

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

A.D., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Hammond, IN, Employer)

**Docket No. 08-1236
Issued: November 18, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 21, 2008 appellant filed a timely appeal from the Office of Workers Compensation Programs February 15, 2008 merit decision concerning his entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he is entitled to additional schedule award compensation for permanent impairment of his legs.

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on October 12, 2007 setting aside the Office's March 1, 2007 schedule award for permanent impairment of appellant's

legs. It remanded the case for further development.¹ The Board found that the October 27, 2006 impairment evaluation of Dr. Benjamin P. Crane, a Board-certified orthopedic surgeon who served as an Office medical adviser, required additional clarification.² He did not adequately explain his rating of three percent permanent impairment of the left leg and a one percent permanent impairment of the right leg due to sensory loss associated with the sural nerves. It did not appear that Dr. Crane correctly combined the impairment values for appellant's right leg.³ The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand, Dr. David H. Garelick, a Board-certified orthopedic and Office medical adviser, reviewed the medical evidence and provided clarification of appellant's permanent impairment of his legs. On November 26, 2007 Dr. Garelick indicated that in each leg appellant had Grade 4 or 25 percent, for pain associated with the sural nerve as derived from Table 17-37 on page 522 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed 2001). He multiplied this 25 percent grade times the 5 percent maximum value for pain associated with the sural nerve (derived from Table 16-10 on page 482) to find that appellant had a 1 percent impairment (rounded down from 1.25 percent) in each leg due to sensory loss associated with the sural nerve. Dr. Garelick then used the Combined Values Chart on page 604 to combine these values for sensory loss impairment with the loss of motion impairments in each leg. He concluded that appellant had a 28 percent permanent impairment of his left leg and a 17 percent permanent impairment of his right leg.

In a February 15, 2008 decision, the Office granted appellant schedule awards for a 28 percent permanent impairment of his left leg and a 17 percent permanent impairment of his right leg minus schedule award compensation which had previously been paid.⁴ The effective date of

¹ Docket No. 07-1160 (issued October 12, 2007). In late 1995 the Office accepted that appellant, then a 32-year-old letter carrier, sustained tarsal tunnel syndrome of his left ankle and, in mid 1996, it accepted that he sustained hallux rigidus of his left foot. Appellant first sustained disability due to his employment injuries on March 16, 1995 at which time he earned \$679.20 per week. In an April 1, 1997 decision, the Office granted appellant a schedule award for a 14 percent permanent impairment of his left leg due to limited motion of his left ankle and great toe and sensory loss in his toes. The award ran for 40.32 weeks. In mid 1997, it accepted that appellant sustained a bone spur of his right toe. In a January 11, 1999 decision, the Office granted appellant a schedule award for an additional 8 percent permanent impairment of his left leg and a 15 percent permanent impairment of his right leg based on limited motion of his ankles and great toes and sensory loss in his toes. The award ran for 66.24 weeks.

² Dr. Crane reviewed the February 2006 findings of Dr. Irwin M. Siegel, an attending Board-certified neurosurgeon. On October 27, 2006 he concluded that appellant had a 29 percent permanent impairment of his left leg and a 12 percent permanent impairment of his right leg and, in a March 1, 2007 decision, the Office granted appellant a schedule award for an additional 1 percent permanent impairment of his left leg. The award ran for 2.88 weeks. The Office stated that appellant had already received schedule awards for a 28 percent permanent impairment of his left leg and a 21 percent permanent impairment of his right leg.

³ The Office indicated that appellant received schedule award compensation for a 29 percent permanent impairment of his left leg and a 21 percent permanent impairment of his right leg, but it appeared from the record that he only received compensation for a 23 percent permanent impairment of his left leg and a 15 percent permanent impairment rating of his right leg.

⁴ The Office indicated that the award ran for 126.72 weeks from January 7, 2000 to June 12, 2002.

appellant's pay rate was March 16, 1995 at which time he earned \$679.20 per week. The Office adjusted appellant's pay rate for compensation purposes to reflect that he was paid at the 2/3 statutory rate for those without qualifying dependents and provided figures for periodic cost-of-living adjustments (COLA). In an accompanying February 15, 2008 memorandum, it noted that he had previously received compensation awards for a 23 percent permanent impairment of his left leg and a 15 percent permanent impairment of his right leg.⁵ Appellant was entitled to receive \$63,903.18 in schedule award compensation for permanent impairment of his legs and that he had already received \$51,584.39, resulting in an additional \$12,038.79 in compensation.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁶ and its implementing regulation⁷ 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 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.⁸ For total loss of one leg, the Act provides for 288 weeks of compensation and any loss less than a total loss is compensated at a proportionate rate.⁹

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."¹⁰ Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."¹¹

⁵ The Office actually stated that the schedule awards were for foot impairment but this appears to have been an inadvertent statement as it otherwise appears to have considered appellant's impairment to be for leg impairment.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *Id.*

⁹ See 5 U.S.C. § 8107(c)(2); *Jeffrey J. Stickney*, 51 ECAB 616 (2000).

¹⁰ 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

¹¹ 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002). The appropriate effective date for COLA increases is set by 5 U.S.C. § 8146 and the Office has no authority to change the effective date of March 1, 1983. 5 U.S.C. § 8146; see also 20 C.F.R. § 10.420 for the standards for applying COLA increases.

ANALYSIS

On November 26, 2007 Dr. Garelick, a Board-certified orthopedic and Office medical adviser, found that appellant had a 28 percent permanent impairment of his left leg and a 17 percent permanent impairment of his right leg. The Board finds that this assessment is proper. Dr. Garelick indicated that in each leg appellant had Grade 4 or 25 percent, for pain associated with the sural nerve which, when multiplied times the 5 percent maximum value for pain associated with the sural nerve, totals a 1 percent impairment (rounded down from 1.25 percent) in each leg.¹² He then properly used the Combined Values Chart to combine these values for sensory loss impairment with the motion loss impairments in each leg.¹³ Therefore, the Office properly found that appellant had 28 percent permanent impairment of his left leg and a 17 percent permanent impairment of his right leg.

The record reveals that appellant had previously received schedule award compensation for a 23 percent permanent impairment of his left leg and a 15 percent permanent impairment of his right leg. Therefore, appellant is entitled to additional compensation for a five percent permanent impairment of his left leg and a two percent permanent impairment of his right leg.¹⁴ The Board notes that the additional compensation paid to appellant by the Office in connection with its February 15, 2006 schedule award (\$12,038.79) would compensate him for the additional calculated leg impairment.¹⁵

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he is entitled to additional schedule award compensation for permanent impairment of his legs.

¹² See A.M.A., *Guides* 492, 522, Tables 16-10, 17-37.

¹³ The Board found that the Office properly determined that appellant had a 15 percent impairment due to limited motion of his left ankle, a 7 percent impairment due to limited motion of his left great toe, a 7 percent impairment due to limited motion of his left hindfoot, a 7 percent impairment due to limited motion of his right ankle, a 7 percent impairment due to limited motion of his right great toe and a 2 percent impairment due to limited motion of his right hindfoot.

¹⁴ For total loss of one leg, the Act provides for 288 weeks of compensation and any loss less than a total loss is compensated at a proportionate rate. The total leg impairment for which appellant had not been previously compensated totals 7 percent and multiplying this partial impairment times the 288 weeks of compensation for total leg loss shows that appellant would be entitled to an additional 20.16 weeks of compensation. See *supra* note 9 and accompanying text.

¹⁵ It appears that the Office properly determined that appellant's pay rate should be measured by his pay on March 16, 1995, the date he first sustained disability due to his employment-related injuries. The Office adjusted appellant's pay rate for compensation purposes to reflect that he was paid at the 2/3 rate for those without qualifying dependents and calculated pay increases to account for COLA. See *supra* notes 10 and 11 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 15, 2008 decision is affirmed.

Issued: November 18, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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