

Dr. Patrick R. Scerpella, an attending Board-certified orthopedic surgeon, performed several surgical procedures on appellant's right foot that were authorized by OWCP. On February 12, 2008 Dr. Scerpella determined that appellant had reached maximum medical improvement, provided findings on examination, and made an impairment calculation under the standards of the New York State Workers' Compensation Board.

On March 7, 2008 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving an OWCP medical adviser, applied the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) to Dr. Scerpella's findings and determined that appellant had 12 percent permanent impairment of her right lower extremity. In a May 29, 2008 decision, OWCP granted appellant a schedule award for 12 percent permanent impairment of her right lower extremity and, in a January 23, 2009 decision, an OWCP hearing representative affirmed the May 29, 2008 decision. Appellant filed an appeal with the Board.

By decision dated November 2, 2009,² the Board affirmed OWCP's May 29, 2008 and January 23, 2009 decisions as modified to reflect that appellant had 14 percent permanent impairment of her right lower extremity. The Board found that Dr. Berman properly determined that appellant had seven percent permanent impairment of her right lower extremity due to 10 degrees of right ankle dorsiflexion (or extension), and five percent permanent impairment of her right lower extremity due to 0 degrees of right hind foot inversion. The Board determined, however, that appellant also had two percent permanent impairment of her right lower extremity due to zero degrees of right ankle eversion and noted that combining all of appellant's impairment ratings (using the Combined Values Chart of the A.M.A., *Guides*) meant that appellant had a total right lower extremity impairment of 14 percent. Because appellant had already been compensated for 12 percent permanent impairment of her right lower extremity, the Board determined that she was entitled to schedule award compensation for an additional 2 percent permanent impairment of her right lower extremity. The facts and circumstances surrounding the prior appeal are incorporated herein by reference.

By decision dated January 14, 2010, OWCP granted appellant a schedule award for an additional two percent permanent impairment of her right lower extremity. The award ran for 5.76 weeks from October 11 to November 20, 2008. Through this supplemental award, the permanent impairment of appellant's right lower extremity, for which she had been compensated, totaled 14 percent.

On August 11, 2015 appellant filed a claim for compensation (Form CA-7) alleging additional permanent impairment.

In a November 19, 2015 letter, OWCP requested that appellant submit additional evidence in support of her schedule award claim, including an impairment rating derived in accordance with the standards of the sixth edition of the A.M.A., *Guides*.

Appellant submitted a November 24, 2015 form report for the State of New York Compensation Board in which Dr. Mark S. Post, an attending podiatrist, indicated that her right

² Docket No. 09-0814 (issued November 2, 2009).

ankle exhibited 5 degrees of dorsiflexion, 25 degrees of plantar flexion, 10 degrees of inversion, and 10 degrees of eversion. Dr. Post noted, “[T]here is additional impairment of function due to weakness, atrophy, pain, or anesthesia estimated at right 5 percent.... I recommend an impairment rating of 45 percent of the right lower extremity.”³

Appellant also submitted other medical reports, including operative reports dated June 22, 2005, July 12, 2006, and March 26, 2007, and an office visit note dated September 28, 2006.

In a February 1, 2016 decision, OWCP determined that appellant had not met her burden of proof to establish more than 14 percent permanent impairment of her right lower extremity, for which she received schedule awards. It found that the documents appellant submitted did not contain an impairment rating derived in accordance with the standards of the sixth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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, FECA 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.⁶ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁷

ANALYSIS

OWCP accepted that on June 13, 1996 appellant sustained a sprain and posterior malleolus fracture of her right ankle due to a fall at work. By decision dated May 29, 2008, it granted appellant a schedule award for 12 percent permanent impairment of her right lower extremity. In a November 2, 2009 decision, the Board determined that appellant was entitled to compensation for an additional two percent permanent impairment of her right lower extremity.

³ Appellant also submitted a narrative report of Dr. Post’s physical examination on November 24, 2015, including the findings of range of motion testing for the right ankle.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

⁶ *Id.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (January 2010); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); see also *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

By decision dated January 14, 2010, OWCP granted appellant a schedule award for an additional 2 percent permanent impairment of her right lower extremity such that the permanent impairment of her right lower extremity for which she had been compensated totaled 14 percent. Appellant filed a claim for an additional schedule award but OWCP found that the medical evidence was insufficient to establish a greater impairment.

The Board finds that appellant failed to meet her burden of proof to establish more than 14 percent permanent impairment of her right lower extremity, for which she received schedule awards.

In support of her claim, appellant submitted a November 24, 2015 form report in which Dr. Post indicated that her right ankle exhibited 5 degrees of dorsiflexion, 25 degrees of plantar flexion, 10 degrees of inversion, and 10 degrees of eversion. Dr. Post noted, “[T]here is additional impairment of function due to weakness, atrophy, pain, or anesthesia estimated at right 5 percent.... I recommend an impairment rating of 45 percent of the right lower extremity.”

The Board finds that this report is of limited probative value because Dr. Post failed to provide any explanation of how his impairment rating was derived in accordance with the relevant standards, *i.e.*, those of the sixth edition of the A.M.A., *Guides* as requested.⁸ Dr. Post provided range of motion figures for appellant’s right ankle, but did not explain how they might have contributed to an impairment rating under the specific standards of the sixth edition of the A.M.A., *Guides*.⁹ The Board has held that an opinion on permanent impairment is of limited probative value if it is not derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.¹⁰

Appellant also submitted other medical reports in support of her claim, including several operative reports and an office visit note, but these documents do not contain any opinion on the extent of her right lower extremity impairment.

For these reasons, the Board finds that appellant failed to meet her burden of proof to establish more than 14 percent permanent impairment of her right lower extremity.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

⁸ See *supra* notes 6 and 7.

⁹ The source of the impairment form completed by Dr. Post is unclear, but its contents does not appear to be related to the standards of the sixth edition of the A.M.A., *Guides*.

¹⁰ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP 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).

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish more than 14 percent permanent impairment of her right lower extremity, for which she had received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board