

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

C.P., Appellant	)	
	)	
and	)	<b>Docket No. 09-1536</b>
	)	<b>Issued: April 1, 2010</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>CUSTOMS &amp; BORDER PROTECTION,</b>	)	
<b>PORT OF LAREDO, Laredo, TX, Employer</b>	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 11, 2009 appellant filed a timely appeal from the May 12, 2008 decision of the Office of Workers' Compensation Programs which denied an additional schedule award for impairment to his left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

**ISSUE**

The issue is whether appellant has more than a 21 percent impairment of his left leg for which he received a schedule award.

On appeal, appellant contends that the Office erred in giving weight to the opinion of the impartial medical examiner.<sup>1</sup>

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<sup>1</sup> Appellant contends that the Office also erred in denying his request for surgery in January 2006. The Board notes that appellant did not file an appeal within one year of that decision and it is not an issue in the current appeal. 20 C.F.R. § 501.3(d)(2).

## **FACTUAL HISTORY**

On June 19, 2003 appellant, then a 45-year-old customs inspector, filed an occupational disease claim alleging that he sustained tarsal tunnel syndrome in the left leg and a mass in the leg above the ankle as a result of the repetitious standing and walking he performed during his federal employment. On July 22, 2003 the Office accepted his claim for aggravation of left leg tarsal tunnel syndrome. It also accepted temporary aggravation of venous varicosities and aggravation of left partial tear tibial tendon. The Office paid appropriate compensation and medical benefits.

On June 18, 2006 appellant filed a claim for a schedule award.

In an October 27, 2005 report, Dr. Neil Novin, a Board-certified surgeon, determined that appellant had a 66 percent impairment of the left foot and ankle. In making this rating, he referred generally to various tables at Chapter 17 in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*).<sup>2</sup> Dr. Novin did not refer to any findings on examination to support his rating. On September 11, 2006 an Office medical adviser noted that the rating provided by Dr. Novin did not conform to the Office's standards for evaluating permanent impairment. He recommended that appellant be referred for examination.

On November 8, 2006 the Office referred appellant to Dr. Paul J. Foxcroft, an orthopedic surgeon, for a second opinion examination. In a December 11, 2006 report, Dr. Foxcroft determined that appellant had 23 percent impairment to his left leg. Under Table 17-11, he noted that appellant had only five degrees of dorsiflexion ankle motion which represented seven percent impairment. Dr. Foxcroft rated impairment for both sensory deficit and dyesthesia of both the medial plantar and lateral plantar nerves. Under Table 17-37 maximum impairment for dyesthesia and sensory loss involving the medial plantar and lateral plantar nerves was seven percent of five percent of the leg. Dr. Foxcroft advised that under Table 16-10 he graded the extent of sensory deficit as Grade 2 or 80 percent. Appellant had four percent impairment for both sensory loss and dyesthesia of the medial plantar nerve and four percent impairment for both sensory loss and dyesthesia of the lateral plantar nerve. Dr. Foxcroft totaled impairment due to sensory loss and dyesthesia affecting the lower extremity at 16 percent. To this, he added the 7 percent range of motion loss to total 23 percent impairment.

On March 1, 2007 an Office medical adviser reviewed the medical record and agreed with the findings of Dr. Foxcroft. He noted that sensory loss of the medial plantar nerve was 4 percent, dyesthesia of the medial plantar nerve was 4 percent, sensory loss of the lateral plantar nerve was 4 percent and dyesthesia of the plateral plantar nerve was 4 percent, which totaled 16 percent impairment to the left leg. The medical adviser noted that Dr. Foxcroft had added this impairment value with the loss of range of motion impairment rather than using the Combined

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<sup>2</sup> Without further discussion, Dr. Novin stated that his opinion was based on the following tables from the A.M.A., *Guides*: 526, Table 17-2; 529, Table 17-6; 530, Table 17-7; 531, Table 17-8; 432, section 16.5E; 495, section 17.2M; 553, Table 17-37; and 442, Tables 17-8 and 551, 17-9.

Values Chart. Under the chart, 16 percent impairment for sensory loss and dysthesia was combined with the 7 percent motion loss to total 21 percent impairment to the leg.<sup>3</sup>

In a March 15, 2007 decision, the Office granted a schedule award for a 21 percent impairment of the left leg. The period of the award was from March 18, 2007 to May 14, 2008 or a total of 60.48 weeks of compensation.

On April 6, 2007 appellant requested an oral hearing which was held on July 17, 2007. Appellant, through his attorney, submitted a July 11, 2007 report by Dr. Allan H. Macht, a Board-certified surgeon, who advised that he had 55 percent impairment to his left leg.<sup>4</sup> Under Table 17-11, appellant had seven percent loss based on extension at the ankle and two percent loss under Table 17-12 for loss of eversion, for a total nine percent range of motion loss. Dr. Macht stated that he rated loss of strength as Grade 4 under Table 17-8 and then graded weakness under Table 16-11 to find a 29 percent impairment of the left leg.<sup>5</sup> The report of the physician incorporated the 16 percent sensory loss and dysthesia affecting the medial plantar and lateral plantar nerves. Dr. Macht also rated impairment due to peripheral vascular disease under Table 17-38 as class 2, or 37 percent impairment to the leg. He stated that he referred to Table 17-2, the cross usage chart, to combine 37 percent vascular impairment with the 9 percent range of motion and 16 percent sensory loss to total 55 percent to the leg as the highest impairment.<sup>6</sup>

In a September 25, 2007 decision, an Office hearing representative remanded the case for an Office medical adviser to review the report of Dr. Macht.

In an October 18, 2007 report, the Office medical adviser found that the opinion of Dr. Macht created a conflict in medical opinion based on the rating for vascular disease as previous physicians had not found such impairment on examination of appellant.

On December 12, 2007 the Office referred appellant to Dr. William Healey, a Board-certified surgeon, for an impartial medical examination. In a January 11, 2008 report, Dr. Healey found that appellant had a 14 percent impairment of the left lower extremity. On examination,

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<sup>3</sup> The Board notes that under the Combined Values Chart 16 percent combined with 7 percent is 22 percent impairment.

<sup>4</sup> Dr. Macht found that there was a 37 percent impairment of the left leg due to the vascular condition. He noted that there was a Class II impairment of the vascular system since he required surgery for this condition but did not have swelling. A.M.A., *Guides* 554, Table 17-38. Dr. Macht also found a 16 percent impairment of the left leg due to tarsal tunnel syndrome, using the same analysis and charts as used by Dr. Foxcroft and the impartial medical examiner. *See supra* note 4. Dr. Macht then found a nine percent impairment of the left leg due to loss of range of motion. In addition to seven percent impairment, based on loss of extension at the ankle, he found two percent impairment due to loss of eversion. A.M.A., *Guides* 537, Tables 17-11 and 17-12. Dr. Macht then combined these figures, noting that the range of motion figure can be combined with the sensory figure, but not the weakness. Combining the range of motion and sensory he noted a 24 percent impairment of the leg. Combining the weakness of the vascular condition, he concluded that appellant sustained a 55 percent impairment of the left lower extremity.

<sup>5</sup> This impairment rating departs from the A.M.A., *Guides*. Dr. Macht did not clearly identify the muscle group involving the ankle that he was rating under Table 17-8. The maximum value for impairment of the lower extremity for loss of ankle flexion is 17 percent. Further, the A.M.A., *Guides* do not provide that Table 17-8 is to be used with reference to Table 16-11.

<sup>6</sup> The Board notes that combining 37 percent with 16 percent yields 48 percent which, when combined with 16 percent, totals 52 percent impairment. *See Combined Values Chart, page 604.*

he noted that the left ankle revealed normal skin turgor and color, normal pulses and venous runoff, good range of motion and strength. There were no significant sensory changes. Dr. Healey advised that appellant had residuals of his accepted condition. Based on 13 degrees plantar flexion, there was seven percent impairment to the leg based on Table 17-11. Dr. Healey described the nature of appellant's left leg nerve disorder as dysesthesias of the medial plantar and lateral plantar nerves. This resulted in four percent loss to both nerves under Table 17-37 and Table 16-10 and totaled eight percent to the left leg. Dr. Healey stated that he combined the range of motion loss (7 percent) with the nerve loss (8 percent) to find a total of 14 percent impairment to appellant's left leg. He noted no objective motor deficit of the left lower extremity.

On February 8, 2008 an Office medical adviser reviewed the medical evidence and concurred with the findings of Dr. Healey.

On March 20, 2008 the Office requested that Dr. Healey clarify his opinion and address whether there was any impairment related to appellant's accepted aggravation of varices. On April 17, 2008 Dr. Healey noted that he did not find any permanent impairment rated to the accepted varices. He advised that appellant had superficial varicose veins in both legs; however this did not demonstrate significant evidence as appellant had normal skin turgor and color. Dr. Healey noted that the left leg had normal venous run off and that pulses were normal and equal. Appellant did not have any evidence of edema to support impairment under the A.M.A., *Guides*.

By decision dated May 12, 2008, the Office found that the medical evidence did not support additional impairment and denied appellant's request for an increased schedule award.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act<sup>7</sup> sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>8</sup> The Act, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.<sup>9</sup> The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>10</sup>

Where there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>11</sup>

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<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> *Id.*

<sup>9</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>10</sup> 20 C.F.R. § 10.404.

<sup>11</sup> *Darlene Kennedy*, 57 ECAB 414 (2006).

## ANALYSIS

The Office accepted appellant's claim for left leg tarsal tunnel syndrome, temporary aggravation of venous varicosities and aggravation of a partial tibial tendon tear. On March 15, 2007 he received a schedule award for 21 percent impairment of his left leg based on his accepted conditions. The award was based on loss of range of motion, sensory deficit and dysesthesias.

Dr. Novin found that appellant sustained a 66 percent impairment to his left foot and ankle and generally referred to various tables at Chapter 17 of the A.M.A., *Guides*. However, he did not provide any explanation of how he applied the designated tables to rate impairment. Without such explanation, Dr. Novin's opinion is of diminished probative value. Dr. Foxcroft, a second opinion physician, determined that appellant had 23 percent impairment to the left lower extremity. The Office medical adviser reviewed Dr. Foxcroft's report and concurred with the findings, with the exception of the fact that he improperly added the impairment values rather than apply the Combined Values Chart. The Office medical adviser stated that he applied the chart to combine the impairment values to find 21 percent impairment of the left leg. This was based on seven percent impairment due to loss of motion in the ankle, resulting from five degrees dorsiflexion. Dr. Foxcroft also found 16 percent impairment to the left leg due to sensory loss and dysthesia involving both the medial plantar and lateral plantar nerve roots.

Appellant subsequently submitted the report of Dr. Macht to support his contention of greater impairment of the left leg. Dr. Macht rated impairment at 55 percent of the member based on 37 percent vascular loss, 16 percent sensory loss and 9 percent range of motion.

The Office found a conflict in medical opinion between Dr. Macht and Dr. Foxcroft and referred appellant to Dr. Healey for an impartial medical examination. Dr. Healey determined that appellant had 14 percent impairment of the left lower extremity. He rated seven percent impairment to the lower extremity due to range of motion loss in his left ankle.<sup>12</sup> Based on neuromuscular examination, Dr. Healey found that appellant had dysesthesias at the medial plantar and lateral plantar nerves which he graded at 80 percent.<sup>13</sup> When multiplied by the maximum five percent impairment value, this resulted in four percent loss of each nerve root.<sup>14</sup> Combining 8 percent dysthesia impairment with 7 percent loss of range of motion totaled 14 percent. Dr. Healey found no loss of strength involving appellant's left leg and advised that examination revealed normal venous flow. He did not support Dr. Macht's opinion that the employment injury caused loss of strength or venous insufficiency to the affected member. When asked whether appellant had any impairment based on the accepted aggravation of the varices, Dr. Healey provided a supplemental opinion. He found that appellant did not have any permanent impairment due to venous insufficiency as a result of his varicose veins.

When a case is referred to an impartial medical examiner to resolve a conflict in the evidence, the opinion of such specialist, if sufficiently well rationalized and based upon a proper

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<sup>12</sup> A.M.A., *Guides* 537, Tables 17-11 and 17-12.

<sup>13</sup> This was calculated based on a Grade 2 impairment. A.M.A., *Guides* 482, Table 16-10.

<sup>14</sup> A.M.A., *Guides* 552, Table 17-37.

factual background, must be given special weight.<sup>15</sup> The Board finds that the report of the impartial medical examiner, Dr. Healey, constitutes the special weight of the medical evidence. Dr. Healey supported his conclusions with a rationalized medical opinion and appropriately applied the A.M.A., *Guides*. He found that appellant did not have more than 14 percent impairment to the left leg due to residuals of his accepted conditions. As appellant previously received a schedule award for 21 percent impairment, the Office properly denied his request for a greater award.

### **CONCLUSION**

The Board finds that appellant has not established that he has more than 21 percent impairment of his left leg for which he received a schedule award.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 12, 2008 is affirmed.

Issued: April 1, 2010  
Washington, DC

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

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

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

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<sup>15</sup> *Darlene Kennedy, supra* note 11.