

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

G.S., Appellant

and

**U.S. POSTAL SERVICE, WYATT PARK
STATION, St. Joseph, MO, Employer**

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**Docket No. 10-135
Issued: October 13, 2010**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2009 appellant, through her attorney, filed a timely appeal of a September 24, 2009 merit decision of the Office of Workers' Compensation Programs' schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has more than seven percent impairment of her left lower extremity for which she received a schedule award.

FACTUAL HISTORY

On July 25, 2007 appellant, then a 51-year-old mail carrier, twisted both ankles when she fell from a porch in the performance of duty. The Office accepted her claim for right ankle sprain and left lateral malleolus fracture. Appellant returned to work on July 9, 2007. The Office subsequently accepted a stress fracture of the left tibia shaft on April 9, 2008.

Appellant's attending physician, Dr. Brett A. Miller, Board-certified in emergency medicine, completed a report on August 7, 2008 advising that appellant had reached maximum medical improvement. He stated that she had frequent popping of her left ankle, but no tenderness of the lateral malleolus or distal tibia and no effusion. Appellant's three phase bone scan did not demonstrate uptake. She filed a claim for a schedule award on October 9, 2008. In a letter dated October 29, 2008, the Office requested additional medical evidence to establish the extent of her permanent impairment.

On November 17, 2008 Dr. Martin Fritzhand, a Board-certified urologist, listed appellant's range of motion in her left ankle, finding 30 degrees of plantar flexion,¹ 15 degrees of dorsiflexion,² 20 degrees of inversion³ and 0 degrees of eversion.⁴ He found tenderness over the left heel, lateral malleolus and pretibial region as well as crepitus in the left ankle. Dr. Fritzhand reported that pinprick and light touch were diminished over the left leg and medial aspect of the left foot. He identified sensory loss of the superficial peroneal nerve for which a maximum impairment of five percent was allowed.⁵ Dr. Fritzhand determined that the degree of sensory impairment of the superficial peroneal nerve corresponded to the A.M.A., *Guides* rating of Grade 3 impairment or distorted superficial tactile sensibility or diminished light touch and two-point discrimination with some abnormal sensations or slight pain that interferes with some activities.⁶ He stated that appellant had 50 percent deficit. Dr. Fritzhand multiplied the maximum for sensory impairment, 5 percent, by the 50 percent sensory deficit to find impairment to the left lower extremity of 2.5 percent. He stated, "I also used the guidelines for estimating impairment of pain in Chapter 18 with use of Figure 18-1 indicating an impairment to the left lower extremity of [five] percent." Dr. Fritzhand combined these impairments to reach 12 percent impairment of the left lower extremity due to loss of range of motion, sensory impairment of the superficial peroneal nerve and pain.

The District medical adviser, Dr. Daniel D. Zimmerman, a Board-certified internist, reviewed Dr. Fritzhand's report on February 20, 2009. He noted that Chapter 18 of the A.M.A., *Guides* did not provide for five percent impairment due to pain under any circumstances. Dr. Zimmerman also noted that by including a rating for sensory loss and pain of the superficial peroneal nerve, Dr. Fritzhand duplicated the rating. He stated that Dr. Fritzhand did not provide complete range of motion figures. Dr. Zimmerman concluded that the report could not be utilized for schedule award purposes.

¹ This is not a ratable impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* 537, Table 17-11 (5th ed. 2001).

² *Id.*

³ This is two percent impairment of the lower extremity. *Id.* at 537, Table 17-12.

⁴ *Id.* This loss of range of motion is also two percent impairment of the lower extremity in accordance with the A.M.A., *Guides*.

⁵ *Id.* at 552, Table 17-37.

⁶ *Id.* at 482, Table 16-10.

On February 27, 2009 the Office referred appellant for a second opinion evaluation with Dr. George Varghese, a physician of professorial rank Board-certified in physical medicine and rehabilitation. In a March 20, 2009 report, Dr. Varghese found no edema, atrophy or cellulitis in the left foot. He found no hyperesthesia, but some pain along the posterior aspect of the left malleolus. Dr. Varghese found dorsiflexion of 15 degrees, resulting in a zero percent left lower extremity impairment, plantar flexion of 20 degrees resulting in seven percent lower left extremity impairment and inversion of 35 degrees and eversion of 20 degrees both resulting in a zero percent perfect impairment of the left lower extremity. He concluded that appellant had reached maximum medical improvement and had seven percent impairment of her left leg based on loss of range of motion. Dr. Zimmerman reviewed this report on March 26, 2009 and agreed with Dr. Varghese's findings and conclusions.

By decision dated April 2, 2009, the Office granted appellant a schedule award for seven percent impairment of her left lower extremity.

Appellant, through her attorney, requested an oral hearing that was held on July 24, 2009.

In a September 24, 2009 decision, an Office hearing representative affirmed the April 2, 2009 decision finding seven percent impairment of the left lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁷ and its implementing regulations⁸ 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 regulations as the appropriate standard for evaluating schedule losses.⁹ Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.¹⁰

ANALYSIS

Appellant reached maximum medical improvement on August 7, 2008. She requested a schedule award on October 9, 2008 and submitted a November 17, 2008 report from Dr. Fritzhand finding 30 degrees of plantar flexion, which is not a ratable impairment under the

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ A.M.A., *Guides*, 5th ed. 2001.

¹⁰ *Tommy R. Martin*, 56 ECAB 273 (2005).

A.M.A., *Guides*.¹¹ He also reported 15 degrees of dorsiflexion, which is also not a ratable impairment.¹² Dr. Fritzhand measured 20 degrees of inversion and 0 degrees of eversion and these losses of range of motion correlated to two percent impairment each.¹³ In regard to appellant's sensory impairment or pain, he reported that she demonstrated diminished response to pinprick and light touch on the left leg and medial aspect of the left foot. Dr. Fritzhand identified the superficial peroneal nerve and noted that the maximum value for sensory impairment was five percent.¹⁴ He found the extent of sensory deficit to be 50 percent. Dr. Fritzhand multiplied the 50 percent sensory deficit by the 5 percent maximum volume to find 2.5 percent. He stated, "I also used the guidelines for estimating impairment of pain in Chapter 18 with use of Figure 18-1 indicating an impairment to the left lower extremity of five percent." The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain by using Chapter 18, which provides a qualitative method for evaluating impairment due to chronic pain. If an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly, the examiner may increase the percentage up to three percent. However, examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.¹⁵ Dr. Fritzhand did not explain why the allowed five percent impairment for pain under Chapter 18 of the A.M.A., *Guides* in light of the fact that he rated sensory loss under Chapter 17 with regards to the peroneal nerve impairment. This duplicates impairment for pain under Chapter 17 and Chapter 18. This reduces the probative value of the rating provided by Dr. Fritzhand.

Dr. Varghese found dorsiflexion of 15 degrees, not a ratable impairment;¹⁶ plantar flexion of 20 degrees, seven percent impairment;¹⁷ inversion of 35 degrees, not a ratable impairment¹⁸ and eversion of 20 degrees, not a ratable impairment.¹⁹ He concluded that appellant had reached maximum medical improvement and had seven percent impairment of her left leg based on loss of range of motion. The district medical adviser concurred in this assessment.

The Board finds that the weight of the medical evidence is represented by Dr. Varghese's rating of seven percent impairment to appellant's left lower extremity due to loss of range of

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 552, Table 17-37.

¹⁵ Federal Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* at 18.3(b); *see also Philip Norulak*, 55 ECAB 690 (2004).

¹⁶ *Supra* note 7.

¹⁷ *Id.*

¹⁸ *Supra* note 3.

¹⁹ *Id.*

motion. There is no rationalized medical report to establish that appellant has more than seven percent impairment of her left leg.

CONCLUSION

The Board finds that appellant has seven percent impairment of her left leg for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 13, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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