

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

MICHAEL REED, Appellant

and

**DEPARTMENT OF THE ARMY,
FORT LEWIS, WA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-1533
Issued: November 3, 2005**

Appearances:
Michael Reed, pro se
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 July 12, 2005 appellant filed a timely appeal of the April 1, 2005 merit decision of the Office of Workers' Compensation Programs, which granted an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award.

ISSUE

The issue is whether appellant has greater than 11 percent impairment of the right lower extremity, for which he received a schedule award.

FACTUAL HISTORY

This case was previously before the Board. In a decision dated October 5, 2004, the Board affirmed, in part, a May 20, 2003 Office decision, which found that appellant received an overpayment of compensation.¹ The \$9,205.20 overpayment resulted from an October 31, 2002

¹ Docket No. 04-734. The Board's October 5, 2004 decision is incorporated herein by reference.

schedule award for an additional five percent impairment of the right lower extremity. The Office previously granted appellant a schedule award for 10 percent impairment of the right lower extremity on July 11, 1985.² However, the Office later determined that the medical evidence did not support an award greater than the prior 10 percent impairment appellant received in 1985. The Office found that appellant was not entitled to a waiver of recovery of the overpayment and ordered him to remit payment of \$9,205.20 within 30 days. The Board found that the record did not support entitlement to a schedule award totaling 15 percent impairment of the right lower extremity. Therefore, an overpayment of compensation was created. However, the amount of the overpayment was not in posture for decision. Because of uncertainties with appellant's recent physical examination findings and the Office medical adviser's calculations, the Board noted that appellant might possibly be entitled to an award of 11 percent impairment of the right lower extremity. The Board remanded the case for further development of the medical evidence regarding the extent of appellant's permanent impairment. The facts of the case as set forth in the October 5, 2004 decision are incorporated by reference.

On remand, the Office referred the case record to a medical adviser who, in a report dated December 18, 2004, found that appellant had 11 percent impairment of the right lower extremity.

In a decision dated April 1, 2005, the Office found that appellant had an 11 percent impairment of his right lower extremity.³

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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate

² At that time appellant had submitted medical evidence indicating he had 18 percent impairment of the right lower extremity. The Office issued the October 31, 2002 award while the medical evidence was still under development.

³ The April 1, 2005 schedule award includes a summary of the prior adjudication of the schedule award and overpayment issues and notes that the national office had been advised that the current award would reduce the previously calculated overpayment by \$1,635.84. The record before the Board does not include a final overpayment decision addressing the amount of overpayment or appellant's entitlement to waiver of recovery of overpayment. The only issue presently before the Board is whether appellant has greater than 11 percent impairment of the right lower extremity.

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

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

A claim for an increased schedule award may be based on new employment exposure; however, additional occupational exposure is not a prerequisite. Absent additional employment exposure, an increased schedule award may also be based on medical evidence demonstrating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.⁷

Section 8108 of the Act⁸ provides for the reduction of compensation for subsequent injury to the same member:

“The period of compensation payable under the schedule in section 8107(c) ... is reduced by the period of compensation paid or payable under the schedule for an earlier injury if --

(1) compensation in both cases is for disability of the same member or function or different parts of the same member or function or for disfigurement; and

(2) the Secretary of Labor finds that compensation payable for the later disability in whole or in part would duplicate the compensation payable for the preexisting disability.”

ANALYSIS

In a December 28, 2004 report, the Office medical adviser calculated an 11 percent impairment of the right lower extremity due to loss of ankle range of motion. Appellant had 10 degrees of ankle extension (dorsiflexion), which represented 7 percent lower extremity impairment under Table 17-11, A.M.A., *Guides* 537. He also demonstrated 20 degrees of inversion and 10 degrees of eversion, each of which represent an additional 2 percent lower extremity impairment under Table 17-12, A.M.A., *Guides* 537. Thus, the total lower extremity impairment for loss of range of motion in the ankle is 11 percent. Appellant also had impairment due to calf muscle atrophy and arthritis, but these impairments were less than the impairment for loss of range of motion. The A.M.A., *Guides* cross-usage chart precludes combining those impairments with each other or with the rating for loss of range of motion.⁹ Because the loss of

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 *Linda T. Brown*, 51 ECAB 115 (1999).

⁸ 5 U.S.C. § 8108.

⁹ Table 17-2, A.M.A., *Guides* 526. Appellant’s impairment for calf muscle atrophy was noted to be three percent in accordance with Table 17-6, A.M.A., *Guides* 530. He also had 10 percent impairment for arthritis in his ankle under Table 17-31, A.M.A., *Guides* 544.

range of motion impairment is more favorable to appellant than the impairments for muscle atrophy and arthritis, the Office medical adviser properly selected it as the preferred method for rating appellant's impairment. Appellant has not submitted any credible medical evidence indicating that he has greater than 11 percent impairment of the right lower extremity.¹⁰

Appellant does not take issue with the Office medical adviser's finding of 11 percent impairment of the right lower extremity. He argues that the recent 11 percent award should be in addition to the 1985 award for 10 percent impairment of the right lower extremity, for a total of 21 percent impairment. The Office granted a 1 percent increase over the 1985 10 percent schedule award. The medical evidence does not support an additional 10 percent lower extremity impairment under section 8108 of the Act.¹¹

CONCLUSION

The Board finds that appellant failed to establish that he has more than 11 percent impairment of the right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 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

¹⁰ The Office medical adviser's December 28, 2004 impairment rating constitutes the weight of the medical evidence. See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

¹¹ 5 U.S.C. § 8108; see *Tammy L. Meehan*, 53 ECAB 229, 231 (2001).