

claim for a right ankle sprain. It subsequently accepted a closed fracture of the cuboid bone in the right foot.¹

Appellant claimed a schedule award. She submitted a December 4, 2008 report from Dr. Nicholas P. Diamond, an osteopath, who examined her, reviewed medical reports and diagnosed post-traumatic right calcaneal fracture and right ankle strain and sprain. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), Dr. Diamond determined that appellant had a 37 percent impairment of her right lower extremity due to 4/5 or 4+/5 motor strength deficits of the right ankle in four planes and due to an additional pain-related impairment. He noted that the work injuries sustained on September 15, 1999 were the competent producing factors for appellant's current subjective and objective findings. Dr. Diamond added that she reached maximum medical improvement on December 4, 2008.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for a second opinion. In a March 3, 2009 report, Dr. Stark set forth findings on examination, reviewed medical reports and concluded that appellant had no disability in relation to the accepted condition. He noted no history of noninduced preexisting disability. In Dr. Stark's opinion, appellant completely recovered from her accepted condition such that she had no impairment under the fifth edition of the A.M.A., *Guides*. He found that appellant reached maximum medical improvement by August 22, 2000.

On April 21, 2008 an Office medical adviser, Dr. Morley Slutsky, noted that Dr. Diamond's impairment rating was invalid because the A.M.A., *Guides* did not permit the use of manual muscle testing for individuals inhibited by pain or the fear of pain. He also noted that Dr. Stark found no residuals of the accepted injury, so no pain rating was applicable.

In an April 27, 2009 decision, the Office denied appellant's schedule award claim. It found that the weight of the medical evidence rested with the Office medical adviser because he correctly applied the A.M.A., *Guides* to the examination findings.

On December 1, 2009 an Office hearing representative affirmed the April 27, 2009 decision, finding that the Dr. Stark's opinion was sufficient to establish no ratable impairment due to the accepted condition. The hearing representative found no conflict arose between Dr. Diamond and Dr. Stark due to deficiencies in the impairment rating provided. Noting that the opinion of an Office medical adviser may constitute the weight of the medical evidence, the hearing representative found that the weight of the medical opinion established no ratable impairment.

On appeal appellant's representative contends a conflict in medical opinion arose between Dr. Diamond and Dr. Stark that cannot be resolved by an Office medical adviser.

¹ In a prior appeal, Docket No. 02-2034 (issued December 17, 2002), the Board noted that the Office had accepted appellant's claim for right ankle sprain. The Board found that an impartial medical specialist had supported his opinion with sufficient rationale to establish that appellant no longer suffered residuals of the accepted right ankle sprain.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act² authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.³

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁴

ANALYSIS

Dr. Diamond, appellant's osteopath, found that the work injuries sustained on September 15, 1999 were the competent producing factors for appellant's current subjective and objective findings, findings that showed a 37 percent impairment of the right lower extremity. Dr. Stark, the second opinion orthopedist, disagreed. He found that appellant had completely recovered from the accepted injury-related condition and had no permanent impairment as a result.

The Board finds a conflict in medical opinion. Appellant's physician and the Office's physician disagree on whether appellant's September 15, 1999 employment injury caused any permanent impairment of her right lower extremity. This is more than a disagreement over the application of the A.M.A., *Guides*. This is a disagreement as to clinical findings and causal relationship.

The Board will therefore set aside the Office's December 1, 2009 decision and remand the case for resolution by an impartial medical specialist. After such further development as may be needed, the Office shall issue an appropriate final decision on appellant's entitlement to a schedule award.

CONCLUSION

The Board finds that this case is not in posture for decision. There is a conflict in medical opinion requiring referral to an impartial medical specialist under 5 U.S.C. § 8123(a).

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

⁴ 5 U.S.C. § 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: December 9, 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