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

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| **T.S., Appellant** | ) | |
| **and** | ) | **Docket No. 06-155** |
| | ) | **Issued: August 28, 2006** |
| **U.S. POSTAL SERVICE, POST OFFICE, Devon, PA, Employer** | ) | |

*Appearances:*
*Thomas 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
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On November 1, 2005 appellant filed a timely appeal from a June 3, 2005 decision of the Office of Workers' Compensation Programs' hearing representative, which affirmed a June 29, 2004 schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

### ***ISSUE***

The issue is whether appellant sustained more than a 14 percent permanent impairment of her right foot, for which she received a schedule award.

### ***FACTUAL HISTORY***

On October 9, 1996 appellant, then a 35-year-old mail handler, filed a traumatic injury claim for a fractured right foot in the performance of duty. She stopped work on October 10, 1996 and returned to limited duties in December 1996. The Office accepted appellant's claim

for stress fracture of the calcaneus of the right foot and degenerative changes of the cuboid bone in the right foot.[1] Appellant received appropriate compensation benefits.

In a February 19, 1999 report, Dr. Donald F. Leatherwood, a Board-certified orthopedic surgeon and second opinion physician, noted appellant's history of injury and treatment. He opined that appellant could return to full-time light duty on a sedentary basis.

On March 20 and October 2, 2001 appellant's representative requested a schedule award.[2] Appellant submitted a June 29, 2000 report from Dr. David Weiss, an osteopath who utilized the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Weiss opined that appellant had a 27 percent permanent impairment of the right lower extremity.

On October 12, 2001 the Office found that a conflict existed between Dr. Weiss and Dr. Leatherwood regarding the nature and extent of permanent impairment.

On January 9, 2003 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Richard P. Whittaker, a Board-certified orthopedic surgeon for an impartial medical evaluation.

In a February 10, 2003 report, Dr. Whittaker noted appellant's history of injury and treatment and conducted a physical examination. He diagnosed a healed fractured cuboid with residual mild degenerative arthritis. Appellant did not have any measurable weakness or atrophy of her lower extremity but experienced mild foot pain with a level 3 over 10. Dr. Whittaker advised that it was not localized to a peripheral nerve, but seemed to be coming from her calcaneal cuboid joint. Appellant had mild arthritis, which would affect her daily activity. Dr. Whittaker advised that appellant could stand for 4 hours, walk for 4 hours, that she had a pushing limitation of 50 pounds, a lifting limitation of 20 pounds and her walking was limited to 5 blocks. He opined that appellant reached maximum medical improvement on March 19, 1997 when she was returned to her limited-duty status. Dr. Whittaker utilized the fifth edition of the A.M.A., *Guides* and referred to page 544, Table 17-31. He indicated that appellant's objective findings included a mild arthritis with joint space of one millimeter (mm). Dr. Whittaker noted that, for the calcaneal cuboid joint, 1 mm was equal to a 14 percent impairment to the foot or a 10 percent impairment of the lower extremity and a 4 percent impairment of the whole person.

In June 11, 2003 report, the Office medical adviser concurred with Dr. Whittaker and noted that he utilized the appropriate table from the A.M.A., *Guides*. He noted that the calcaneal cuboid joint was part of the foot and not the ankle and opined that appellant was entitled to a schedule award of 14 percent to the foot. Appellant reached maximum medical improvement on February 10, 2003.

[1] The Office also accepted appellant's claim for a recurrence on October 17, 1998 for medical care. Appellant stopped work again on October 17, 1998. Appellant returned to limited duties as a mailhandler in March 1999.

[2] Appellant had previously requested a schedule award on September 29, 2000. However, she was advised that she needed to have a permanent impairment.

On July 9, 2003 the Office granted appellant a schedule award for 14 percent permanent impairment of the right foot. The award covered the period February 10 to June 14, 2003.

On July 11, 2003 appellant requested a hearing.

On December 22, 2003 the Office hearing representative determined that a conflict existed between Dr. Weiss and Dr. Whittaker. The Office hearing representative determined that at the time of Dr. Whittaker's evaluation, there was not a conflict in medical opinion on the issue of nature and extent of appellant's injury-related impairment, as Dr. Leatherwood did not perform an impairment rating or indicate that appellant had reached maximum medical improvement. She directed the Office to refer appellant for a referee evaluation to determine whether there were any motor strength deficits, an explanation regarding whether the injury-related permanent impairment was restricted to appellant's foot or extended into her leg and an impairment rating utilizing the fifth edition of the A.M.A., *Guides.*

On April 19, 2004 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. James Nutt, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion.

In a May 13, 2004 report, Dr. Nutt reviewed appellant's history of injury and treatment and conducted a physical examination. He noted that appellant sustained a fracture of the right cuboid and had arthritis at the cuboid fifth metatarsal and calcaneal cuboid joints. Dr. Nutt also noted degenerative arthritis of the talar navicular joint and first cuneiform metatarsal joint in both feet, which was not related to appellant's employment injury. He indicated that appellant had normal strength and sensibility in the right lower extremity and normal range of motion. Dr. Nutt referred to Table 17-31, page 544 of the A.M.A., *Guides* and determined that a 1 mm cartilage interval of the calcaneal cuboid joint resulted in a 4 percent impairment of the whole person. He also indicated that appellant had cuboid fifth metatarsal arthritis and "probable ligament strain across the central three tarsal metatarsal joints, which would give an equal four percent impairment of the whole person.[3] Dr. Nutt combined these two values pursuant to the Combined Values Chart on page 604 of the A.M.A., *Guides* and determined that this resulted in an eight percent impairment of the whole person.

In a June 1, 2004 memorandum, the Office requested that the Office medical adviser determine whether Dr. Nutt's report was sufficient to base a percentage of loss of use of the right foot within the A.M.A., *Guides.* The Office specifically requested that the Office medical adviser determine whether the findings were consistent with regard to the foot as opposed to the whole person.

In a June 28, 2004 report, the Office medical adviser concurred with Drs. Nutt and Whittaker. He explained that he had referred to the A.M.A., *Guides,* Table 17-31 page 544 and determined that appellant was entitled to an award of 10 percent to the right lower extremity for the impairment to the calcaneocuboid and reached maximum medical improvement on February 10, 2003.

[3] Dr. Nutt noted that he had added the additional impairment for appellant's mid foot arthritis and strain, which was not clear in the A.M.A., *Guides.*

By decision dated June 29, 2004, the Office denied appellant's claim for an increased schedule award.

Appellant's representative requested a hearing on July 1, 2004, which was held on March 30, 2005.

By decision dated June 3, 2005, the Office hearing representative affirmed the Office's June 29, 2004 decision.[4]

## ***LEGAL PRECEDENT***

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulation[6] 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 appellants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all appellants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[7]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[8] However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.[9]

## ***ANALYSIS***

The Office determined that a conflict in medical opinion was created between, Dr. Weiss, who found that appellant had an impairment of 27 percent to the right lower extremity and Dr. Whittaker, who determined that appellant had no more than 10 percent of the right lower extremity. The Office referred appellant to Dr. Nutt, a Board-certified orthopedic surgeon and

[4] The Board notes that, while the Office hearing representative indicated 14 percent of the right lower extremity, however, the prior schedule award decision dated July 9, 2003, granted appellant a schedule award of 14 percent to the foot.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] A.M.A., *Guides* (5th ed. 2001).

[8] *See William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

[9] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000); *see also Paul A. Toms*, 28 ECAB 403 (1987).

impartial medical examiner, to resolve the conflict. The Office also requested clarification with regard to whether the impairment was to the foot or extended into the leg.

Section 8123(a) of the Act[10] provides, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.[11] In situations were there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[12]

Dr. Nutt examined appellant, discussed the history of injury and reviewed the evidence of record, including diagnostic studies. In a May 13, 2004 report, he noted appellant's history of injury and treatment and conducted a physical examination. Dr. Nutt referred to the A.M.A., *Guides,* Table 17-31, at page 544. He determined that appellant had a one mm cartilage interval of the calcaneal cuboid joint and that this resulted in a four percent impairment of the whole person. Dr. Nutt also indicated that appellant had cuboid fifth metatarsal arthritis and probable ligament strain across the central three tarsal metatarsal joints, which would give her four percent impairment of the whole person and combined these two values pursuant to the Combined Values Chart on page 604 of the A.M.A., *Guides.* He determined that this resulted in an eight percent impairment of the whole person. However, Dr. Nutt did not sufficiently address whether appellant was entitled to an impairment of the foot or of the lower extremity.[13] In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.[14] The Office should have requested a supplemental report from Dr. Nutt clarifying whether appellant's impairment was to the foot or to the lower extremity. The Board finds that the conflict remains unresolved.

In order to resolve the unresolved conflict in the medical opinion, the case will be remanded to the Office for a supplemental report regarding whether appellant's impairment was

[10] 5 U.S.C. §§ 8101-8193.

[11] 5 U.S.C. § 8123(a).

[12] *Barbara J. Warren*, 51 ECAB 413 (2000).

[13] The Act does not provide for whole person impairment. *Jacqueline S. Harris*, 54 ECAB 139 (2002). Furthermore, with regard to whether the impairment involves the foot or the leg, the Board has held that where the residuals of an injury to a member of the body specified in the schedule extend into an adjoining area of a member also enumerated in the schedule, such as an injury of a finger into the hand, of a hand into the arm or of a foot into the leg, the schedule award should be made on the basis of the percentage loss of use of the larger member. *George A. Boyd*, 56 ECAB ___ (Docket No. 05-725, issued August 25, 2005). Dr. Nutt's report is unclear with regard to whether appellant's impairment is restricted to the foot or whether it extends into the leg.

[14] *Guiseppe Aversa*, 55 ECAB ___ (Docket No. 03-2042, issued December 12, 2003).

to the foot or to the lower extremity. Dr. Nutt should address appellant's impairment according to the relevant standards of the A.M.A., *Guides.* If he is unable to clarify and elaborate on his opinion, the case should be referred to another appropriate impartial medical specialist.[15] After such further development as the Office deems necessary, an appropriate decision should be issued regarding this matter.[16]

## ***CONCLUSION***

The Board finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she sustained more that a 14 percent impairment of her right foot for which she received a schedule award. The case is remanded to the Office for further development of the medical evidence to be followed by an appropriate decision.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 3, 2005 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: August 28, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[15] *See Harold Travis*, 30 ECAB 1071, 1078-79 (1979).

[16] The Board notes that an office medical adviser reviewed Dr. Nutt's report and concluded that appellant had a 10 percent impairment rating of her right lower extremity. *See Richard R. LeMay*, 56 ECAB ___ (Docket No. 04-1652, issued February 16, 2005) (an Office medical adviser may review the opinion of an impartial specialist in a schedule award case, but the resolution of the conflict is the responsibility of the impartial medical specialist).