

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

DOROTHY PALLADINO, Appellant)
and) Docket No. 06-456
DEPARTMENT OF VETERANS AFFAIRS,) Issued: July 19, 2006
VETERANS ADMINISTRATION MEDICAL)
CENTER, Salem, VA, Employer)

)

Appearances:

*Robert J. Helbock, 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 December 21, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs schedule award decision dated September 21, 2005. 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 met her burden of proof to establish that she has more than a 20 percent impairment of her right lower extremity for which she received a schedule award.

FACTUAL HISTORY

On December 8, 2002 appellant, then a 58-year-old secretary, filed a traumatic injury claim alleging that she sustained an injury to her right ankle on November 25, 2002 when she stepped on a broken step in the performance of duty. She stopped work on November 25, 2002 and returned to light duty on May 12, 2003.

Appellant underwent surgery for an open reduction internal fixation of a fracture dislocation and closed reduction and casting of the right ankle on November 27, 2002, performed by Dr. Daniel Wilen, a Board-certified orthopedic surgeon.

On January 21, 2003 the Office accepted appellant's claim for fracture of the right malleolus. She received appropriate compensation benefits.

On May 12, 2003 appellant accepted a limited-duty position as a secretary.

In an October 27, 2003 report, Dr. Wilen advised that appellant was not currently having any difficulty with her hardware, "aside from medial malleolus discomfort." He opined that she had reached maximum medical improvement if she remained at her current level. Dr. Wilen noted that, if appellant developed degenerative joint disease in the future, she might require physical therapy, injections or possible surgical debridement.

In an April 10, 2004 report, Dr. Wilen advised that appellant had developed arthritis in the right ankle and had a decreased range of motion of dorsiflexion to 10 degrees, plantar flexion to 15 degrees, eversion to 10 degrees, weakness of 4/5 muscle strength in the plantar and dorsiflexors of the right ankle. He opined that she had a 50 percent loss to the right ankle due to the significant damage, the fracture, the weakness, the decreased range of motion and the development of her arthritis. In an addendum dated April 12, 2004, Dr. Wilen advised that appellant had a "significant severe injury requiring open reduction internal fixation from which she has continuing pain, deficit and disability with a severely comminuted fracture." He explained that, while appellant's injury was openly reduced, internally fixed, because the fracture was so severe, "it could not help but slightly displace." Dr. Wilen noted that it continued to "give the patient pain, deficit and disability despite proper and effective surgical management." He opined that appellant had a 50 percent loss to her "right ankle/right lower extremity."

By letter dated October 28, 2004, the Office requested that Dr. Wilen provide an impairment rating utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (*hereinafter, A.M.A., Guides*). On November 1, 2004 it received appellant's claim for a schedule award.

In reports dated February 15 and 21, 2005, Dr. Wilen noted that the intensity of appellant's ankle pain was between a 6 and an 8 out of 10 and located in the "medial and lateral malleoli," as well as "generalized ankle pain that cannot be localized." He noted that she had difficulty "with daily activities such as ambulation, even walking to take care of such simple basic tasks as shopping." Dr. Wilen also noted that appellant had diminished range of motion of her ankle at times and at other times she had a normal range of motion. He advised that normal was 20 degrees of dorsiflexion and 40 degrees of plantar flexion. Dr. Wilen explained that at other times appellant only had 5 degrees of dorsiflexion and 10 degrees of plantar flexion. He explained that this was dependent upon several factors, including the weather. Dr. Wilen noted that appellant did not have ankylosis and that she had mild to moderate weakness and atrophy especially manifested in the triceps surae with a 4/5 for strength. He advised that she was tender and painful at the scars in the medial and lateral joint lines. Dr. Wilen opined that appellant had a 50 percent loss of the ankle.

On June 17, 2005 the Office medical adviser reviewed Dr. Wilen's reports and noted that appellant had a 20 percent impairment and had reached maximum medical improvement on February 21, 2005. He noted that she had a 17 percent loss for weakness pursuant to the A.M.A., *Guides* at Table 17-8 at 532 and a 3 percent for pain-related impairment based on Figure 18-1 at page 574 of Chapter 18.

On September 21, 2005 the Office granted appellant a schedule award for 20 percent impairment of the right lower extremity. The award covered a period of 57.60 weeks from February 21, 2005 to March 31, 2006.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act¹ 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.² 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.³ The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁴

ANALYSIS

The Board finds that this case is not in posture for a decision. The case requires further development of the medical evidence.

In support of her claim for a schedule award, the Office requested that appellant's treating physician provide an impairment rating. Dr. Wilen provided findings on examination, noting ankle pain was between a 6 and an 8 out of 10 in the "medial and lateral malleoli" and provided appellant with a 50 percent loss of the ankle. However, he did not provide an explanation as to how he arrived at his rating. Board precedent is well settled that, when an attending physician's report gives an estimate of impairment but does not address how the estimate is based upon the A.M.A., *Guides*, the Office may follow the advice of its medical adviser or consultant where he or she has properly applied the A.M.A., *Guides*.⁵

The Office medical adviser subsequently utilized Dr. Wilen's findings. The Office medical adviser determined that appellant had a 20 percent impairment of the right lower extremity, consisting of 17 percent for loss of weakness based on Table 17-8 at page 532 of the

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8107.

³ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

⁴ 20 C.F.R. § 10.404.

⁵ See *Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

A.M.A., *Guides* and 3 percent for pain-related impairment based on Figure 18-1 at page 574.⁶ The Board notes, however, that according to section 18.3(b) of the A.M.A., *Guides*, examiners should not use this chapter to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.⁷ Office procedures provide that Chapter 18 is not to be used in combination with other methods to measure impairment due to sensory pain.⁸ In this case, the Office medical adviser noted that Dr. Wilen had provided a pain impairment rating of three percent; however, he did not explain how the additional three percent impairment awarded appellant due to pain conformed with the above-noted protocols. The Office medical adviser referred to Table 17-8 at page 532 and determined that appellant was entitled to an award of 17 percent for loss of weakness to the right lower extremity. However, he did not explain how he arrived at this value for impairment due to lower extremity muscle weakness. Table 17-8 allows an impairment of 17 percent to the lower extremity for weakness in plantar flexion in the ankle under Grade 4, but the Office medical adviser did not explain how he arrived at this determination. Table 17-7, at page 531, lists the criteria for Grades 0 to 5 regarding muscle function of the leg. It is not clear why the medical adviser selected Grade 4. The Board notes that it is also unclear why the medical adviser did not attribute any weakness impairment under Table 17-8 for extension or dorsiflexion, for which Dr. Wilen noted some abnormality. While the Office medical adviser utilized Dr. Wilen's findings, he did not fully explain how he calculated impairment pursuant to the A.M.A., *Guides*.

Therefore, further development of the medical record is needed to establish the degree of appellant's right lower extremity impairment. On remand the Office should refer appellant to an appropriate medical specialist for an evaluation of permanent impairment caused by the November 25, 2002 employment injury and an impairment rating based on a proper application of the fifth edition of the A.M.A., *Guides*. Following such further development as the Office deems necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision and must be remanded for further development of the medical evidence.

⁶ A.M.A., *Guides* at 574, Figure 18-1.

⁷ *Id.* at 517, section 18.3b.

⁸ See FECA Bulletin No. 01-05 (issued January 31, 2001); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003). *Philip A. Norulak*, 55 ECAB ____ (Docket No. 04-817, issued September 3, 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 21, 2005 is set aside. The case is remanded for further action consistent with this decision.

Issued: July 19, 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