

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

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**THEODOR B. AMATO, Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVAL AIR  
SYSTEMS COMMAND, Point Mugu, CA,  
Employer**

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**Docket No. 04-2261  
Issued: March 24, 2005**

*Appearances:*  
*Harry F. Berman, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
WILLIE T.C. THOMAS, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On September 13, 2004 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated February 9 and April 21, 2004, which found that he was not entitled to a schedule award for his accepted employment injury, and a nonmerit decision of the Office dated June 9, 2004, which denied the reopening of his claim for further review of the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award and the nonmerit issues in this case.

**ISSUES**

The issues are: (1) whether appellant is entitled to a schedule award for his accepted employment injury; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On June 18, 1993 appellant, then a 45-year-old aircraft mechanic, filed an occupational disease claim for compensation alleging that his bilateral foot condition developed as a result of

his federal employment duties. Following further development, the Office accepted appellant's claim on April 8, 1994 for bilateral foot peripheral neuropathy.

On July 11, 2002 appellant filed a claim for a schedule award.

As none of appellant's physicians provided an impairment rating, the Office referred appellant, along with a statement of accepted facts, a list of questions and the medical record, to Dr. Bunsri T. Sophon, an orthopedic surgeon, for a second opinion evaluation. In a November 7, 2002 report, Dr. Sophon noted the history of injury and that appellant had not received any medical treatment for his complaints. He noted that, although appellant complained of a constant numbness and tingling in the plantar surface of both feet, which was worse when walking barefoot, the examination revealed no abnormal findings of the feet. Dr. Sophon opined that appellant reached maximum medical improvement two months following the injury, November 6, 1992 and that appellant's disability did not interfere with his daily activities. In a separate sheet entitled "The Foot and Toes," which Dr. Sophon signed on October 30, 2002, he noted that appellant reached maximum medical improvement on November 6, 1992, that he did not have any foot pain or discomfort, that there were no measurable range of motion problems in either foot and that appellant's foot pathology did not cause atrophy or weakness in the lower extremities. Range of motion measurements for the joints measured were reported as being within the normal range of motion value.

The Office requested that an Office medical adviser review a statement of accepted facts and appellant's medical records to determine the date of maximum medical improvement and whether appellant had any impairment to his feet. On November 22, 2002 the Office medical adviser reviewed Dr. Sophon's November 7, 2002 report and the October 30, 2002 form report. The Office medical adviser rated appellant's subjective complaints as a zero percent impairment. As the records indicate no loss of range of motion of any joints measured, the Office medical adviser provided a zero percent impairment. The Office medical adviser noted that the records indicated that appellant had a normal station and normal gait, which would equate to a zero percent impairment. Moreover, motor examination and sensation was reported as normal and there was no atrophy or weakness. Thus, the Office medical adviser opined that a review of the records would support a zero percent impairment for each foot with a date of maximum medical improvement reached no later than two months following onset, or by November 6, 2002.

By decision dated February 13, 2003, the Office found that appellant was not entitled to a schedule award for his employment-related condition based on the Office medical adviser's opinion.

In an undated letter, which the Office received on April 12, 2003, and in a letter dated April 14, 2003, appellant requested an oral hearing before an Office representative, which took place on November 18, 2003. After the hearing, appellant submitted December 11, 2003 electrodiagnostic test results from Dr. Ju Sung Wu, a Board-certified neurologist, who advised that the motor and sensory nerve conduction study of both lower extremities showed features of severe peripheral neuropathy probably of demyelinating type, the F-wave study of the right and left peroneal and posterior tibia nerves showed features of proximal neuropathy; and the electromyogram (EMG) study of both lower extremities showed denervation in the distal muscle. Appellant also advised that he was not able to get an impairment rating from Dr. Wu.

By decision dated February 9, 2004, an Office hearing representative affirmed the February 13, 2003 decision.

In an undated letter, which the Office received April 16, 2004, appellant requested reconsideration and submitted additional evidence. In a March 22, 2004 report, Dr. Jason Berkley, a neurologist, advised that appellant was under his care for peripheral neuropathy. He stated that appellant experienced significant pain while standing for prolonged periods or walking. Dr. Berkley additionally noted that the painful neuropathy has been documented by objective electrodiagnostic testing, consisting of nerve conduction studies and EMG, and that the prior records can be referred to for those results.

By decision dated April 21, 2004, the Office denied modification of its February 9, 2004 decision on the basis that Dr. Berkley's opinion was insufficient, without further explanation, to warrant reevaluation of appellant's permanent impairment status by its Office medical adviser.

In a May 21, 2004 letter, appellant, through his attorney, requested reconsideration of the Office's decision. He stated that appellant has a stationary and continuous impairment from a work-related injury that has affected his ability to walk and stand. A copy of Dr. Berkley's March 22, 2004 report was provided.

By decision dated June 9, 2004, the Office denied appellant's request for reconsideration finding that he failed to submit either new and relevant evidence or legal contentions not previously considered.

### **LEGAL PRECEDENT -- ISSUE 1**

A claimant seeking compensation under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence. Section 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>2</sup> The schedule award provisions of the Act<sup>3</sup> and its implementing federal regulation<sup>4</sup> 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. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (5<sup>th</sup> ed. 2001) as the uniform standard applicable to all claimants.<sup>5</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8107(a).

<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> *Id.*

## ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for a decision. Dr. Sophon, the Office's second opinion physician, found that although appellant reported a constant tingling sensation in the plantar surface of both feet, his examination revealed no abnormal findings of the feet. All other examination findings were reported as normal. The Office medical adviser, in reviewing Dr. Sophon's reports, rated appellant's physical and subjective complaints as having a zero percent impairment.

Dr. Berkley, appellant's treating physician, however, indicated in his March 22, 2004 report that appellant had significant pain while standing for prolonged periods or walking. He further noted that this painful neuropathy had been documented by objective electrodiagnostic testing. Dr. Wu's December 11, 2003 electrodiagnostic testing showed features of severe peripheral neuropathy probably of demyelinating type, features of proximal neuropathy and denervation of both lower extremities in the distal muscle.

In this case, appellant may be entitled to compensation for pain as evaluated and described in Chapter 17.2(1) of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* at pages 550-52.<sup>6</sup> When reviewing Dr. Sophon's reports, the Office medical adviser did not address the issue of pain in evaluating appellant's impairment. The Office had, however, sufficient evidence to address the issue of pain in evaluating appellant's impairment once it received Dr. Berkley's March 22, 2004 report and Dr. Wu's electrodiagnostic studies which documented a peripheral nerve injury. Office procedures indicate that, after all necessary medical evidence is obtained, the case file must be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment.<sup>7</sup> Accordingly, the Board will remand the case to the Office for any further development deemed necessary so that its Office medical adviser may address the issue of pain in evaluating appellant's impairment.<sup>8</sup>

## CONCLUSION

The Board finds that this case is not in posture for a decision as further development on the issue of appellant's impairment of his lower extremities is required in this case.

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<sup>6</sup> The Board notes that a separate pain calculation under Chapter 18 may not be used in combination with other methods to measure impairment due to sensory pain as outlined in Chapters 13, 16 and 17 of the fifth edition of the A.M.A., *Guides*. FECA Bulletin No. 01-05 (issued January 29, 2001).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

<sup>8</sup> In light of the disposition of this case, the Board will not address the second issue as it is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 9, April 21 and February 9, 2004 are hereby set aside and the case is remanded for further development consistent with this opinion.

Issued: March 24, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member