

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

JOSE L. RODRIGUEZ, Appellant)
and) Docket No. 05-922
U.S. POSTAL SERVICE, POST OFFICE,) Issued: July 19, 2005
Harlingen, TX, Employer)
_____)

Appearances:
Jose L. Rodriguez, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On March 10, 2005 appellant filed a timely appeal of the December 8, 2004 merit decision of the Office of Workers' Compensation Programs, which granted him a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim for a schedule award.

ISSUE

The issue is whether appellant has more than 35 percent impairment of the left lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On September 18, 1992 appellant, then a 35-year-old letter carrier, sustained a traumatic injury to his left lower extremity while in the performance of duty. The Office accepted his claim for left ankle sprain with ligament tear. On November 2, 1992 appellant underwent surgery for reconstruction of the lateral collateral ligament of the left ankle, which the Office

authorized. Appellant received appropriate wage-loss compensation and he returned to work on January 28, 1993.

On October 23, 2003 appellant filed a claim for a schedule award. He submitted an October 17, 2003 report from Dr. Donald Vargas, a Board-certified orthopedic surgeon, who noted that, following surgery in 1992, appellant reached maximum medical improvement on June 28, 2004 at which point he had 26 percent impairment of the left lower extremity.¹

In a letter dated November 24, 2003, the Office asked Dr. Vargas to provide an assessment of appellant's permanent impairment in accordance with the A.M.A., *Guides* (5th ed. 2001). In a December 15, 2003 report, Dr. Vargas found that appellant had seven percent whole person impairment due to a mild antalgic gait.² He relied on Table 17-5, A.M.A., *Guides* 529.

The Office medical adviser reviewed the record, including Dr. Vargas' December 15, 2003 examination findings and impairment rating and, in a report dated February 2, 2004, he advised that Dr. Vargas' impairment rating was not corroborated by his physical examination results. He also noted that utilizing Table 17-5 was not the preferred method of evaluating permanent impairment when a more specific method was possible. Therefore, the Office medical adviser recommended that appellant be referred to a specialist who was familiar with the fifth edition of the A.M.A., *Guides*.

In a letter to the Office dated February 24, 2004, Dr. Vargas indicated that he reviewed the Office medical adviser's February 2, 2004 report. He explained why he believed Table 17-5 was a more accurate measurement of appellant's impairment. Dr. Vargas also indicated that he received training in the use of the fifth edition of the A.M.A., *Guides* as well as the two prior editions.

Dr. Jorge E. Tijmes, a Board-certified orthopedic surgeon, examined appellant on February 26, 2004 and calculated nine percent impairment of the left lower extremity due to loss of range of motion. Dr. Tijmes based his rating on the A.M.A., *Guides* (4th ed. 1993).³

On May 11, 2004 Dr. Michael M. Leonard, a Board-certified physiatrist and Office referral physician, examined appellant and found that he had 29 percent impairment of the left lower extremity due to loss of range of motion, sensory deficit and arthritis. Dr. Leonard relied on the A.M.A., *Guides* (5th ed. 2001) in determining appellant's left lower extremity impairment.

¹ Dr. Vargas performed the November 2, 1992 left ankle arthrotomy and ligament reconstruction. He provided a copy of his June 28, 1994 treatment records wherein he calculated a 26 percent impairment of the left lower extremity under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (3^d ed. 1991).

² Seven percent whole person impairment corresponds to eighteen percent lower extremity impairment under Table 17-3, A.M.A., *Guides* 527.

³ In a letter dated February 19, 2004, the Office mistakenly advised Dr. Tijmes that the fourth edition of the A.M.A., *Guides* was to be used in determining the extent of appellant's permanent impairment.

The Office medical adviser reviewed the record and in a June 14, 2004 report he found that appellant had 35 percent impairment of the left lower extremity. He noted a combination of impairments due to loss of range of motion, sensory deficit and arthritis. The Office medical adviser's impairment rating differed from Dr. Leonard's with respect to the extent of impairment due to loss of ankle range of motion. Whereas Dr. Leonard found 7 percent impairment based on 10 degrees of left ankle dorsiflexion, the Office medical adviser found 15 percent impairment based on the same measurement under Table 17-11, A.M.A., *Guides* 537.

On December 8, 2004 the Office granted a schedule award for 35 percent impairment of the left lower extremity. The award covered a period of 100.8 weeks beginning May 11, 2004.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁴ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁵ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁶

ANALYSIS

Appellant does not specifically take issue with the Office medical adviser's June 14, 2004 finding that he has 35 percent impairment of the left lower extremity. The earlier impairment ratings from Dr. Vargas, Dr. Tijmes and Dr. Leonard ranged from 9 to 29 percent lower extremity impairment, which is less than the 35 percent award appellant received on December 8, 2004. In this instance, appellant has not submitted any credible medical evidence indicating that he has greater than 35 percent impairment of the left lower extremity.⁷

The only issue appellant raised was that the period of the schedule award should extend beyond "April 16, 2004." In its December 8, 2004 decision, the Office mistakenly noted that the period of the award was from "May 11, 2004 to April 16, 2004." This was clearly a typographical error because the Office correctly noted that appellant was entitled to 100.8 weeks compensation for his 35 percent impairment rating. The December 8, 2004 schedule award also indicated that appellant would initially receive payment of \$17,831.57 for the period May 11 to

⁴ The Act provides that for a total, or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

⁵ 20 C.F.R. § 10.404 (1999).

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003); FECA Bulletin No. 01-05 (issued January 29, 2001).

⁷ The Office medical adviser's June 14, 2004 impairment rating constitutes the weight of the medical evidence. See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

November 27, 2004 and thereafter he would receive regular four-week payments of \$2,484.00. Instead of "April 16, 2004," the correct schedule award termination date should have read April 16, 2006. This typographical error, however, was harmless.⁸

CONCLUSION

The Board finds that appellant failed to establish that he has more than 35 percent impairment of his left lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

⁸ On December 10, 2004 the Office issued a check for \$17,831.57 for the period May 11 to November 27, 2004. On December 25, 2004 the Office issued the first of appellant's regular four-week payments of \$2,484.00.