



his claim for Morton's neuroma at the third interspace of his left foot. On October 6, 2003 appellant underwent surgery to remove the neuroma.

On January 14, 2005 appellant requested a schedule award for the permanent impairment of his left foot. He submitted an impairment rating report prepared by Dr. Dewi Brown on December 7, 2004 who found that appellant had reached maximum medical improvement. Dr. Brown stated that there was no conventional rating for neuroma excision or impairment of digital nerves on the foot, but that the impairment could be rated based on pain and effect on the activities of daily living because of appellant's character and believability. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001), Figure 18-1, page 574, he found a two percent whole person impairment rating.

On December 12, 2005 the Office notified both appellant and his treating physician, Dr. Lance Macey, a Board-certified orthopedic surgeon, to submit a current medical report indicating the date of maximum medical improvement, objective and subjective medical findings and an impairment rating of the affected member based on the A.M.A., *Guides*.

On February 16, 2006 Dr. Macey stated that appellant had reached maximum medical improvement by October 4, 2004. He found that appellant had no movement restrictions in his left foot, but had fat-pad atrophy and palpable tenderness under metatarsal heads two, three and four. Dr. Macey stated that appellant's subjective complaints were consistent with the objective findings and included pain under the affected metatarsal heads with prolonged standing and walking. He noted that the A.M.A., *Guides* did not include a rating specifically for Morton's neuroma or work-related metatarsalgia, but Dr. Macey found the ratings for metatarsalgia related to metatarsal fracture were a valid comparison. Dr. Macey stated that, for metatarsalgia affecting one metatarsal, the A.M.A., *Guides*, Table 17-33, page 547, allowed for ratings of one percent for the whole person, two percent for the lower extremity or three percent for the foot. Because three metatarsals were implicated, he opined that appellant should receive an award for three percent of his whole person, six percent of his left lower extremity or nine percent of his foot. Dr. Macey noted that, alternatively, appellant's impairment could be rated under the A.M.A., *Guides* section on pain-related impairments, page 574. He stated that appellant would be eligible for a discretionary impairment rating of up to three percent of the whole person. Because both methods resulted in the same whole person impairment rating, Dr. Macey recommended that appellant be awarded three percent impairment of the whole person.

On April 23, 2006 the Office medical adviser reviewed appellant's medical records, including Dr. Macey's impairment rating. He concurred with Dr. Macey's use of Table 17-33, page 547, to rate appellant's metatarsalgia. The Office medical adviser opined that the degree of pain and impairment in claimants with chronic metatarsalgia is comparable with that for metatarsalgia with fracture. He opined that appellant should be awarded a two percent impairment rating of his lower left extremity for each of the three metatarsal bones involved, resulting in a six percent impairment of the lower left extremity.

By decision dated June 1, 2006, the Office awarded appellant a six percent impairment of the lower left extremity or 86.10 days of compensation, for the period October 4 to

December 29, 2004.<sup>1</sup> On July 17, 2006 appellant requested reconsideration of the schedule award. He argued that Dr. Macey's report had stated that he was also entitled to impairment ratings of three percent for his whole person, nine percent for his foot and three percent for pain. On October 24, 2006 the Office medical adviser clarified his report to emphasize that the impairment ratings for whole person, lower extremity and foot were equivalent but alternative. He stated that he had recommended an award based on appellant's lower left extremity, not his left foot.

By decision dated October 27, 2006, the Office modified appellant's schedule award. It noted that impairment ratings for the whole body are not payable under the Federal Employees' Compensation Act, but that the Office should select the most favorable award when impairment can be determined based on more than one part of the body identified by the Act. The Office stated that appellant's impairment could be considered in terms of the toes, the foot or the leg. It calculated that the most favorable award would be for the nine percent impairment of appellant's left foot which equaled 129.15 days. The Office noted that its previous award had erroneously been calculated using values for the left foot rather than the left leg. Because appellant had received compensation only for six percent impairment of his left foot, he was now entitled to an additional three percent schedule award. The Office issued the amended schedule award on October 31, 2006.

On November 13, 2006 appellant requested reconsideration of his modified schedule award. He contended that, in accordance with Dr. Macey's report, he was entitled to a three percent increase in his impairment rating for the pain he continued to experience.

By nonmerit decision dated January 26, 2007, the Office denied further merit review of appellant's claim. It stated that appellant's contention that he should receive an additional award for pain could be construed as a new legal argument, but found that there was no obligation to review the merits of the claim because the argument did not have a "reasonable color of validity."

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

The schedule award provision of the Act<sup>2</sup> and its implementing regulation<sup>3</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 should be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standards applicable to all claimants.<sup>4</sup> Office procedures direct the use of

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<sup>1</sup> The Board notes that this number is incorrect. The six percent impairment of the lower left extremity would entitle appellant to 120.96 days of compensation.

<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> 20 C.F.R. § 10.404(a).

the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.<sup>5</sup>

The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain by using Chapter 18, which provides a qualitative method for evaluating impairment due to chronic pain. If an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly, the examiner may increase the percentage up to three percent. However, examiners should not use Chapter 18 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*.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office medical adviser correctly followed the procedures outlined in the A.M.A., *Guides* in determining that appellant's permanent impairment and that the Office properly determined his schedule award.

The determination of the Office medical adviser was based on the complete and thorough examination and impairment rating performed by Dr. Macey, a Board-certified orthopedic surgeon. He found that Dr. Macey's use of Table 17-33, page 547, in the A.M.A., *Guides*, which details ratings for fracture related metatarsalgia, was appropriate to rate appellant's chronic metatarsalgia. The Office medical adviser opined that "the degree of pain and impairment in [appellant] with chronic metatarsalgia is comparable with that for metatarsalgia with fracture." The A.M.A., *Guides*' section for forefoot deformity on Table 17-33, page 547, states that metatarsalgia affecting any of the three middle metatarsal bones creates an impairment of one percent of the whole person, two percent of the lower extremity or three percent of the foot.<sup>7</sup> Finding that these percentages should be multiplied by three to account for the three metatarsal bones that were implicated in appellant's condition, the Office medical adviser properly determined that the A.M.A., *Guides* dictated an impairment rating of either three percent of the whole person, six percent of the lower left extremity or nine percent impairment of the left foot. Accordingly, the Board finds that the Office medical adviser properly established appellant's impairment rating and the Office correctly relied on it in issuing its modified schedule award.

Based on the Office medical adviser's report, the Office modified appellant's schedule award on October 27, 2006 to compensate him for the nine percent impairment of his left foot, rather than the six percent impairment of his left leg that had been previously awarded.<sup>8</sup> The Office determined that an award based on the foot would be larger than one based on the leg and

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<sup>5</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

<sup>6</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* at 18.3(b); see also *Philip Norulak*, 55 ECAB 690 (2004).

<sup>7</sup> A.M.A., *Guides* 547, Figure 17-33.

<sup>8</sup> The Office properly did not consider a three percent whole person rating because such a rating is not compensable under the Act.

properly found that appellant should have the benefit of the more favorable schedule award.<sup>9</sup> The Board finds that the Office properly determined appellant's schedule award under the Act.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.<sup>10</sup> Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>11</sup> Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant met none of the regulatory requirements for a review of the merits of his claim. His November 13, 2006 request for reconsideration raised a point of disagreement with the merit decision, but did not establish that the Office erroneously applied or interpreted a specific point of law. He is thus, not entitled to further review on the merits of his case under section 10.606(b)(2)(i).<sup>13</sup> Because appellant did not submit any new medical evidence he is not entitled to review under section 10.606(b)(2)(iii).

In his request for reconsideration, appellant contended that he was entitled to a three percent increase in his award to compensate him for pain-related impairment. Though appellant raised this claim in his July 17, 2006 request for reconsideration, the Office did not address the issue of a pain-based award directly in its October 27, 2006 decision. Because it is unclear whether the Office previously considered this argument, it was proper to construe it as a new legal argument. While the reopening of a case for further review of the merits may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>14</sup> The Board finds that the Office properly determined that this legal argument was not supported by the medical evidence in the case, as the discretionary award for pain was offered as an alternative to the nine percent left foot

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<sup>9</sup> See *Patricia J. Lieb*, 42 ECAB 861 (1991) and *Harold T. Nelson*, 42 ECAB 763 (1991); see also *Susana Sanchez*, (Docket No. 99-64, issued May 22, 2000).

<sup>10</sup> 5 U.S.C. § 8128(a).

<sup>11</sup> 20 C.F.R. § 10.606(b)(2).

<sup>12</sup> 20 C.F.R. § 10.608(b).

<sup>13</sup> 20 C.F.R. § 10.606(b)(2)(i) and (ii).

<sup>14</sup> *Cleopatra McDougal-Saddler*, 50 ECAB 367 (1999); *Nora Favors*, 43 ECAB 403 (1992); *Constance G. Mills*, 40 ECAB 317 (1988).

impairment rating that he received, not a supplement to it. The Board, therefore, finds that the Office was not required to conduct a further merit review of this case on the basis of a new legal argument.

Because appellant did not meet any of the statutory requirements for a review of the merits of his claim, the Office properly denied his July 11, 2006 request for reconsideration.

**CONCLUSION**

The Board finds that appellant did not establish that he had more than nine percent impairment of his left foot. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 26, 2007 and October 27, 2006 are affirmed.

Issued: July 25, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board