U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE MILLER and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Bayonne, NJ

Docket No. 98-2058; Submitted on the Record;
Issued February 28, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has more than a 21 percent permanent impairment of the right leg.

On October 24, 1994 appellant, then a 41-year-old letter carrier, was walking from one letter case to another when she slipped and fell, fracturing the tibia and fibula in her right leg. She underwent surgery on October 28, 1994 for reduction of the fractures. She underwent additional surgery on January 31, 1995 for a bone graft on the fracture site of the fibula. The Office of Workers' Compensation Programs accepted appellant's claim for fractures of the right tibia and fibula. Appellant received continuation of pay for the period October 26 through December 9, 1994. The Office began payment of temporary total disability compensation effective December 10, 1994. Appellant returned to light-duty work, four hours a day on July 24, 1995, increasing to six hours a day on September 18, 1995 and eight hours a day on October 16, 1995. She received compensation for the hours she did not work. She returned to her regular duties on February 16, 1996.

In a May 27, 1997 decision, the Office issued a schedule award for an 18 percent permanent impairment of the right leg. In a June 5, 1997 letter, appellant, through her attorney, requested a hearing before an Office hearing representative, which was conducted on January 29, 1998. In an April 1, 1998 decision, the Office hearing representative modified the May 27, 1997 schedule award, finding that appellant was entitled to a schedule award for a 21 percent permanent impairment of the right leg.

The Board finds that the case is not in posture for decision.

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation to be paid for

[1] 5 U.S.C. § 8107(c).

permanent loss, or loss of use, of members or functions of the body listed in the schedule. However, neither the Act nor its regulations specify the manner in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice to all claimants, the Board has authorized the use of a single set of tables in evaluating schedule losses, so that there may be uniform standards applicable to all claimants seeking schedule awards. The American Medical Association, *Guides to the Evaluation of Permanent Impairment*[3] has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.[4]

In a January 18, 1996 report, Dr. David Weiss, an osteopath, indicated that appellant had pain and weakness in the right ankle, numbness in the lateral aspect of the right foot, progressive swelling in the right ankle during the day and exacerbation of pain in the ankle due to weather changes. He found marked tenderness over the distal third of the tibia with tenderness over the base of the medial malleolus. Dr. Weiss described appellant's ranges of motion in the right ankle as 10 degrees of dorsiflexion, 35 degrees of plantar flexion, 5 degrees of inversion and 5 degrees of eversion. He noted that the motion was painful at the extremes of motion. Dr. Weiss stated that, motor testing revealed a grade of four out of five in dorsiflexion. He noted that measurement of appellant's gastrocnemius muscle revealed a circumference of 33 centimeters on the right side and 35 on the left side. Dr. Weiss calculated that appellant had a 7 percent permanent impairment for loss of dorsiflexion, a 2 percent permanent impairment for loss of inversion, a 2 percent permanent impairment for loss of eversion and a 13 percent permanent impairment for atrophy of the calf for a total permanent impairment of 24 percent.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Herman Frank, a Board-certified orthopedic surgeon, for an examination and second opinion. In an August 18, 1996 report, Dr. Frank indicated that appellant's ranges of motion in the right ankle were 15 degrees dorsiflexion, 15 degrees extension, 0 degrees inversion and 0 degrees eversion. He noted that his measurements showed a discrepancy with the findings of Dr. Weiss but he reported that he repeated the measurements three times. Dr. Frank noted appellant had a two centimeter atrophy of the calf. He calculated that appellant had a seven percent permanent impairment for loss of flexion, a two percent permanent impairment for loss of eversion and a five percent permanent impairment for loss of inversion. Dr. Frank noted that under the A.M.A., *Guides* atrophy of 2.0 to 2.9 centimeters equaled a permanent impairment of 8 to 13 percent. He commented that, since appellant's atrophy was toward the lower end of that range, he would assign an eight percent permanent impairment for atrophy. Dr. Frank stated that all the muscles innervated the peroneal nerve functioned normally and the appellant had normal sensation in the dorsum area of the foot supplied by the peroneal nerve. He calculated that appellant had a 22 percent permanent impairment of the right leg. An Office medical adviser reviewed Dr. Frank's findings and indicated that appellant had a 14 percent permanent

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[2] 20 C.F.R. § 10.304.

[3] Fourth edition (1993).

[4] *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

impairment for loss of motion and an 8 percent permanent impairment for atrophy. He applied the combined values table of the A.M.A., *Guides* to conclude that appellant had a 21 percent permanent impairment of the right leg.

To resolve the conflict in the medical evidence between Dr. Weiss and Dr. Frank, the Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Charles E. Granatir, a Board-certified orthopedic surgeon, for an examination. In a May 5, 1997 report, Dr. Granatir indicated that appellant had numbness of the lateral aspect of the right foot and some sharp pain in the medial aspect of the right ankle. He found a 1.5 centimeter atrophy of the right calf and a 0.7 centimeter atrophy of the right thigh. Dr. Granatir noted appellant had some difficulty walking on her toes due to weakness. He indicated appellant had seven degrees of dorsiflexion of the right ankle compared to nine degrees in the left ankle. Dr. Granatir stated that appellant had plantar flexion of 15 degrees on the right and 35 degrees on the left. He found full motion of the subtalar joints without any impairment. Dr. Granatir specifically indicated that appellant had no deficits of inversion and eversion in his examination. He calculated that appellant had a 4 percent permanent impairment for loss of dorsiflexion, a 7 percent permanent impairment for loss of plantar flexion and a 5 percent permanent impairment for weakness of the foot for a total permanent impairment of 16 percent for the right foot, which equaled an 11 percent permanent impairment of the right leg.

The Office medical adviser reviewed Dr. Granatir's report. He indicated that appellant had a 7 percent permanent impairment for loss of dorsiflexion and a 7 percent permanent impairment for loss of plantar flexion for a total 14 percent permanent impairment due to loss of motion. He indicated appellant had a five percent permanent impairment for atrophy of the calf. He calculated, based on the combined values table, appellant had a 18 percent permanent impairment of the right leg.

In his decision, the Office hearing representative found that appellant had a 14 percent permanent impairment due to loss of motion, based on the reports of Dr. Frank and Dr. Granatir and an 8 percent permanent impairment for 2 centimeters of atrophy as reported by Dr. Frank and Dr. Weiss for a total permanent impairment of 21 percent based on the combined values table. In *Louis Jackson, Sr.*,[5] the Board held that an Office medical adviser cannot selectively choose findings from the reports of several physicians in calculating a schedule award. The proper procedure requires the selection of one medical report which contains all the essential information for calculating a schedule award. The Office medical adviser must then give his reason for selecting one report over the other reports of record. Similarly, an Office hearing representative cannot select findings from different medical reports to use in the calculation of a schedule award. The Office hearing representative, therefore, improperly found that appellant had a 21 percent permanent impairment of the right leg.

The medical reports of record contain conflicting findings. Dr. Weiss and Dr. Granatir found a loss of sensation in appellant's right foot, while Dr. Frank found no loss of sensation. Dr. Weiss stated that appellant had a loss of strength in dorsiflexion, which Dr. Granatir found to a lesser extent and Dr. Frank did not note any in his report. Dr. Weiss and Dr. Frank found loss

[5] 47 ECAB 426 (1996).

of motion in eversion and inversion, with Dr. Frank finding a total loss of motion, while Dr. Granatir found no loss of motion in these movements of the ankle. Dr. Weiss and Dr. Frank found appellant had a 2.0 centimeter atrophy of the right calf, while Dr. Granatir found a 1.5 centimeter atrophy. None of the physicians and the Office medical adviser considered whether appellant had any permanent impairment for loss of sensation in the foot as reported by Dr. Weiss and Dr. Granatir. The Office medical adviser did not discuss whether a permanent impairment rating for atrophy of the calf should be given instead of a permanent impairment rating for loss of sensation in the right foot.[6]

The differing findings of Drs. Weiss, Frank and Granatir cannot be reconciled. In situations when there exists opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial 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.[7] In this case, however, Dr. Granatir did not provide sufficient rationale to show that his calculations of appellant's permanent impairment were more accurate than those of Dr. Weiss and Dr. Frank, particularly in explaining why appellant had no loss of eversion and inversion in his examination while Dr. Weiss and Dr. Frank found a loss of motion in these movements on testing. His report, therefore, does not have sufficient rationale to be given special weight. The case must, therefore, be remanded for further development.

When the Office secures an opinion from an impartial specialist and the opinion of the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.[8] The Office, therefore, should request from Dr. Granatir a clarification of his report. After further development as it may find necessary the Office should issue a *de novo* decision.

[6] The A.M.A., *Guides* indicates that diminished muscle function of the leg should be determined by only one of four methods; gait derangement, muscle atrophy, manual muscle testing or peripheral nerve injury. A.M.A., *Guides*, page 76.

[7] *James P. Roberts*, 31 ECAB 1010 (1980).

[8] *Harold Travis*, 30 ECAB 1071 (1979).

The decision of the Office of Workers' Compensation Programs, dated April 1, 1998, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
February 28, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member