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

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| **RENEE J. BATTS, Appellant** | ) | |
| **and** | ) | **Docket No. 05-1519** |
| | ) | **Issued: June 8, 2006** |
| **NATIONAL AERONAUTICS SPACE ADMINISTRATION, LEWIS RESEARCH CENTER, Cleveland, OH, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.,* for the appellant
*Office of Solicitor*, for the Director

*Cases Submitted on the Record*

# DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

## *JURISDICTION*

On July 12, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decision dated November 22, 2004 and a June 14, 2005 decision denying modification. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

## *ISSUE*

The issue is whether appellant has more than a nine percent permanent impairment of the right lower extremity for which she has received a schedule award.

## *FACTUAL HISTORY*

On July 5, 2000 appellant, then a 41-year-old equal employment opportunity specialist filed a traumatic injury claim alleging that she fell down steps on June 19, 2000 injuring her right ankle while in the performance of duty. The Office accepted a right ankle fracture and authorized surgery which was performed on June 27, 2000. Appellant stopped work on June 19,

2000 and returned to part-time light-duty work on September 10, 2000 and full-time duty on September 25, 2000.

Appellant was treated in the emergency room on June 19, 2000 by Dr. David C. Pelini, Board-certified in emergency medicine, who noted that appellant fell down steps at work and injured her right ankle. An x-ray of the right ankle revealed a trimalleolar fracture. On June 27, 2000 Jaime Sabogal, an orthopedic surgeon, performed an open reduction and internal fixation of the right ankle and diagnosed bimalleolar fracture of the right ankle displaced.

On March 27, 2002 appellant filed a claim for a schedule award. She submitted a September 3, 2002 report from Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, who noted examining appellant on August 26, 2002. He listed findings upon physical examination of generalized swelling of the right ankle, no calf atrophy, generalized tenderness medially, tenderness to palpation along the lateral and medial malleolus, range of motion of the right ankle for extension was 0 degrees, eversion was 20 degrees and inversion 20 degrees. Dr. Kaffen opined that appellant reached maximum medical improvement. He determined that appellant sustained a 16 percent permanent impairment of the right lower extremity in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (A.M.A., *Guides*).[1] Dr. Kaffen noted impairment due to abnormal motion of the ankle was moderate with a rating of 15 percent[2] and impairment due to abnormal hindfoot motion was mild with a rating of 1 percent.[3] Utilizing the Combined Values Chart of the A.M.A., *Guides*, page 604, the physician determined that appellant sustained a 16 percent permanent impairment of the right lower extremity.

Dr. Kaffen's report and the case record were referred to an Office medical adviser. In a report dated October 6, 2002, he applied Dr. Kaffen's findings upon examination to rate impairment in accordance with the A.M.A., *Guides*. He determined that appellant sustained nine percent permanent impairment of the lower extremities.[4]

In a decision dated November 20, 2002, the Office granted appellant a schedule award for nine percent permanent impairment of the right lower extremity. The period of the award was from August 26, 2002 to February 23, 2003.

In a letter dated November 23, 2002, appellant requested an oral hearing before an Office hearing representative. The hearing was held on July 31, 2003.

In a decision dated September 25, 2003, the hearing representative set aside the November 20, 2002 schedule award. The hearing representative determined that a conflict of medical opinion arose between appellant's attending physician, Dr. Kaffen, who determined that

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

[2] *See id.* at 537, Table 17-11.

[3] *See id*. at 537, Table 17-12.

[4] *See id*. at 537, Table 17-11; Table 17-12; 541 Table 17-24 to 17-28; and 565 at Chapter 18.

appellant sustained 16 percent impairment of the right lower extremity, and the medical adviser, who found 9 percent permanent impairment of the right lower extremity.

To resolve the conflict, the Office referred appellant to a referee physician, Dr. Ralph J. Kovach, a Board-certified orthopedic surgeon. In a report dated November 22, 2003, he reviewed the record and performed a physical examination of appellant. He noted a history of appellant's work-related injury and advised that appellant had reached maximum medical improvement. Dr. Kovach noted findings upon physical examination of a moderate antalgic gait, bilateral pes planus, swelling of the right ankle, moderate tenderness over the medial and lateral aspects of the ankle and no sensory discrepancy. He noted that range of motion for plantar flexion on the right measured 30 degrees for a 0 percent impairment;[5] extension measured 10 degrees for 7 percent impairment;[6] eversion measured 20 degrees for 0 percent impairment;[7] and inversion was 20 degrees for 2 percent impairment.[8] Dr. Kovach advised that based on the fifth edition of the A.M.A., *Guides*[9] appellant sustained nine percent permanent impairment of the right lower extremity.

Dr. Kovach's report and the case record were referred to the Office medical adviser. In a report dated December 18, 2003, he agreed that appellant sustained nine percent permanent impairment of the lower extremities.[10]

By decision dated January 22, 2004, the Office determined that appellant did not have greater than the nine percent impairment of the right lower extremity previously granted. The Office noted that Dr. Kovach's opinion resolved the medical conflict and determined that appellant was entitled to a schedule award for nine percent permanent impairment of the right lower extremity.

By letter dated January 27, 2004, appellant requested an oral hearing before an Office hearing representative. The hearing was held on July 26, 2004.

In a decision dated November 22, 2004, the hearing representative affirmed the Office's January 22, 2004 decision.

By letter dated March 29, 2005, appellant requested reconsideration. Appellant submitted a report from Dr. Timothy Morley, an osteopath, dated March 23, 2005. Dr. Morley noted a history of the work-related injury and subsequent surgical repair of the right ankle on June 27, 2000. He noted findings upon physical examination of some atrophy of the right calf which measured 17 centimeters in comparison to the left which measured 17.5 centimeters,

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[5] *See id.* at 537, Table 17-11.

[6] *Id.*

[7] *See id.* at 537, Table 17-12.

[8] *Id.*

[9] *Id*.

[10] *See id.* at 537, Table 17-11; Table 17-12; 541, Table 17-24 to 17-28; 565 at Chapter 18.

plantar flexion measured 15 degrees for a 7 percent impairment,[11] extension measured 5 degrees for 7 percent impairment,[12] eversion measured 10 degrees for 2 percent impairment,[13] inversion measured 10 degrees for 2 percent impairment,[14] and there was no sensory deficit noted. Dr. Morley opined that in accordance with the A.M.A., *Guides* (5th ed. 2001) appellant sustained 18 percent permanent impairment of the right lower extremity.[15]

In a decision dated June 14, 2005, the Office denied modification of the prior decision. The Office found that the weight of the medical opinion rested with Dr. Kovach.

## ***LEGAL PRECEDENT***

The schedule award provision of the Federal Employees' Compensation Act[16] and its implementing regulation[17] 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 claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[18]

## ***ANALYSIS***

The Office accepted that appellant sustained a right ankle fracture and paid appropriate compensation. The Office determined that appellant had nine percent impairment of the right lower extremity for which a scheduled award was granted on January 22, 2004.

The Board notes that a conflict of opinion did not arise between Dr. Kaffen and the Office medical adviser. Although Dr. Kaffen determined that appellant sustained a 16 percent permanent impairment of the right lower extremity, he misapplied the A.M.A., *Guides* in reaching his impairment determination. He noted impairment due to abnormal motion of the ankle was moderate with a rating of 15 percent[19] and impairment due to abnormal hindfoot

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[11] *See id*. at 537, Table 17-11.

[12] *See id.*

[13] *See id.* at 537, Table 17-12.

[14] *See id.*

[15] *See id.* at 604, Combined Values Chart.

[16] 5 U.S.C. § 8107.

[17] 20 C.F.R. § 10.404 (1999).

[18] *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[19] *See* A.M.A., *Guides* 537, Table 17-11.

motion was mild with a rating of 1 percent.[20] However, the Board notes that range of motion of the right ankle for extension of 0 degrees is a mild impairment of 7 percent[21] and inversion of 20 degrees is a mild impairment of 2 percent for an impairment rating of 9 percent for the right lower extremity. The medical evidence was referred to an Office medical adviser who, in a report dated October 6, 2002, determined that appellant sustained 9 percent permanent impairment of the lower extremities in accordance with the A.M.A., *Guides*.[22] The medical adviser, in calculating impairment, merely corrected Dr. Kaffen's error in correlating the physical findings to the A.M.A., *Guides*. As Dr. Kaffen did not properly apply the applicable tables in the A.M.A., *Guides*, a conflict did not arise.

The Office referred appellant to Dr. Kovach to resolve a conflict of medical opinion regarding appellant's right leg impairment. As noted, there was no conflict at the time of his appointment. Therefore, the Board finds that Dr. Kovach is a second opinion examiner and not an impartial medical examiner. His status is that of a second opinion specialist.

Dr. Kovach opined, in a report dated November 22, 2003, that, based on the fifth edition of the A.M.A., *Guides,*[23] appellant sustained nine percent permanent impairment of the right lower extremity. He noted that range of motion for plantar flexion on the right measured 30 degrees for 0 percent impairment,[24] extension measured 10 degrees for 7 percent impairment,[25] eversion measured 20 degrees for 0 percent impairment,[26] and inversion was 20 degrees for 2 percent impairment.[27]

In a March 23, 2005 report, Dr. Morley opined that in accordance with the A.M.A., *Guides* (5th ed. 2001) appellant sustained an 18 percent permanent impairment of the right lower extremity. The Board notes that Dr. Morley's findings with regard to impairment of the right lower extremity including plantar flexion which measured 15 degrees for 7 percent impairment,[28] extension which measured 5 degrees for 7 percent impairment,[29] eversion which measured 10

[20] *See id*. at 537, Table 17-12.

[21] *See id.* at 537, Table 17-11.

[22] *See id*. at 537, Table 17-11; Table 17-12; 541 Table 17-24 to 17-28; and 565 at Chapter 18.

[23] *Id.*

[24] *See id.* at 537, Table 17-11.

[25] *Id.*

[26] *See id.* at 537, Table 17-12.

[27] *Id.*

[28] *See id.* at 537 (the A.M.A., *Guides* provide that plantar flexion which measures from 11 to 20 degrees correlates to an impairment rating of 7 percent of the lower extremity).

[29] *See id.* (the A.M.A., *Guides* provide that extension which measures from 0 to 10 degrees correlates to an impairment rating of 7 percent of the lower extremity).

degrees for 2 percent impairment,[30] and inversion which measured 10 degrees for 2 percent lower extremity impairment.[31] These are consistent with appellant's accepted condition of right ankle fracture, and may merit a higher schedule award than the 9 percent awarded.[32] Dr. Morley determined that the work-related injury of June 19, 2000 was the competent producing factor for appellant's subjective and objective findings described above.

The Board finds that Dr. Morley's report creates a conflict with the report of Dr. Kovach. Dr. Morley examined appellant and provided range of motion findings from which he concluded that appellant had greater than nine percent impairment for the right leg. On the other hand, Dr. Kovach reviewed findings from his examination of appellant and opined that appellant had no more than nine percent permanent impairment of the right leg.

Section 8123(a) of the Act provides in pertinent part: "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."[33] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[34] The Board finds that the Office should have referred appellant to an impartial medical specialist to resolve the medical conflict regarding the extent of permanent impairment arising from appellant's accepted employment injury.

Therefore, in order to resolve the conflict in the medical opinions, the case will be remanded to the Office for referral of the case record, including a statement of accepted facts, and, if necessary, appellant, to an impartial medical specialist for a determination regarding the extent of appellant's right lower extremity impairment as determined in accordance with the relevant standards of the A.M.A., *Guides*.[35] After such further development as the Office deems necessary, an appropriate decision should be issued regarding the extent of appellant's left upper extremity impairment.

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[30] *See id*. at 537, Table 17-12 (the A.M.A., *Guides* provide that eversion which measures from 0 to 10 degrees correlates to an impairment rating of 2 percent of the lower extremity).

[31] *See id.*

[32] The Board notes that, although Dr. Morley mentioned an atrophy impairment of the right lower extremity in his report, Table 17-2, page 526 of the A.M.A., *Guides,* prohibits combining the evaluation methods of muscle atrophy with loss of range of motion.

[33] 5 U.S.C. § 8123(a).

[34] *William C. Bush,* 40 ECAB 1064 (1989).

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

## ***CONCLUSION***

The Board finds that this case is not in posture for decision due to a conflict in the medical evidence.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 14, 2005 and November 22, 2004 are set aside and the case is remanded for further action consistent with this decision.

Issued: June 8, 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