

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

N.T., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Albany, NY, Employer)

Docket No. 09-814
Issued: November 2, 2009

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 4, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 29, 2008 and January 23, 2009 merit decisions regarding her entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a 12 percent permanent impairment of her right leg, for which she received a schedule award.

FACTUAL HISTORY

The Office accepted that on June 13, 1996 appellant, then a 43-year-old distribution clerk, sustained a sprain and posterior malleolus fracture of her right ankle due to a fall at work. Appellant received appropriate compensation from the Office for periods of disability.

On June 22, 2005 Dr. Patrick R. Scerpella, an attending Board-certified orthopedic surgeon, performed right ankle surgery including a medial displacement calcaneal osteotomy,

first metacarpophalangeal joint fusion with tendon debridement, excision of the posterior tibial tendon insertion of the navicular bone, transfer of the flexor digitorum communism to the midfoot and medial talonavicular capsular plication. On July 12, 2006 he performed a triple arthrodesis of appellant's right foot with deep hardware removal and on March 26, 2007 he performed a repair of a right talonavicular nonunion with deep hardware removal and tibial bone graft. The procedures were authorized by the Office.

On October 3, 2007 appellant filed a claim for a schedule award in connection with the June 13, 1996 work injury to her right foot. On August 8, 2007 Dr. Scerpella indicated that she had chronic foot swelling, but to a lesser degree than her prior visit. He found that appellant had 25 degrees of plantar flexion and 15 degrees of dorsiflexion of her right foot.

In a February 12, 2008 report, Dr. Scerpella indicated that appellant was then approaching one year since her most recent right foot surgery and she reported aching in her right foot after standing for extended periods. Examination of the right foot showed benign scars and mild swelling. Dr. Scerpella indicated that appellant had active dorsiflexion of her right ankle to 10 degrees and plantar flexion to 30 degrees and noted that her right hindfoot was fused. He found appellant's subtalar motion to be unremarkable. Dr. Scerpella determined that appellant had reached maximal medical improvement for purposes of evaluating impairment of her right foot. He indicated that he was not familiar with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th edition) and determined that under the standards of the New York State Workers' Compensation Board appellant had a 42.5 percent permanent impairment of her right foot due to lack of hindfoot inversion and eversion and limited plantar flexion.

In a March 7, 2008 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving an Office medical adviser, reviewed a description of the treatment of appellant's right ankle condition, including the surgical interventions. Based on the February 12, 2008 evaluation of Dr. Scerpella, appellant had reached maximum medical improvement by that date. Dr. Berman noted that Dr. Scerpella found with respect to right ankle motion that appellant's 10 degrees of dorsiflexion (or extension) and 30 degrees of plantar flexion and, with respect to right hindfoot motion, she had 0 degrees of inversion and 0 degrees of eversion. Dr. Scerpella applied the standards of the New York State Workmen's Compensation Board to find that appellant had a 42.5 percent permanent impairment of her right leg; however, it was only appropriate to apply the standards of the fifth edition of the A.M.A., *Guides*. He concluded that appellant had a 12 percent permanent impairment of her right leg, stating:

“Utilizing page 537, Table 17-11: *Ankle Motion Impairment Estimates*, dorsiflexion 10 degrees, plantar flexion 30 degrees matches category entitled, mild, Table 17-11, *Ankle Motion Impairment*, which represents seven percent impairment of the lower extremity.

“Utilizing Table 17-11: *Hindfoot Impairment Estimates*, ... zero [to] nine degrees inversion, eversion represents moderate to severe category five percent impairment.

“Therefore, utilizing the Combined Values Chart, page 604, 7 combined with 5 equals 12 percent impairment.”

In a May 29, 2008 decision, the Office granted appellant a schedule award for a 12 percent permanent impairment of her right leg. The award ran for 34.56 weeks from February 12 to October 10, 2008.

Appellant requested a telephone hearing before an Office hearing representative. At the November 5, 2008 hearing, she testified that her right foot had not fully healed. Appellant did not submit any additional medical evidence. In a January 23, 2009 decision, the Office hearing representative affirmed the May 29, 2008 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act¹ and its implementing regulations² 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.³

In some instances, an Office medical adviser’s opinion can constitute the weight of the medical evidence. This occurs in schedule award cases where an opinion on the percentage of permanent impairment and a description of physical findings is on file from an examining physician, but the percentage estimate by this physician is not based on the A.M.A. *Guides*. In this instance, a detailed opinion by the Office medical adviser which gives a percentage based on reported findings and the A.M.A., *Guides* may constitute the weight of the medical evidence.⁴

ANALYSIS

The Office accepted that on June 13, 1996, appellant sustained a sprain and posterior malleolus fracture of her right ankle due to a fall at work. Between June 2005 and March 2007, Dr. Scerpella, an attending Board-certified orthopedic surgeon, performed several surgical procedures on appellant’s right foot that were authorized by the Office. On February 12, 2008 he determined that appellant had reached maximal medical improvement, provided findings on

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ *Id.*

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(h) (April 1993).

examination and made an impairment calculation under the standards of the New York State Workmen's Compensation Board. On March 7, 2008 Dr. Berman, a Board-certified orthopedic surgeon, serving an Office medical adviser, applied the standards of the fifth edition of the A.M.A., *Guides* to Dr. Scerpella's findings and determined that appellant had a 12 percent permanent impairment of her right leg. The Office granted appellant a schedule award to reflect this degree of impairment.

On appeal, appellant argued that the Office should have granted her a schedule award based on Dr. Scerpella's rating of a 42.5 percent impairment of her right leg. However, Dr. Scerpella's impairment rating under the standards of the New York State Workmen's Compensation Board is of limited probative value. He did not rate appellant's impairment under the A.M.A., *Guides*, the standard adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.⁵

The Board notes that Dr. Berman properly determined that appellant has a seven percent impairment of her right leg due to 10 degrees of right ankle dorsiflexion (or extension) and a zero percent impairment of her right leg due to 30 degrees of right ankle plantar flexion.⁶ Dr. Berman also properly found that appellant has a five percent impairment of her right leg due to zero degrees of right hindfoot inversion.⁷ However, pursuant to the A.M.A., *Guides*, he also should have found that appellant has a two percent impairment of her right leg due to zero degrees of right ankle eversion.⁸

Adding the five percent and two percent values for limited right hindfoot motion means that appellant has seven percent impairment for limited right hindfoot motion. The A.M.A., *Guides* directs that this seven percent value should be combined (using the Combined Values Chart) with the seven percent value for limited right ankle motion. This combination yields a total right leg impairment of 14 percent.⁹

Appellant has already been compensated for a 12 percent permanent impairment of her right leg. Therefore, she is entitled to an additional two percent impairment of her right leg.

CONCLUSION

The Board finds that appellant has a 14 percent permanent impairment of her right leg.

⁵ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

⁶ A.M.A., *Guides* 537, Table 17-11.

⁷ *Id.* at 537, Table 17-12. The Board notes that the Office properly referred the case to Dr. Berman because Dr. Scerpella did not apply the standards of the A.M.A., *Guides* in making his impairment rating. See *supra* note 4. On appeal, appellant argued that Dr. Berman did not properly characterize her right foot surgeries, but the Board notes that he accurately described her main surgeries.

⁸ A.M.A., *Guides* 537, Table 17-12.

⁹ *Id.* at 533, 604 (Combined Values Chart).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 23, 2009 and May 29, 2008 decisions are affirmed, as modified, to reflect that appellant has a 14 percent permanent impairment of her right leg.

Issued: November 2, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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