.M.A., *Guides* 17 (5th ed. 2001).

ANALYSIS

Dr. Diamond, the osteopath, who rated appellant's impairment of the left leg based on a February 22, 2001 examination and an Office medical adviser agreed that appellant had a 7 percent impairment for his 10 degrees of dorsiflexion and this percentage comports with Table 17-11 of the A.M.A., *Guides*. No impairment was allotted by either of these physicians for the other ranges of motion reported by Dr. Diamond, which is consistent with Tables 17-11 and 17-12 of the A.M.A., *Guides*.

Dr. Diamond and Dr. Weiss and the Office medical adviser disagreed on the percentage of impairment for appellant's one centimeter of left calf atrophy. Under Table 17-6, which all three physicians used, a difference in calf circumference of 0 to 0.9 centimeters represents no impairment of the lower extremity. A difference of 1 to 1.9 centimeters represents an impairment of 3 to 8 percent. Where a range of impairment values is provided, the impairment value for the recorded measurement may be adjusted or interpolated proportionally within that range.⁷

Dr. Diamond measured a one cm difference in circumference between the left and right calf. This is at the lowest end of the 1 to 1.9 cm category and is enough to constitute a ratable impairment. It therefore makes sense to assign an impairment value at the lowest end of the range given for that category or three percent. This is how the Office medical adviser reasoned when he reviewed Dr. Diamond's finding and compared it to Table 17-6, page 530. Dr. Diamond found that the smallest atrophy in the 1 to 1.9 cm category should be given the highest impairment value for that category or 8 percent but provided no rationale for this rating.

On appeal, appellant's attorney argues that the rating of eight percent for atrophy by Drs. Diamond and Weiss conforms to the A.M.A., *Guides* and creates a conflict of medical opinion with the Office medical adviser. The Board does not agree. The rating for atrophy by Drs. Diamond and Weiss is incongruous with Table 17-6, page 530. Example 17-4, page 530, shows a patient with one cm of calf atrophy, as was found in this case. The comment explains that this finding on physical examination represents a three percent impairment of the lower extremity. The Board finds that the rating of three percent for one cm of atrophy given by the Office medical adviser that conforms to the A.M.A., *Guides*.

The opinion of Dr. Weiss that eight percent, the top of the range, was appropriate because of appellant's pain and loss of muscle strength finds no support in the A.M.A., *Guides*. If appellant has impairments due to pain and loss of muscle strength, they must be rated under the appropriate tables of the A.M.A., *Guides*. These factors have no bearing on what percentage should be allotted for atrophy under Table 17-6. For this reason, the Board finds that the rating of the Office medical adviser constitutes the weight of the medical evidence and establishes a three percent permanent impairment of the left lower extremity due to calf atrophy. The eight percent rating reported by Drs. Diamond and Weiss is of diminished probative value as it does not conform with the protocols of the A.M.A., *Guides*.

⁷ E.g., A.M.A., *Guides* 453 (5th ed. 2001) (range of motion measurements for the upper extremity).

Dr. Weiss also stated that appellant was entitled to a three percent impairment for pain, using Figure 18-1 of the A.M.A., *Guides*. This figure provides that, if a pain-related impairment appears to increase the burden of the individual's condition slightly, the examiner can increase the percentage found by the conventional rating system by up to three percent, with no formal assessment of the pain-related impairment required. Dr. Diamond reported that appellant complained of pain at a 6 out of 10 level on his February 22, 2001 examination and at a June 18, 2002 hearing appellant described his left ankle pain. It is not apparent why the Office did not seek review of this finding by the Office medical adviser. The case will therefore be remanded to the Office for review by an Office medical adviser for a reasoned opinion on whether appellant's schedule award should include a rating for pain.

CONCLUSION

The Office's schedule award for 10 percent impairment of the left leg correctly assigned percentages of impairment for appellant's loss of motion and his calf atrophy. The case will be remanded, however, for consideration of whether appellant is entitled to additional impairment due to pain.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2005 decision of the Office of Workers' Compensation Programs is affirmed with regard to the schedule award issued for loss of ankle motion and calf atrophy and is remanded for further action in conformance with this decision.

Issued: December 20, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board