

Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) fifth edition Dr. Diamond calculated a 12 percent impairment for a 4/5 loss of muscle in the right anterior tibialis muscle pursuant to Table 17-8, page 532 of the A.M.A., *Guides*; and a 3 percent impairment for pain pursuant to Figure 18-1 at page 574 of the A.M.A., *Guides*.

On March 26, 2004 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his right leg.

The Office referred appellant for a second opinion examination with Dr. Robert F. Draper, Board-certified in orthopedic surgery. In a report dated May 21, 2004, Dr. Draper found that appellant had a three percent impairment of the right foot. He stated:

“There is no specific area which documents impairment rating associated with this injury. However, I have decided to use Table 18-3, *Impairment Classification Due to Pain Disorders*, at page 575 [of the A.M.A., *Guides*]. I estimate that [appellant] is in a Class I [m]ild [p]ain and estimate that [appellant] has a [three] percent impairment of the right foot associated with [his accepted work injury].”

In a June 14, 2004 memorandum, an Office claims examiner recommended that Dr. Draper’s report be referred to an Office medical adviser for review and commentary.

On October 26, 2004 the Office granted appellant a schedule award for a three percent permanent impairment of the right leg for the period July 1 to August 30, 1996, for a total of 8.64 weeks of compensation.

By letter dated October 29, 2004, appellant’s attorney requested an oral hearing.

By decision dated June 22, 2005, an Office hearing representative found that the case was not in posture for a hearing because the Office failed to refer the case to an Office medical adviser for review in accordance with the June 14, 2004 Office memorandum. The hearing representative set aside the October 26, 2004 decision and remanded for referral to an Office medical adviser for review and evaluation and to determine an impairment rating for appellant’s accepted right foot condition.

In a November 20, 2005 report, the Office medical adviser found that appellant had a three percent impairment of the right foot. He stated:

“I concur with Dr. Draper’s second opinion report of a [three] percent impairment of the right [foot]. The difference between Dr. Draper’s calculation and Dr. Diamond’s calculation is that Dr. Diamond concluded that there was weakness of the anterior tibial muscle of the ankle with resulting 4/5 strength deficit that resulted in the recommendation of a 12 percent award. Dr. Draper did not note any weakness in his exam[ination] and Dr. Draper did not note any specific anterior tibial weakness in his examination. Dr. Diamond, on page 3 of his report, only mentions a [G]rade 4/5 weakness in the right lower extremity, and in the body of the report does not mention anything about any specific areas of weakness. It is only in Dr. Diamond’s conclusion that he makes a transition from

a general comment in his report about weakness to a specific comment about anterior tibial weakness, and this is the basis of his calculation. Dr. Draper does not note any weakness of any kind.

“Because of the inconsistencies noted in Dr. Diamond’s report, I would conclude that Dr. Draper’s report is more accurate in regards to the question of weakness. Dr. Draper is correct. It would be appropriate for him to use Table 18-3, impairment classification due to pain disorders on page 575 with Class I mild pain. [W]e can estimate that [appellant] has a [three] percent impairment of the right foot.”

By decision dated December 8, 2005, the Office found that appellant was not entitled to an additional schedule award greater than the three percent already awarded.

By letter dated December 13, 2005, appellant’s attorney requested an oral hearing, which was held on April 26, 2006. Counsel contended at the hearing that the Office erred in relying on Dr. Draper’s report because he did not indicate that he performed any strength testing, unlike Dr. Diamond.

By decision dated July 11, 2006, an Office hearing representative set aside the December 8, 2005 decision. He accepted the argument of appellant’s attorney that Dr. Draper’s report was not probative as the issue of right lower extremity weakness because he failed to indicate whether he performed strength testing of appellant’s right leg during his May 21, 2004 evaluation. The hearing representative stated that, contrary to Office medical adviser’s finding, Dr. Diamond’s findings related to weakness were not inconsistent; he noted that Dr. Diamond’s twice stated in his report that he performed strength testing which indicated Grade 4/5 weakness in the right lower extremity, based on weakness related to the right anterior tibialis. He therefore remanded the case and instructed the Office to refer the case to Dr. Draper for a supplemental opinion regarding whether or not appellant has right lower extremity weakness. The hearing representative also instructed the Office to ask Dr. Draper to explain whether or not he performed any strength testing during his May 21, 2004 evaluation and, if so provide the results of these strength tests. He stated that, after the referral to Dr. Draper and any further development deemed necessary, the Office should issue a new decision regarding appellant’s entitlement to any additional schedule award.

In a report dated September 28, 2006, Dr. Draper stated findings on examination and reiterated his previous finding of a three percent impairment of the right foot. He indicated that he had performed motor function tests as requested by the Office and had determined that appellant had no weakness of any muscle groups involving the right foot. Dr. Draper indicated that he conducted strength tests for tibialis anterior, extensor hallucis longus, extensor digitorum, peroneus longus and brevis and gastrocnemius-soleus; all of these muscle groups tested at +5.

By decision dated October 6, 2006, the Office, found that appellant was not entitled to an additional schedule award greater than the three percent already awarded. It found that Dr. Draper’s supplemental report represented the weight of the medical evidence.

By letter dated October 11, 2006, appellant’s attorney requested an oral hearing.

By decision dated January 9, 2007, an Office hearing representative set aside the December 8, 2006 decision. The hearing representative found that there was a conflict in the medical evidence between Drs. Diamond and Draper regarding whether appellant had any permanent impairment in his right leg due to weakness in the anterior tibialis muscle. He instructed the Office to refer the case to a referee medical specialist to resolve the conflict in the medical evidence regarding this issue.

The Office scheduled appellant for an impartial medical examination with Dr. Charles D. Hummer, Board-certified in orthopedic surgery. In a February 16, 2007 report, Dr. Hummer tested for strength deficit in the right leg and found no evidence of muscle weakness or atrophy. He had appellant undergo strength tests in the tibialis anterior, extensor hallucis longus tendon, the extensor digitorum tendons, peroneus longus and brevis and gastroc-soleus mechanisms and concluded that all these groups showed strong 5/5 motor power with manual testing for resistance. Dr. Hummer concluded that based on page 575 of the A.M.A., *Guides*,¹ appellant had mild discomfort and a mild impairment, yielding a three percent permanent impairment of the right lower extremity.

By decision dated March 6, 2007, the Office denied appellant's claim for an additional schedule award. It found that Dr. Hummer's referee medical opinion represented the weight of the medical evidence.

By decision dated September 14, 2007, an Office hearing representative affirmed the August 4, 2005 Office decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.³ However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* fifth edition as the standard to be used for evaluating schedule losses.⁴

¹ Dr. Hummer did not refer to the specific table listed on page 575, Table 18-3 of the A.M.A. *Guides*, which presents "Impairment Classification Due to Pain Disorder." However, there is no dispute among the physicians of record regarding appellant's entitlement to a three percent impairment for pain and no other table or figure listed at page 575.

² 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

³ 5 U.S.C. § 8107(c)(19).

⁴ 20 C.F.R. § 10.404.

ANALYSIS

The Office found in its October 26, 2004 decision that appellant had a three percent permanent impairment of the right leg based on pain and discomfort in the foot. There is no dispute in the record regarding this determination. However, the Office hearing representative in his January 9, 2007 decision determined that there was a conflict in the medical evidence between Dr. Diamond, appellant's treating physician, and Dr. Draper, the second opinion physician, regarding whether he had any additional permanent impairment in his right leg due to his accepted right heel condition; specifically, whether he had any permanent impairment in his right leg due to weakness in the anterior tibialis muscle. Dr. Diamond had determined a 12 percent impairment due to a 4/5 weakness in the anterior tibialis muscle based on strength testing, while Dr. Draper found that appellant tested 5/5 in the anterior tibialis. The Office referred the case to a referee medical specialist, Dr. Hummer, who tested appellant for strength loss in the tibialis anterior, extensor hallucis longus tendon, the extensor digitorum tendons, peroneus longus and brevis and gastroc-soleus mechanisms. He found that appellant showed strong 5/5 motor power with manual testing for resistance in all muscle groups that he tested. Dr. Hummer concluded that appellant had no additional impairment of the right leg due to strength loss pursuant to the A.M.A., *Guides*.

The Board finds that the Office properly determined that appellant was not entitled to an additional schedule award for the right lower extremity. The Office properly relied on Dr. Hummer's opinion, which was in conformance with the applicable standards of the A.M.A., *Guides*. The Board therefore affirms the March 6, 2007 decision. Subsequent to the Office's decision, appellant requested an oral hearing but did not submit any additional medical evidence. Appellant has not established that he is entitled to a schedule award for more than a three percent impairment of the right lower extremity.

CONCLUSION

The Board finds that appellant has no more than a three percent impairment of the right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the Office's September 14 and March 6, 2007 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: September 10, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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